

Recent Developments in Alternative Dispute Resolution

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*This **ADR Update** is intended to inform the advice sector of developments and initiatives in alternative dispute resolution. ASA wants to encourage dialogue between advisers and ADR providers so that the growing field of ADR develops in a way that ensures access to justice and informed choice.*


*If you know of others who might like to receive a copy of **ADR Update** by email, if you would like to be removed from the ADR Update email circulation list, or if you would like more information about any of these topics, please contact Val Reid, ASA's ADR policy officer. **ADR Updates** can be downloaded from the policy section of ASA's website www.asauk.org.uk*

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ADR research

Small claims mediation – does it work?

Research into three pilot schemes offering mediation in small claims disputes was published in December 2006 by the Department for Constitutional Affairs (DCA). Headline conclusions seem to show that mediation is highly successful in resolving small claims, and that the process is popular with the parties. In fact, the results of the Manchester pilot appear so successful that the DCA has announced that it will use this model to roll out the scheme to other court areas across the country during 2007-8.

However, a more detailed reading raises serious issues about whether *'too much emphasis is placed on expediting cases and too little on the safety of outcomes in terms of justice'*.¹

Background

Four research reports have now been published by the DCA into three small claims mediation pilot schemes at Exeter, Manchester and Reading. Three were commissioned by the DCA Proportionate Dispute Resolution Team, and one by the DCA research unit.

- In the Exeter scheme, mediators who were also qualified as solicitors offered 30 minute mediation appointments to small claims litigants referred by the District Judge. Two research reports look at this scheme².
- In the Manchester pilot³ a full time salaried mediation officer (MO) was available in court to give information and advice about mediation, and to provide free, voluntary, one hour face-to-face mediations to small claims parties. Towards the end of the pilot period he began to offer telephone mediation when parties had problems travelling to the court; this proved very popular.
- The Reading pilot⁴ focused more on giving advice and information about the small claims process to unrepresented litigants, with a 'by-product' of facilitating some settlement negotiations. The scheme has since been discontinued.

Take-up

In Manchester, 27% of the small claims cases at the court were referred to the MO, and 41% of these cases went on to face-to-face or telephone mediation. In the Sefton Exeter research, 44% of the small claims cases at the court were assigned⁵ to mediation, and 62% of those were actually mediated. In the Prince research, these figures were 34% referred, and 53% mediated.

¹ Jill Enterkin and Mark Sefton, DCA Research Series 10/06 (pg 86)
www.dca.gov.uk/research/2006/10_2006.htm

² Jill Enterkin and Mark Sefton, DCA Research Series 10/06 (as above). See also an evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court 2006 by Dr Sue Prince and Sophie Belcher. www.dca.gov.uk/civil/adr/index.htm. For convenience I will refer to these as 'Sefton' and 'Prince'. Sefton refers to the period 2003-4, and Prince to 2005-6.

³ Evaluation of the Small Claims Mediation Service at Manchester county court September 2006 by Margaret Doyle. www.dca.gov.uk/civil/adr/index.htm

⁴ Evaluation of the Small Claims Support Service pilot at Reading county court September 2006 by Craigforth. www.dca.gov.uk/civil/adr/index.htm

⁵ See point 4 "Is this really Justice?" for comments on 'assigning' cases at Exeter.

Outcomes

In Manchester, 82% of face-to-face mediations resulted in a settlement, and when telephone mediation is included, the settlement rate rises to 86%. In the Sefton Exeter research, 69% of mediated cases settled at the mediation (65% in the Prince research).

On the face of it, this seems like a success – as well as the high settlement rates, user satisfaction with the mediation service itself was good at both courts. There was also little or no problem with enforcement. In Manchester, all the mediated settlements were complied with – in the Sefton Exeter research, only 4% of mediated cases required enforcement action, compared with 19% in the control sample of cases where a judicial order was made.

However, ASA believes that there are some further questions which should be asked.

1. Is the service really cost-effective?

Although the settlement rate for cases that actually ended up at mediation was an impressive 82% (or even 86%) at Manchester, in fact only 34% of the total number of cases referred to mediation were settled that way, and the percentage of all small claims cases actually resolved through mediation was less than 10%. Similarly, at Exeter (Sefton), the 69% settlement rate of mediated cases translates into a 43% settlement rate for the cases referred to mediation, and less than 20% for all small claims cases. The Manchester research report estimates that 172 hours of judicial time were saved over 12 months, and the two Exeter research reports estimate 216 (Sefton) or 121 (Prince) hours. But these estimates of judicial time saved do not allow for cases which might not have led to a hearing anyway: for example, in Exeter (Sefton) 49% of non-mediated cases did not result in a hearing because the case was settled or withdrawn, or because one of the parties did not attend⁶. Nor do the estimates allow for judicial time spent on allocating cases to mediation, or dealing with objections to the allocation. Researchers for both schemes conclude that there is simply not enough information to make an accurate cost/benefit analysis.

