NUMBER 23 MARCH 2019

Journal of Licensing

The Journal of the Institute of Licensing

EXTRACT FROM (2019) 23 JoL

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Institute of Licensing

The (underutilised) role of mediation in licensing

As a way of resolving disputes, mediation has proved its value in civil cases but has yet to make its mark in the licensing field. **Jeremy Phillips QC** examines why this is so, and suggests practitioners should consider its merits more closely

Mediation is unlikely to be the first thing which springs to mind when one prepares for a heavily contested licensing hearing concerning the grant of a premises licence - indeed, the possibility of any value being derived from mediation at this stage in the process might seem to be remote. The parties appear to be firmly entrenched. Contrary to expectation, however, that is precisely the time when thoughts ought to be turning to mediation as a process where all parties can emerge as "winners" - or at least not as losers in the conventional sense. In this article we will seek to argue that mediation offers a significant number of benefits which ought to be more readily exploited by licensing practitioners and those before whom they appear.

The article will proceed in four parts. Part I will define mediation, before going on to sketch out its proliferation in recent years. Part II will discuss some of the challenges and opportunities posed by mediation. Part III will describe a typical licensing case in which mediation was successfully utilised. Part IV will conclude with some brief observations on the road ahead for mediation in licensing.

Part I: Mediation - what is it? Why haven't we heard much about it?

Mediation is a form of alternative dispute resolution[1] where an independent and neutral third party - the mediator - actively assists the parties in working towards a *negotiated* agreement of the dispute or difference under consideration. The process is conducted confidentially so that the parties can engage in a frank exchange of views amongst themselves and between themselves and the mediator. Throughout the process, the parties retain complete control both over any decision to settle and the terms upon which any such settlement is achieved.[2]

Beyond this, it is difficult to define mediation with any particularity in the abstract; it is a fundamentally flexible process, which will be tailored to meet the particular needs of the parties. Its definition takes colour from the dispute under consideration in practice; there is a wide range of issues - from the selection of the mediator and process to be followed during the mediation, through to the means by which any agreement will be reached and recorded - over which the parties, in consultation with the mediator, have a wide degree of discretion.[3]

Despite the difficulties associated with speaking about mediation in general terms, it can, nevertheless, accurately be stated that the uptake of mediation - in all its different guises - has sharply increased over the last two decades; this increase forms a small part of what has been identified by Sir Rupert Jackson as a "...pan-European, indeed global trend..." in favour of alternative dispute resolution.[4] In England and Wales, this trend was ushered in by the Woolf Reforms of the civil justice system in the late 1990s and later placed on a solid footing by a series of judicial decisions which endorsed the use of alternative dispute resolution - and in particular, mediation - in the context of civil litigation.[5] Although the

1 Often abbreviated to ADR, which can take the form of mediation, negotiation, collaborative law, conciliation and arbitration. Indeed, within these broad categories there are sub-categories, so that mediations, for example, may take the form of "Facilitative Mediation", "Evaluative Mediation", or "Transformative Mediation". Space does not admit of a more comprehensive exposition of these different forms of ADR in this brief article.

2 For an informative overview of the definition of mediation, see: S Blake, J Browne & S Sime, *A Practical Approach to Alternative Dispute Resolution* (4th Edn, OUP 2016) Ch 14.

3 For an example of how a mediation might be run in practice, see the resources on the Centre for Effective Dispute Resolution (CEDR) website: < https://www.cedr.com/about_us/modeldocs/> (accessed 7 December 2018).

4 Jackson, "Civil Justice Reform and Alternative Dispute Resolution" (Chartered Institute of Arbitrators, 20 September 2016) <https://www.judiciary.uk/wp-content/uploads/2013/03/lj-jackson-cjreform-adr.pdf> accessed 5 December 2018; Blake, Browne and Sime (n1) at 14.16.

5 For example, see: *Dunnett v Railtrack* [2002] 1 WLR 2434; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Faida v Elliot Corporation* [2012] EWCA Civ 287.

courts have generally[6] thus far fallen short of requiring parties to mediate before bringing disputes to court, the law as it stands means that parties who unreasonably refuse to engage in mediation before commencing litigation are more likely to be penalised in costs; this has, unsurprisingly, focused the minds of many litigants and their advisors on the benefits associated with mediation.[7] Furthermore, with the recent transposition of the so-called ADR Directive into domestic law, it is clear that the future of mediation in England and Wales is increasingly rosy.[8]

What, then, of mediation in licensing? It would be wrong to state that mediation is alien to licensing practitioners; to give just two examples: some licensing authorities explicitly recognise that certain disputes are best resolved by mediation, while most, if not all, recognise that the reaching of some form of an agreement between objectors and applicants is best practice;[9] and secondly, legal advisors with a specialist licensing practice have, unsurprisingly given their training and experience in civil courts, been keen to emphasise the benefits of mediation.[10] However, it would be misleading to suggest that mediation has gained a foothold in licensing equivalent to that which it has gained in civil litigation. There is both a practical and a principled reason for this: the practical reason, is that money influences behaviour and in the context of first instance hearings before licensing sub-committees there is no equivalent to the adverse costs orders that caused civil practitioners to pause for thought before dismissing mediation; the principled reason is that there appears to be a relative lack of knowledge in the sector about how mediation can be utilised effectively so as to deliver the best result for clients.

