Mediation and Early Neutral Evaluation in the Lands Chamber: A Timely Reminder

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Introduction

Alternative Dispute Resolution ("ADR") is well established in the UK legal system. It is generally understood as a generic concept covering a wide range of methods that can be employed to resolve disputes without resorting to normal court-based litigation. It covers mediation, arbitration, expert determination, adjudication, conciliation, early neutral evaluation and many other variants. This paper considers the use of two of these in compensation cases in the Upper Tribunal (Lands Chamber): Mediation and Early Neutral Evaluation ("ENE"). This is not to suggest that other forms of ADR are not important—there are many different forms and each will have value in certain circumstances—but the aim is to focus on Mediation and ENE because they are the two most obvious options in cases that have reached the Lands Chamber and are otherwise destined for trial. It is also considered that they are too often overlooked or simply misunderstood by parties or their legal advisors. This paper seeks to provide a useful reminder of their merits.

But first, a brief review of the place of ADR in the civil courts.

ADR in the courts

Whilst it is not likely ever to obviate the need for court and tribunal litigation, ADR is now very much embedded within the legal system in the United Kingdom. The civil courts have embraced ADR and the Ministry of Justice supports its use across many areas of law. Lawyers are now aware of its existence, even if in many instances there is no familiarity with it and sometimes a reluctance to use it. There is a growing number of accredited ADR providers, in particular those that specialise in Mediation. In some areas of law, for example family law, ADR is now the first option for settling cases.

There are various rules, practice directions and protocols that relate to ADR in one way or another. The Civil Procedure Rules encourage the use of alternative dispute resolution procedures where appropriate. The court's duty of active case management includes "encouraging the parties to use an alternative dispute resolution process if the court considers that appropriate and facilitating the use of such procedure"[1] and the court may stay cases to enable parties to try to settle the case by ADR.[2] The Civil Procedure Rules also provide that in exercising its discretion on costs the court must take into account the conduct of the parties including the extent to which the parties have complied with the Practice Direction (Pre-Action Conduct) and any relevant pre-action protocol.[3] This is important because the Practice Direction aims to enable parties to settle disputes without litigation by encouraging them to consider using ADR. Paragraph 8.1 of the Practice Direction states that parties "should … in particular consider the use of an appropriate

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[1] Civil Procedure Rules Pt 1r.1.4(2)(e).

[2] Civil Procedure Rules Pt 26r.26.4.

[3] Civil Procedure Rules Pt 44r.44.3(5)(a).

form of ADR" in order to resolve the matter without starting proceedings[4] and para.4.4(3) provides that the court may decide that there has been non-compliance if a party has unreasonably refused to consider ADR. An example of a pre-action protocol that encourages ADR is the Pre-Action Protocol for Construction and Engineering Disputes.[5] (It is to be noted in passing that the Technology and Construction Court promotes in particular the use of Mediation and ENE.[6])

The courts encourage mediation in appropriate cases[7] and the *Jackson Report*[8] reiterated the benefits that mediation can sometimes offer in terms of cost and satisfaction. The courts therefore not only seek to encourage mediation but also can do so with some force. Indeed, case law indicates that judges have not been afraid to espouse the value of ADR in some cases, nor slow to criticise parties for not considering ADR. In *Egan v Motor Services (Bath) Ltd*[9] Ward L.J. said:

> "'This case cries out for mediation', should have been the advice given to both the claimant and the defendant … It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."

In *Halsey v Milton Keynes General NHS Trust*,[10] the Court of Appeal emphasised the high rate of success in Mediation cases. Dyson L.J. said:

> "the value and importance of ADR have been established within a remarkably short time. All litigators should now routinely consider with their clients whether their disputes are suitable for ADR."

The Court of Appeal stated that the question whether a party has acted unreasonably in refusing ADR will include (but are not limited to) the following:

> "(a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; (f) whether the ADR had a reasonable prospect of success."[11]

These factors have been applied in subsequent cases and the courts have maintained a willingness to penalise parties through awards of costs for unreasonably refusing to ADR. For example, the Court of Appeal in *Burchell v Bullard*,[12] a case relating to a building dispute, found that the defendant had behaved unreasonably:

> "in believing, if they did, that their case was so watertight that they need not engage in attempts to settle … the stated reason for refusing mediation, that the matter was too complex for mediation, is plain nonsense."