2. What do the parties think about their outcomes?

The Sefton Exeter research identifies an assumption that if settlement is reached, parties are satisfied. This is not necessarily true, for a number of reasons. In Exeter (Sefton), where the research compared cases settled through mediation with a control group where a judgement was issued, the mean value of mediated settlements was 63% of the claim value, and the mean value of judgments was 83% of the claim value. Claimants using mediation can therefore expect to settle for significantly less than those going to court. On average, in Manchester cases settled for around half of the claim value, and nearly a quarter of cases settled for less than a third of the claim value. In both schemes, some claimants expressed disappointment at what they perceived as low settlements, and some defendants were unhappy at having agreed to pay more than they thought was fair.

A number of parties felt under pressure to settle – partly by the limited time available, and partly by the mediator. One mediator in Exeter referred to the process as ‘*a thirty-minute hustle*’⁷ and a litigant in that pilot talked about the process being a ‘*mild form of*

⁶ Sefton. www.dca.gov.uk/research/2006/10_2006.htm

⁷ Sefton. As above page 71

*bullying*⁸. Another less mealy-mouthed litigant referred to mediation as ‘a load of crap – bollocks – a form of blackmail’⁹.

The Manchester research found that many parties’ satisfaction with the mediation process was linked to relief at avoiding what they feared would be a daunting court hearing – but most had no actual experience of this. Margaret Doyle, the researcher, suggested that better information about the small claims process would help parties make more realistic assessments about the most appropriate way to resolve their dispute. Interestingly, the pilot at Reading County Court has been discontinued: this scheme focussed on giving information about the small claims process to unrepresented parties, and did not demonstrate the same potential cost savings as the settlement-orientated processes at Manchester and Exeter.

3. Does mediation offer added value to the parties?

One of the claims made for mediation is that it can offer creative settlements which are not available through court orders – apologies, changes in policies and procedures, donations to charity. However, in the Manchester pilot, only 12% of mediated settlements included an outcome that could not have been ordered by the court, and several parties felt that the focus was on compromise and bartering rather than achieving a win/win solution. The percentage was even lower in both Exeter reports.

4. Is this really ‘justice’?

There are a number of significant questions about whether these small claims mediation schemes really offer justice to the parties.

Voluntary or compulsory?

In Exeter (Sefton), although the scheme was nominally a voluntary one, interviews reveal that two thirds of the participants felt they had no choice, and that their case would be compromised if they failed to mediate. In addition, three of the ten mediators in the scheme were unclear about just how voluntary it was. A key element of mediation is its voluntary nature, and the Halsey judgement¹⁰ stressed that mediation should not be a compulsory part of the court process – the Sefton research indicates a worrying lack of clarity about this. Despite changes to the pilot scheme following the period of this research in 2003-4, this was still an issue for Prince in 2005-6.

What is the role of the mediator?

In Manchester, the Mediation Officer (MO) does not advise the parties, but he does talk to them about what he considers to be the advantages of mediation compared with a court hearing and judgement. He also provides what he calls a ‘reality check’ to parties who might have ‘unreasonable’ expectations. The MO is an ex-policeman with three days of mediation training, and Margaret Doyle, the researcher, comments on his lack of supervision during the pilot. She also makes the point that “*if parties perceive that [the MO’s] job is to obtain mediated settlements, it might affect their perception of his impartiality*”¹¹. In Exeter, Mark Sefton found evidence that the mediators sometimes slipped into their role as solicitors and gave advice to the parties. The research also found a competitive element among the mediators in Exeter, who saw failure to

⁸ Sefton. As above page 75

⁹ Sefton. As above pg 76

¹⁰ www.adrnw.org.uk/halsey

¹¹ Evaluation of the Small Claims Mediation Service at Manchester county court September 2006 by Margaret Doyle www.dca.gov.uk/civil/adr/index.htm page 33

achieve a settlement as a slight on their reputation¹². A second key principle of mediation is the neutrality of the mediator; the appearance of neutrality certainly appears to be compromised in these pilots.

What about the rights and wrongs of the case?