Nothing further will be said about the practical reason in the remainder of this piece; however, with respect to the principled reason this piece now turns to consider and address the opportunities and challenges associated with mediation in licensing.

Part II: Mediation in licensing - challenges and opportunities

Mediation throws up a number of challenges in practice which those advising clients need to be aware of; however, as discussed below, it is rarely the case that these challenges act as insurmountable barriers to success.

It is useful to start by briefly addressing a fundamental concern, related to subject-matter - namely, that certain subject-matters are *prima facie* unsuitable for mediation irrespective of the circumstances. That this challenge has force in certain contexts - for example, constitutional law disputes - is undeniable; but it is important not to overstate its extent. The reality is that "mediation is suitable for almost all disputes, whatever the subject-matter of the underlying cause of action".[11] And in the context of disputes arising from licensing applications, there is no reason why mediation cannot be deployed successfully. Of course, it is not open to applicants or objectors to agree to grant a licence; but that does not mean that applicants and objectors cannot influence that process through mediation - in fact, both applicants and objectors can exert a significant degree of influence over this process when mediation is carefully deployed.

Given the importance of this point, it is worth sketching out two examples.

Where an applicant is faced with an objection, they may decide to engage in mediation with the objector with a view to convincing the objector to formally withdraw or dilute their objection. They may convince the objector to do so by, for example, making minor amendments to their operating schedule, by paying a sum of money to the objector for some ancillary project, or by offering some form of assurance or apology. If the objector ultimately agrees and formally

6 A notable exception was an experiment carried out by the Central London County Court in the 2004/5 when the Automatic Referral to Mediation (ARM) pilot scheme was set up to run for a year. The intention was to randomly select 100 cases each month to be referred to mediation. If one or both of the parties objected, they had to justify their reluctance to a judge. The judge would have the power to override their objections if he or she felt the case was suitable for mediation. A research project was set up to explore what happened when people were, in effect, compelled to mediate. A few weeks after the pilot began, in May 2004, the *Halsey judgment (Halsey v Milton Keynes General NHS Trust etc.* [2004] EWCA Civ 576) was made public. Lord Justice Dyson said, "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." This had an immediate impact on the pilot ARM project, as the court could no longer insist that parties tried mediation.

7 See the discussion in: Blake, Browne and Sime (n1) at 14.06 – 14.12.

8 Council & Parliament Directive, 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

9 See for example Dover District Council, who state: "...if a representation (objection) is received, which appears to be resolvable by means of discussion and negotiation, the Licensing Officer will make every effort to resolve the issues by acting as a *mediator* between the parties..." (emphasis added) < https://www.dover.gov.uk/Business/Licensing/Alcohol,-Entertainment--Late-Night-Food/Objections.aspx> accessed 10 December 2018.

10 For example, the basis of this paper was a panel discussion at the Institute of Licensing National Training Conference 2018 during which the *Paterson's* panel discussion on mediation was led by eight leading licensing barristers.

11 Blake, Browne and Sime (n1) at 14.13.

withdraws their objection, then the effect is that the licensing authority comes under a duty to grant the licence in the absence of any representations (s 18(2) Licensing Act 2003), instead of having a duty to determine the application in light of outstanding representations (s 18(3) Licensing Act 2003). In this particular situation, mediation allows the applicant to eliminate the very real possibility that they will not be granted a licence; the only outstanding matter will then be the imposition of conditions (s 18(2) Licensing Act 2003).

To give an example from the other side, where an objector is concerned about a particular aspect of an application - for example, antisocial behaviour outside a prospective nightclub - they might propose mediation with a view to guaranteeing a compromise solution. In exchange for a promise to withdraw the objection, the objector might ask the applicant to reduce the opening hours in their operating schedule, to pay for CCTV to be installed around their home, or to pay them a sum of money to install double-glazing. Such an agreement is beneficial for both parties, who can walk away satisfied, without having to risk it all before a licensing committee.