Ward L.J. gave these warning words:

[4] See also Practice Direction (Pre-Action Conduct) para.6.1(2).
[5] See Practice Direction (Pre-Action Conduct) para.5.2.
[6] See paras 7.1.1 and 7.5.1 of the *Technology and Construction Court Guide* (2010).
[7] See e.g. *R. (on the application of Cowl) v Plymouth CC* [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Pennock v Hodgson* [2010] EWCA Civ 873. See also the cautionary comments of Lord Neuberger of Abbotsbury MR in the Gordon Slynn Memorial Lecture 2010.
[8] The Jackson Report, *Review of Civil Litigation Costs* 2010.
[9] *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002; [2008] 1 W.L.R. 1589.
[10] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.
[11] See also *Swain Mason v Mills and Reeve* [2012] EWCA Civ 498 in which the Court of Appeal referred to *Halsey;* and made clear that parties are not compelled to mediate and that the fundamental question was whether or not the unsuccessful party had shown that the successful party had acted unreasonably in refusing to agree to mediate.
[12] *Burchell v Bullard* [2005] EWCA Civ 358.

> "Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to paragraph 5.4 of the pre-action protocol for Construction and Engineering Disputes—which I doubt was at the forefront of the parties' minds—which expressly requires the parties to consider at a pre-action meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."[13]

It is also worth mentioning the Government's recent ADR pledge. The Dispute Resolution Commitment ("DRC") requires government departments and agencies to be proactive in the management of disputes, and to use effective, proportionate and appropriate forms of dispute resolution to avoid expensive legal costs or court actions.[14] This includes adopting appropriate dispute resolution clauses in all relevant government contracts. The Local Government Association has lent its support to the DRC and the aim is to develop and launch a local authority-specific pledge.[15]

ADR in the Lands Chamber

The procedures in the Lands Chamber (the Tribunal) are governed by The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the 2010 Rules")[16] and the Lands Chamber of the Upper Tribunal Practice Directions 2010 ("the Practice Directions"). In large part they reflect the rules, practice directions and protocols that govern civil cases in the High Court.

Rule 2(1) of the 2010 Rules provides that "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly". Rule 3 relates to ADR and provides as follows:

> "(1) The Tribunal should seek, where appropriate—
>
> (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
>
> (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure."

The 2010 Rules provide that the Tribunal may stay proceedings[17] and this power can be used to allow parties a period of time to try to settle a dispute by ADR.

The Practice Directions supplement the 2010 Rules and set out in more detail the procedures for ADR. Paragraph 2.1 states as follows:

> "1) Parties may apply at any time for a short stay in the proceedings to attempt to resolve their differences, in whole or in part, outside the Tribunal process …"

[13] *Burchell v Bullard* [2005] EWCA Civ 358 per Ward L.J.

[14] See *http://www.justice.gov.uk/courts/mediation/dispute-resolution-commitment* [Accessed January 20, 2013].

[15] See *http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=11320%3Agovernment-plans-local-authority-specific-dispute-resolution-commitment&catid=53&3Aprocurement-and-contracts-articles&Itemid=21* [Accessed January 20, 2013].

[16] The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600).

[17] The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600) r.5(3)(j).

Paragraphs 2.2 relates to costs in the context of the ability of the Tribunal to allow the parties time to settle disputes by ADR. This states as follows:

> "In exercising its power to order that any or all of the costs of any proceedings incurred by one party be paid by another party or by their legal or other representative the Tribunal may consider whether a party has unreasonably refused to consider ADR when deciding what costs order to make, even when the refusing party is otherwise successful."

Paragraph 12.2 of the Practice Directions provides that:

> "Costs are in the discretion of the Tribunal … the discretion will usually be exercised in accordance with the principles applied in the High Court and county courts. Accordingly, the Tribunal will have regard to all the circumstances, including the conduct of the parties … The conduct of a party will include conduct during and before the proceedings; whether a party has acted unreasonably in pursuing or contesting an issue … and the matters stated in paragraphs 2.2 …"

This general discretion is however subject to the special approach in cases relating to compensation following compulsory purchase. In such cases the costs incurred by a claimant in establishing the amount of compensation to be paid are properly to be seen as part of the expense that is imposed by acquisition. The Practice Directions provide that:

> "the Tribunal will, therefore, normally make an order for costs in favour of a claimant who receives an award of compensation unless there are special reasons for not doing so."[18]

The Practice Directions further note the effect of s.4 of the Land Compensation Act 1961, which is that where an acquiring authority has made an unconditional offer in writing of compensation and the sum awarded does not exceed the sum offered:

> "the Tribunal must, in the absence of special reasons, order the claimant to bear their own costs thereafter and to pay the post-offer costs of the acquiring authority …"[19]

The Tribunal has also published relevant guidance.[20]Paragraph 2.5 of the Tribunal's *Explanatory Leaflet* (2011) refers prospective litigants to the opportunity afforded by the Tribunal's rules to settle a dispute without a hearing: "… you may wish to try mediation or another method of alternative dispute resolution."[21] The Tribunal has also published a document specifically on ADR entitled ADR and Mediation (Lands Chamber Form MED01). This notes that ADR includes Mediation, adjudication, arbitration, conciliation, early neutral evaluation and ombudsman schemes, but focuses on Mediation. It not only refers to the ability for parties to request a stay of proceedings to try Mediation but also provides some guidance as to what Mediation involves as well as providing the contact details for the Online Civil Mediation Directory (set up by the Ministry of Justice, which enables individuals and businesses to find a Mediation provider

[18] Upper Tribunal Practice Directions 2010 para.12.3.1.

[19] Upper Tribunal Practice Directions 2010 para.12.3.2. It should be noted that the Tribunal Procedure Committee recently consulted on changes to the costs rules in the Tribunal, including the repeal of s.4. See *http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations* [Accessed January 20, 2013].

[20] Paragraph 26 of the Memorandum to Circular 06/2004 which promotes the use of ADR in compulsory purchase cases, in particular the use of Mediation and ENE.

[21] The *Explanatory Leaflet* also refers to the power of the Tribunal to award costs with a cross-reference to the Practice Directions (para.2.4). Reference can also be made to the Upper Tribunal Lands Chamber procedure flowchart, which states that "The Tribunal will allow a short stay of proceedings where the parties agree to seek Alternative Dispute Resolution, such as mediation, but it will not delay the progress of a case simply to allow negations to continue."

accredited by the Civil Mediation Council[22]) and useful contact details for specific schemes offered by two accredited providers.[23] The guidance note states as follows:

> "Mediation is often more cost effective and quicker than going to a court or tribunal. It is a flexible process that can be used to settle disputes in a whole range of situations. It is also an excellent tool to stop problems becoming worse.
>
> The majority of cases settle either completely or in part after mediation but if no agreement is reached the Tribunal process continues."

Three firm conclusions can be drawn from this brief review of the Tribunal's Rules and guidance:

- the Tribunal Rules and the Practice Directions generally provide for and encourage the use of ADR;
- the Tribunal in particular recognises the benefits of and encourages the use of Mediation as a means of ADR in appropriate cases; and
- the Tribunal can award costs against a party for unreasonably refusing to consider ADR.

However, notwithstanding the existence of the Rules and Practice Directions, the active encouragement by the Tribunal, and the guidance available to prospective litigants, it appears that ADR and Mediation are not much used in compensation cases. There is no available statistical record of the number or proportion of Mediations undertaken in compensation cases before the Tribunal, but it is understood from discussions amongst colleagues working in the field is that cases very few. The Tribunal Registrar has indeed confirmed to the writer that they are "surprisingly rare".[24] The use of ENE in Tribunal cases is even less.

Why is this so? In the absence of detailed research, it is impossible to be certain and there is unlikely to be one single cause. However, it is considered probable that in many cases, notwithstanding the Tribunal Rules, the Practice Directions and the available guidance, the opportunity for ADR is simply overlooked. There may also be amongst many legal practitioners and other relevant professional advisors a lack of understanding or familiarity with the principles and process of Mediation; many will lack direct experience of mediation and this understandably makes them cautious about advising their clients to embark upon such a course.[25] Apparently, there are very few cases in which costs are awarded for unreasonably refusing to consider Mediation; this too is likely to be as result of a lack of understanding or familiarity with Mediation.

So perhaps there is need for a reminder of the principles of Mediation and of the procedure involved. If Mediation has the potential to allow disputes to settle without the need for further expensive litigation—which it certainly has—it should be better understood.

What is Mediation? Is it suitable for compensation cases?

Mediation is a means of ADR. There is no single definition of Mediation. The Centre for Effective Dispute Resolution ("CEDR") has a general definition as follows:

> "Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

[22] The Civil Mediation Council ("CMC") represents the common interests of mediation providers and mediators in promoting mediation.