A number of the interviewees in the Sefton Exeter research, particularly where the case was about the non-payment of a debt, felt aggrieved that no legal arguments were accepted, and that often the mediators didn't seem to know anything about the case at the start of the session. The apparent compulsion to use the scheme, the short time available, the pressure to settle applied by some of the mediators, and the lack of 'a legalistic approach'¹³ meant that some felt that they were having their arm twisted in order to arrive at a compromise agreement and that justice was not being done¹⁴.

Is the process transparent and accountable?

Mediation is confidential, and there is no independent scrutiny of the process. There is also no procedure for reviewing the content of the mediated settlements. If judges did spend time checking settlement terms, potential savings in judicial time would be lost. Although both schemes nominally had complaints procedures, the researchers found little evidence that users were aware of them. The Sefton Exeter research makes the point that *'the streamlined nature of these proceedings and their lack of internal checks leave litigants with little or no recourse to challenge, appeal or simply complain about procedures or outcomes'*¹⁵.

What about the future?

In a postscript, the Sefton Exeter research notes that changes have been introduced to address some of these concerns. However, the problem may not be amenable to simple procedural change; many of the same issues, in particular the confusion about voluntariness, are noted in the 2005-6 research into the Exeter scheme undertaken by Dr Sue Prince for the DCA Better Dispute Resolution team.¹⁶ The Manchester report also makes 13 recommendations to improve the clarity and accountability of the process. If the DCA proceeds with its plan to roll out small claims mediation in other courts, these concerns should be taken seriously.

The three research reports into the small claims mediation pilot schemes at Manchester, Exeter and Reading, commissioned by the Proportionate Dispute Resolution Team at the DCA, can be found on:

www.dca.gov.uk/civil/adr/index.htm

The research report into the Exeter small claims mediation pilot by Jill Enterkin and Mark Sefton, DCA Research Series 10/06, can be found on:

www.dca.gov.uk/research/2006/10_2006.htm

¹² Sefton. www.dca.gov.uk/research/2006/10_2006.htm page 73

¹³ Sefton. As above page 76

¹⁴ Sefton. As above page 75

¹⁵ Sefton. As above page 77

¹⁶ Small Claims Dispute Resolution Pilot at Exeter County Court 2006 by Dr Sue Prince and Sophie Belcher. www.dca.gov.uk/civil/adr/index.htm

ADR issues

New consumer redress schemes – energy suppliers and estate agents

The Consumers, Estate Agents and Redress Bill was introduced into Parliament in November 2006. It includes provision for the regulators of energy suppliers, water suppliers and postal services to require companies in their sector to be members of an independent approved redress scheme for consumer complaints. It will also make it compulsory for estate agents to be members of such a scheme.

Currently, estate agents can become members of the Estate Agents Ombudsman scheme on a voluntary basis. There is also a fairly new ombudsman scheme for energy suppliers – suppliers including British Gas, Scottish Power, EDF Energy, npower and Powergen are already members on a voluntary basis – but again the Bill would make membership of this or an equivalent scheme a requirement.

The legislation allows for more than one independent ADR scheme to operate within each sector, subject to approval: the DTI, the department which introduced the Bill, proposes that the regulator for each sector should decide on the criteria for approval of such schemes. Looking at the situation that currently exists within the telecommunications industry, this proposal does raise some questions which ought to be debated. In the telecommunications sector, two independent redress schemes were approved by the regulator in 2003 and again in 2005. Otelo is an independent ombudsman scheme, and CISAS is an adjudication scheme run by the Chartered Institute of Arbitrators. All public communications providers – which includes landline providers such as BT, carrier preselect services, mobile phone providers, cable TV and internet service providers – must belong to one of the two schemes, but can choose which scheme to belong to. The two schemes operate rather differently.

- Ombudsmen (such as Otelo) are inquisitorial, which means that they take on the responsibility of looking into a complaint raised by a consumer. Adjudication (such as CISAS) requires both sides to put their case in writing for the adjudicator to consider, which could disadvantage a customer who is less articulate or confident.
- Otelo, the ombudsman scheme, expects its member companies to give the ombudsman contact details to their customers, preferably on bills. The CISAS adjudication scheme does not require such signposting of its member companies. It is also a requirement of CISAS that complainants can only access the scheme with a reference number from their provider, which creates an additional hurdle, although this can be overridden in some cases.

An analysis of the recent annual reports of both schemes (available at www.otelo.org.uk and www.cisas.org.uk) shows that even with comparable percentages of the mobile phone market among their members, the two schemes have received vastly different numbers of complaints, suggesting that lack of signposting might be preventing consumers from accessing the CISAS scheme. This is an area in which the regulator, Ofcom, is currently conducting further research to determine if there are differences in the consumer experiences of each scheme.