No consideration has been given to how an applicant, or less likely, an objector, could engage in mediation with a licensing authority. Although not impossible, this is made more difficult by the fact that the licensing authority must act within the constraints set by the Licensing Act 2003 and more generally within the constraints of its public law powers; navigating these issues is a matter which would merit an article of its own.[12]

Turning now towards the practical challenges associated with mediation, the issue of timing is one encountered in virtually every dispute[13] - namely, the need to undertake mediation at precisely the right stage in the dispute. This is a matter which has attracted judicial comment, the punchline being that mediation should be undertaken at a point when the dispute between the parties is sufficiently well-formulated but has not reached a stage where the parties' positions have become entrenched.[14] In the context of licensing, mediation will generally be best pitched when the objections to an application are known, but before the application has gone in front of a committee. At this point the parties will know the points of contention between them, but will hopefully not have reached an entrenched position with the result that they will still be mindful of the time and resources that could be saved if the matter was settled prior to that stage. That is, however, no more than a general rule; timing will ultimately be a matter of judgement for individual practitioners.

Closely linked to this is a belief that some disputes are simply beyond mediation because the parties are so far apart or so entrenched in their positions that mediation is hopeless. While there are indeed some cases where mediation is unlikely to achieve a resolution, the statistics available in the context of civil litigation tell us that these cases are very much in the minority; there is no reason to believe licensing is any different.[15] The ability of a skilled, dispassionate third-party mediator to navigate the parties to an agreement should not be underestimated even - and perhaps particularly so - in cases where a sensible compromise seems unlikely.[16]

So much for the challenges, what then of the opportunities? Mediation offers practitioners and their clients a number of opportunities that are not otherwise available through the ordinary licensing process - in short, it provides a means by which the parties may retain a degree of control over the process with a view to reaching a timely, cost-effective and innovative resolution of the dispute.[17] It may be helpful to break down these opportunities in some detail….

It is clearly advantageous to all parties to retain as much control over the licensing process as they possibly can; mediation can help reduce, or eliminate entirely, the risks (and, to some degree, the costs) borne by both applicants and objectors when leaving an application to be decided by a committee. Perhaps the primary risk for an applicant is that their application will be rejected outright by the licensing authority. To state the obvious, if, however, as a result of mediation, the objectors withdraw their objections then this risk will no longer exist. Similarly, for an objector, although they will likely wish to see the entire application

12 Those minded to might draw parallels with planning law, where some literature exists considering mediation between local planning authorities and applicants. See, for example: H Brooke, *Mediation and Planning: The Role of Mediation in Planning and Environmental Disputes* [2008] JPL 1390; J Parmiter and J Phillips, Finding Common Ground Planning magazine 21 March 2008; A Grossman, *Mediation in Planning – From Talking the Talk to Walking the Walk* [2009] JPL 24; *Mediation in Planning* – a Report commissioned by the National Planning Forum and the Planning Inspectorate by Leonora Rozee OBE & Kay Powell (June 2010); and most recently, ADR and Civil Justice, the Final Report of the CJC ADR Working Group (Nov 2018).

13 Blake, Browne and Sime (n1) at 14.24 – 14.35.

14 See: *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC) at [32]; *Bradford v James* [2008] EWCA Civ 837 at [1]; *Egan v Motor Services (Bath) Ltd* [2008] 1 WLR 1589 at [53].

15 For a discussion of some of the statistics available, see: Blake, Browne and Sime (n1) at 14.15 – 14.19.

16 See the comments of Brooke LJ in *Dunnett* (n4) at [14] and Elias LJ in *Faida* (n4) at [39] to a similar effect.

17 For useful overview of the advantages of mediation, see: Blake, Browne and Sime (n1) at 14.14.

fail, they may, in private, be more concerned about a particular issue, such as anti-social behaviour; better for them, then, to secure concessions through mediation to deal with those specific concerns, than to risk gaining nothing at a committee hearing. As these two perspectives demonstrate, the desire to leave as little as possible to chance in front of a licensing committee will often serve as a powerful motivator for settlement during mediation.

The benefits in relation to cost and time effectiveness can be briefly stated: if a mediated settlement in the form of an agreement or memorandum signed between the parties can be reached at an early stage in the process, then it is likely that a licence will be granted earlier than would otherwise have been the case. This will ultimately be advantageous in two respects: first, the client will forgo the cost and time implications of having to fight the matter at a committee hearing; second, the cost benefits associated with having the licence earlier than they would otherwise have done will accrue to the client. In light of the length of time it can take for contested matters to come before a licensing committee, in some cases this benefit may turn out to be very significant.

