Court guidance on when it will and will not suggest mediation

Order 56A of the RSC empowers the Superior Courts, on their own motion or that of one of the parties, to invite the parties to avail of an alternative dispute resolution process ("**ADR Process**") or to refer proceedings to an ADR Process where the parties agree. An ADR Process is defined as including mediation, conciliation or another process approved by the Court but arbitration is expressly excluded. By contrast with Section 15 of the Civil Liability Act 2004 (applicable in personal injuries actions only) Order 56A does not provide for compulsory mediation or ADR. Whether to engage in an ADR Process if invited to do so by the Court under Order 56A remains a decision for the parties alone. However, under Order 99(1)(b), the Court may depart from the rule that costs follow the event where the Court has invited the use of an ADR Process pursuant to Order 56A and the (ultimately) successful party has, "*without good reason*", failed to participate in that ADR Process.

The Courts have given guidance concerning the circumstances in which the parties ought to be invited to engage in an ADR process under Order 56A, most recently in *Grant & Ors v Minister for Communications & Ors* [2016] IEHC 328.

In *Grant* the Plaintiffs' claims against the State arose out of the regulation of shipping as it impacted on several vessels owned by the Plaintiffs over a number of years in the late 1990s and early 2000s. The case, which commenced in 2003, was legally and factually complex and was ready to be set down for trial by the time the Plaintiffs' Order 56A application came to be determined. Refusing the application for an order under Order 56A, Costello J was critical of the Plainitffs's delay in suggesting mediation and noted that "*…the proceedings have progressed over 13 years with all the expense that entails, including the costs of discovery, to the point where the case is ready to be set down for trial. It is the experience of the courts that proceedings are most likely to be resolved by mediation after the pleadings are closed but before the parties have incurred the expense of complying with discovery. They are far less likely to be resolved by a mediation just before the case is ready to proceed a fortiori where one party does not wish to engage in mediation.*"

Costello J followed the judgment of Gilligan J in the High Court in *Atlantic Shellfish & Ors v The County Council of the County of Cork & Ors* [2015] IEHC 570, as affirmed by the Court of Appeal at [2015] IECA 283, in taking into account that mediation was less likely to succeed where one of the parties was not a wholly willing participant. Following the *Atlantic* Court of Appeal decision Costello J was also satisfied that it was reasonable for the State Defendants to seek to vindicate their conduct in open Court, given the very serious allegations including misfeasance made against certain named officials.

Costello J noted that a resolution of the proceedings would require the parties to abandon the positions which they had maintained in the proceedings for 13 years and, while acknowledging that this was possible, regarded this as a matter of considerable weight in the exercise of the Court's discretion. Costello J noted counsel for the State's submission that a mediation would be long and complex because of the complexity of the proceedings and would therefore impose a significant cost on the State, who was unwilling to mediate. Costello J concluded that the State's refusal to mediate was bona fide and that an invitation to do so ought not to be issued by the Court under Order 56A.

*Comment: Despite the outcome in each case the judgements in Atlantic and Grant roundly endorse the benefits of mediation. The refusal to direct that Order 56A requests be issued in both cases turned on the late stage at which an order was sought and other relevant factors. In Atlantic there was a novel point of law raised which had a precedent value and in Grant there were serious allegations made against State officials, which the State wished to have the legally determi*ned. *The Mediation Bill published in February 2017 will place an obligation on solicitors, prior to commencing proceedings for clients, to advise those clients to consider resolving their dispute through mediation, explain what the process entails and provide names of mediation service providers. If enacted it will be interesting to see how these provisions will impact the timing of applications under O56A, given that plaintiffs will have considered and decided against mediation before issuing proceedings. In that scenario will the exchange of pleadings be enough to change a plaintiff's mind or will discovery be necessary, contrary to the timing guidance in Grant?*