[23] The Centre for Effective Dispute Resolution Mediation Services ("CEDR") and the Royal Institution of Chartered Surveyors ("RICS"). A number of barristers' chambers also offer mediation as an area of specialism. Barristers can be accredited mediators and also have experience as advocates in mediations.

[24] With thanks to George Bartlett QC, former Chamber President of the Upper Tribunal (Lands Chamber) and to Mr Donald Scannell, Lands Chamber Registrar for the help that they gave to me in considering the subject matter of this paper.

[25] It is hoped that there are none who decline to consider Mediation with their client because they fear that their fees will be reduced.

Whatever the particular definition, Mediation has particular characteristics which together serve to distinguish it from court litigation and other forms of ADR. First, the mediator is neutral—his role is to help the parties reach agreement, not to take sides, give a ruling or impose a settlement. Secondly, it is fundamental that the parties are in charge of the process—they are the final arbiters of how the dispute should be resolved. Thirdly, it is normally a voluntary process—it is normally the parties that agree to mediate.[26] Fourthly, Mediation is normally conducted confidentially—although this too is in the hands of the parties. Fifthly, Mediation is a flexible process—there are no set rules of procedure.

There is no fixed procedure for Mediation, but a basic structure that is often employed is as follows.

Before the mediation the parties will send to the mediator an agreed bundle of the relevant documents, including case summaries. Each party may send a position statement setting out what it seeks to achieve in the mediation. The parties and the mediator will sign a mediation agreement. This document will set out the conditions for the mediation, including terms relating to confidentiality. The mediator will contact the parties in order to explain the process, answer any questions and if necessary ask for further information.

At the mediation the parties must be well prepared to participate in the process and, normally, must have authority to settle. The litigants must be present, a lawyer or a trusted friend should attend to advise the litigant (and as necessary speak for him) and experts may be required in some cases to consider technical issues (for example experts on land valuation).

The mediator will often begin by holding a joint session, with both parties present in one room, so that they can set out their positions and identify matters that they think should be discussed. The mediator will then hold private sessions with each party in order to understand better their concerns, to consider (sometimes by testing) the strengths and weaknesses of their cases, and to explore options for settlement. The mediator will encourage the parties to discuss the differences between them and to reach agreement on them. This can be done either directly in joint session or indirectly in private sessions with the mediator acting as go-between. There is also the opportunity during the mediation to have "break-out" sessions, for example for experts (such as valuers) to discuss specific issues.

Throughout the mediation it will be the role of the mediator to create an optimistic environment for frank discussion, to ensure an efficient and fair process, to understand the issues and the imperatives that affect each party's position, as well as to keep the momentum, with energy and drive, towards a settlement. He will always respect the wishes of the parties and, of critical importance, he will not pass on information or make offers except with the party's instruction (matters remain confidential between a party and the mediator unless and until the party says otherwise).

If the mediation is successful, the parties will record the terms of this in writing. The result may be a binding agreement, a conditional agreement, heads of terms or a form of agreed statement.

It is to be stressed that Mediation is a flexible tool and can be put to a variety of uses. Its use is not limited to single-issue cases, or to disputes that are based solely on claims for financial claims. Nor must it be thought that Mediation is only suitable in terms of reaching a final binding settlement. The presence of a mediator can not only assist parties to negotiate in order to resolve a dispute, but it can also facilitate dialogue in order to improve understanding between parties or reduce the scope of the differences between them.

The skills which a mediator can bring to a mediation to improve the prospects of agreement between the parties are myriad, but the following are standout functions of the role which are considered to be relevant for compensation cases. First, the mediator, who must be qualified and accredited by a recognised mediation training body,[27] must conduct the mediation in accordance with the principles of Mediation; in particular, he should focus on helping the parties reach a settlement with which they are content and not

[26] Although, as I have indicated, the courts require that the parties should behave in a reasonable manner when determining the means by which disputes are settled.

[27] Such as CEDR.