The final opportunity is one which is often underestimated - the ability to reach innovative solutions not otherwise possible in the ordinary course of a dispute. The options open to a licensing authority faced with an application are limited by statute (s 18 Licensing Act 2003) and are in all instances influenced by the licensing objectives (s 4(2) Licensing Act 2003); parties engaged in mediation are not so confined. It is open to applicants and objectors to strike innovative deals that would otherwise be beyond the power of the licensing authority - for example, an applicant could agree to apologise for previous anti-social behaviour, to enter into a contractual undertaking to indemnify in respect of any damage caused to the property, or agree to pay for the installation of security features at a house etc. The opportunities are endless from the perspective of an objector; and although an applicant is hamstrung by the fact that what he ultimately wants is a licence - something which only a licensing authority can grant within the powers conferred upon it - the flexibility open to him during a mediation to settle objections on innovative terms provides him with an important opportunity to influence the licensing process in his favour.

In short, it is evident that the opportunities are many and the challenges few; those challenges which do arise are easily navigable by practitioners. Mediation is best viewed as a tool, capable of serving the best interests of clients; how useful and effective that tool is will ultimately depend on its user. What follows is an example of how this tool has been effectively used in practice.

Part III: Mediation in licensing - an example

Examples of mediation in the context of commercial disputes and civil litigation are legion. This is primarily because they relate to *inter partes* disputes where the courts have either yet to be invited to adjudicate, or have agreed to suspend that process pending discussions between the parties. In such cases the courts have no public duty to perform, other than to adjudicate at the invitation of one or more of the parties.

In licensing, as in planning, the position is complicated by the fact that the local authority is performing a statutory duty on behalf of the public. For this reason, members of the licensing authority may not become directly involved in any mediation as to do so would risk compromising their duty to remain wholly independent, or lead to them acting unlawfully by constraining or overreaching their statutory powers.[18]

There have been a number of cases where licensing officers have acted as “mediators” between the parties to a potentially contentious licensing dispute. Where they have done so they were, presumably, acting as officers to the licensing authority, rather than the “responsible authority” under s 13(4)(za). Even then, it would have been necessary to take extreme care to ensure that no step taken could possibly infect the licensing process, should the mediation be inconclusive and a formal hearing take place.

In an early case, the author was representing a group of residents who had finally lost patience with a national sporting event taking place on their doorsteps in a comparatively rural location. Originally this had been for a very limited duration. In time, however, the owner of the land upon which the event occurred had extended both its duration and scope, to the extent that the previously cordial relations with her neighbours had broken down irretrievably.

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18 For an example of illegality as a ground for judicial review, see *R(Unison) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 and for irrationality, the leading case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, which lent its name to the expression “Wednesbury unreasonableness”. For an example of a decision by justices that was unlawful see *R (on the application of Carmarthenshire County Council) v Llanelli Magistrates’ Court [2009] EWHC 3016 (Admin), [2010] All ER (D) 209.* Costs may even be awarded against magistrates where they have appeared in the Administrative Court, having been found to have unlawfully refused to hear and determine an application for the extension of licensing hours: *R v Llanidloes Licensing Justices, ex p Davies [1957] 2 All ER 610n, [1957] 1 WLR 809.*

The licensing authority, which itself had some interest in the important local event, duly extended the premises licence. An appeal was lodged.

On the first day of the three-day licensing appeal it became apparent that insufficient time had been allocated and that at least a further two days needed to be found. The hearing was adjourned. However, at the instigation of the respective advocates it was suggested that the principal protagonists, having been brought together for the occasion, might sensibly sit down to discuss the issues. To cut a long story short, by using counsel for the authority as a *de facto* mediator it proved possible (by 1am the following morning!) to thrash out detailed terms for an enduring settlement, so avoiding the delay, significant cost and uncertainty for all concerned of leaving the outcome to lay magistrates. Although compromises were made on all sides, the benefits of such an approach were very apparent to all concerned.

Part IV: Mediation in licensing - looking ahead

It is clear that licensing has, for too long, lagged behind many other sectors in its uptake of mediation; there is no reason why this should continue to be the case. It is hoped that this piece will cause practitioners to reconsider the role of mediation in their practices and in the sector as a whole.

Whether or not mediation will find a home in the context of licensing must remain a matter of speculation. However, if mediation is to gain the firm foothold in licensing that it currently has in the context of civil litigation, it will require somewhat of a sea-change in opinion amongst practitioners. Such a change will not occur unless a number of so-called "early adopters" rise to the challenge of championing the cause of mediation in this field, with a view to ultimately persuading the reluctant majority of the opportunities which mediation presents. [19]

Those interested in seeing such a change occur would be well-advised to reflect upon the unique opportunities - and indeed challenges - which mediation presents in the context of licensing and consider how these are best explained to clients and applied to their advantage. This will require innovative thinking in many cases, but it will ultimately be to the benefit of individual clients and the sector as a whole.

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19 On the importance of early adopters and the effect on the market, see: E Rogers, *Diffusion of Innovations* (5th Edn, 2003).