seek to impose a settlement upon them, and he should remain independent and impartial throughout. Secondly, the mediator must manage the mediation in a way that encourages the parties to discuss and come closer to agreement. This means that he must ensure that the environment is such that the parties feel comfortable and willing to discuss matters in a constructive way towards settlement. Whilst the parties remain in ultimate control, the mediator should assume responsibility for managing the process. Thirdly, the mediator must be able to assist the parties define the issues and arguments as well as identifying the differences between them. There is no legal requirement for the mediator to have specialist knowledge of the subject matter but this will certainly help. It is worth adding that Mediation, being a flexible tool, does allow the opportunity for the parties by agreement to ask for a non-binding view on a point. This could be given on an informal basis but might be useful to the parties in assessing their prospects. Fourthly, the mediator must act as "facilitator" in the mediation—that is he must make it easier for the parties to reach agreement and help them remove the obstacles that stand in the way. This is fundamental to his performance and may be vital to the prospects for success in the mediation. Amongst other things, the mediator must: ensure that each party listens to and understands the other party's position; assist the parties explore all reasonable options for resolving the dispute; and where appropriate help a party test the reality of their position ("reality testing"). In this respect, it is of course of benefit to have a mediator with relevant specialist knowledge or expertise. Of course, it should be emphasised that, whatever the skill of the mediator, the parties are in ultimate control—if one party is obstinately fixed to a position it is unlikely that progress will be made.

Whether or not Mediation is suitable will obviously depend on the particular nature of the case and the attitude of the parties. However, the Tribunal's guidance on ADR (the form MED01) notes that mediation is "a flexible process that can be used to settle disputes in whole range of situations" and there is no reason why compensation cases should be regarded as unsuitable in principle. In very simple terms, if a dispute is capable of being negotiated and settled by the parties, it is capable of being mediated. A typical compensation case is well suited to Mediation since it involves two parties each with a different view about the financial value of land/rights or disturbance. Assuming that there is room for argument on the issues, there is scope for negotiation and the opportunity for Mediation. Nor is complexity a bar to progress; mediation will focus the parties on the fundamental determining issues. There may be occasions where there is an important question of law which ought to be decided by the Tribunal or where there is a question of fact which can only properly be determined by the Tribunal, but legal or evidential issues will not necessarily preclude Mediation. Compensation cases are often centred on arguments about financial sums and allow scope for settlement by negotiation (or failing that litigation). Mediation differs from negotiation in so far as it involves a neutral mediator; the parties are still negotiating but the mediator is there to facilitate the negotiation and to help the parties resolve their differences.

There is therefore significant potential for the use of mediation across a range of cases involving claims for compensation following the acquisition of land or rights and under various acts, including for example ss.237 and 226(1)(a) of the Town and Country Planning Act 1990. There may be aggravating features in a case that preclude Mediation, but these are more likely to be difficulties caused by the parties rather than by the substance of the issues in the case. In this regard the Tribunal's guidance advises that mediation works best when those in dispute are:

> "willing to take part; prepared to be as honest and open as they can about the situation and the part they have played in it; willing to work co-operatively with the other person to find a solution; or willing to consider continuing to have a relationship in the future as neighbours, colleagues, family or businesses"

and works less well when:

> "people feel coerced into taking part; they have no reason to work out a future relationship; …. there is a need for a public/legal judgment (e.g. because a legal precedent is needed to clarify the law or inform policy); … there is an abuse of power …"

The potential benefits of Mediation in compensation cases are very significant. The dispute can be resolved in a very short time (most mediations taking no more than one day) and can avoid the costs of a trial of the issue before the Tribunal (which might take several days). Even if the dispute is not finally resolved, the mediation may serve to reduce the differences between the parties. Mediation (and other ADR methods) can resolve specific issues even if not the whole matter in dispute (e.g. a mediation might succeed in resolving an issue over disturbance but not an argument over valuation). Moreover, Mediation can avoid the stress of adversarial litigation and is generally more likely to maintain long term relations between the parties. In the light of the significant potential benefits of Mediation, as well as having regard to the rules and guidance[28] and the potential for cost sanctions for not considering Mediation, all those involved in conducting compensation cases should advise their clients seriously to consider resolving their dispute by Mediation, and, rather than fall into default mode and continue with trial based litigation, ask themselves the question—is there a good reason in this case for not trying Mediation?[29] Where there is room for argument and negotiation there may well be scope for Mediation. Certainly, if both parties are agreeable to using Mediation, and are genuinely prepared to consider a settlement in that process, there must be a reasonable prospect that Mediation will achieve a good result.

The Tribunal's guidance is helpful in relation to some specific questions.

- It advises that where the parties agree they may apply for a stay of proceedings at any time after the Tribunal case has started. The timing for Mediation may be important. It may well be that the differences between the parties are sufficiently well articulated in the claimant's statement of case and the reply to provide a sound platform for mediation. However, these documents are often not very particularised and in many circumstances it will be better to await the exchange of evidence and the expert reports in order for the parties to have a proper understanding of each other's case. That having been said, the later Mediation takes place the more costs will have been incurred.
- The Tribunal will automatically allow a six-week period for mediation, but the parties may apply for a longer period.[30] It is considered that the period of six weeks is not long enough, bearing in mind the need to instruct a mediator and exchange statements in advance, but there is the opportunity to request a longer stay.[31]
- The parties will pay for the mediation and the fee will be paid directly to the appointed mediator. There will also be professional fees.

What is early neutral evaluation? Is it suitable for compensation cases?

Early neutral evaluation ("ENE") can be summarised as follows: a technique whereby the parties agree to employ a senior lawyer (or other appropriate expert such as a Chartered Surveyor) to evaluate the likely outcome of a case or to consider the strengths and weaknesses of the parties' evidence or arguments and advise how best to conduct the litigation quickly and economically. ENE can provide the parties with an opinion on a particular question and which may assist them in judging the strength of their case and the merits of litigating further or seeking to settle the case.

[28] Including the Government's Dispute Resolution Commitment for government departments and agencies and the forthcoming local authority specific DRC.

[29] Although the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 did not accept the submission that there should be a presumption in favour of Mediation (per Dyson L.J.)

[30] Paragraph 2.1 of the Practice Directions and the Tribunal's guidance.

[31] Paragraph 2.1.2 of the Practice Directions.

Again, the process is a flexible one and within the control of the parties. There are many variants[32], but ENE will normally comprise of the following broadly described steps. First, the parties will agree to seek ENE. The agreement will set out clearly the question to be asked and include other relevant terms such as the procedure to be adopted (and confidentiality clauses). Secondly, the parties will submit to the evaluator the relevant documents, including summaries of their case and submissions and an agreed bundle of documents. Thirdly, there is the opportunity for the evaluator to hear evidence or argument (as per the agreement) but for most cases ENE can be conducted on the papers. Fourthly, the evaluator will provide an evaluation (as per the agreed instructions to the evaluator).

There is little if any experience of formal ENE in the compensation field, although it is known that an ENE scheme was established for compensation claims arising from the acquisition of land for the construction of the Channel Tunnel Rail Link. A tribunal (chaired by leading counsel) was set up to assist the parties in their negotiations in terms of how valuation would be approached by the Lands Tribunal. Although the details are not known, it is understood that the scheme achieved some success in helping parties assess their case during negotiations.

Although the Tribunal's guidance does not specifically promote the use of ENE, there does appear to be scope for more use of ENE in compensation cases. Paragraph 26 of the Memorandum to Circular 06/2004 recognises its potential when it promotes the use of ENE at an early stage of a compulsory purchase case "to relieve worries … about the potential level of compensation eventually payable if the order were to be confirmed". ENE might be especially useful in cases where the parties are far apart in terms of a settlement figure but where there is only a single issue at stake, for example a point of law or a question on valuation. The success of ENE will depend very much on the level of expertise and experience of the evaluator, but there must be many instances where a non-binding opinion of an expert will assist the parties in better understanding the strength of their case and the likely outcome of further litigation in the Tribunal, in turn assisting the course of negotiations and obviating the need for further costly litigation. The potential benefits are time and cost savings as well as the reducing the scope for argument.

Concluding remarks

In March 2012, former Justice Minister Jonathan Djanogly said:

> "I do strongly believe that for the vast majority of disputes in civil, family and administrative justice, [mediation] can be a better way of reaching a resolution for all concerned—quicker, less expensive, certainly less stressful, and a solution that the parties themselves will buy into because they will have shaped the outcome.
>
> One of the barriers to mediation's greater use, is people's lack of knowledge about mediation, or the misinformation that they have taken on board that it is a lesser from of justice that smacks of compromise."[33]

The Tribunal's guidance is worth re-iterating:

> "Mediation is often more cost effective and quicker than going to court or tribunal. It is a flexible process that can be used to settle disputes in a whole range of situations …"

There is considerable potential for the use of mediation in compensation cases and ENE too has a role to play in assisting parties reach agreement more quickly. The Tribunal Rules 2010 provide for ADR and the relevant guidance promotes ADR, particularly Mediation. Mediation can save time and costs, and there may be cost penalties for not considering it. Neither mediation nor ENE should be overlooked as an

[32] It should also be noted that parties may agree to request a neutral evaluation as part of a mediation process.
[33] Speaking to students on the Bar Professional Training Course at the BPP Law School in London on March 19, 2012.

alternative means of resolving disputes on compensation. Indeed, opportunities to use them should be seized wherever possible.