Competition among ADR schemes can be positive in that it can increase pressure on such schemes to maintain standards. However, it can also have the opposite effect if companies are motivated by cost to join a scheme offering a lower standard of service to consumers. The National Consumer Council opposed such competition in its response to the DTI consultation on the new proposed legislation, in which it stated: *“A single ombudsman for electronic communications, energy, postal and water services offers the best model for achieving simplicity, consistency of outcome and a system that reflects how the market operates in reality for consumers.”*

The NCC went on to state:

“...there are inherent risks in permitting multiple dispute resolution schemes within a given sector. The Ofcom Review of ADR schemes found that both Otelo and CISAS were working well, but there were differences in outcomes. For example, one scheme found in favour of the consumer less often, but compensation awards were higher. The time taken to resolve disputes also varied. It is important that consumers enjoy the same standards of protection whoever their supplier is, not least for reasons of equity. There is also a danger of creating perverse incentives for suppliers to sign up to the scheme that offers them an ‘easier ride’.”

Consideration should be given to these issues before criteria are finalised for independent approved redress schemes for other sectors under this legislation.

Follow the progress of the Bill, and read the contents in detail:

www.publications.parliament.uk/pa/pabills/200607/consumers_estate_agents_and_redress.htm

Read the National Consumer Council response to the DTI consultation on the proposed Bill:

www.ncc.org.uk/protectingconsumers/consumer_voice.pdf

Find out more about:

The Energy Supply Ombudsman: www.energy-ombudsman.org.uk

The Ombudsman for Estate Agents: www.oea.co.uk

Otelo: www.otelo.org.uk

CISAS: www.arbitrators.org/cisas/index.asp

Parliamentary Ombudsman v Government?

As reported in the last edition of the ADR Update, there have been two occasions during the last year when the Government has refused to accept the recommendations of the Ombudsman:

- The Ministry of Defence refused to accept the Ombudsman findings concerning a compensation scheme for British internees in the Far East during World War II, and only agreed to implement the recommendations when the House of Commons Public Administration Select Committee (PASC) took evidence on the issue.
- The Ombudsman report into the role of Government bodies in advising on occupational pension schemes was published in March this year, but the Department for Work and Pensions has contested the findings of the report, and rejected its recommendation that some form of compensation should be considered.

Trusting in the pensions promise

Up to 125,000 people lost part of their occupational pension when some schemes were wound up without sufficient funds. The Parliamentary Ombudsman's report, *Trusting in the pensions promise*, found that Government maladministration had meant that people investing in these pension schemes had not realised the risks they ran, and had been denied the opportunity to reduce them. She recommended that the Government should consider how best to compensate those who had suffered financial loss as a result.

The DWP refused to accept her findings, and refused to consider compensation on the grounds that it would be too expensive for the public purse, and therefore unjustified.

When a Government department refuses to accept the Ombudsman's recommendations, the Ombudsman has the power to lay a report before Parliament, and the Parliamentary Select Committee for Public Administration will investigate the issue. This has happened over the Spring and Summer of 2006.

The Public Administration Committee report

The committee finished taking evidence on this issue, and published its own findings in July 2006. The Committee has basically endorsed the Ombudsman's report:

"We agree with the Ombudsman that maladministration occurred. Government information about pensions was deficient and reasonable people would have been misled. Moreover, the Government should have considered the Ombudsman's recommendations properly, rather than immediately assuming that they would place large burdens on the public purse."

The Ombudsman's concerns

Ann Abraham, the Ombudsman, has major concerns about the increasing tendency for Government departments to simply ignore or repudiate Ombudsman recommendations.

She told the Committee that: *"There appears to be an emerging attitude amongst Government departments that they can properly, and with impunity, reject my independent assessment of their actions, and my findings of maladministration."*

The Committee agreed with her: *"We have been increasingly concerned at the possibility that the Government has been treating the Ombudsman's reports less seriously than it should, and has been too eager to contest them."*

The Committee went on to say: *"It would be extremely unfortunate if Government became accustomed simply to reject findings of maladministration, especially if an investigation on this Committee proved there was indeed a case to answer. It would raise fundamental constitutional issues about the position of the Ombudsman and the relationship between Parliament and the Executive. At the heart of every case of maladministration is someone who has suffered injustice. By concentrating its energy on denying findings of maladministration, rather than on considering what remedies might be practical and proportionate, the Government has caused further distress to complainants. It has delayed any resolution of their problems."*

Other approaches

An application for judicial review of the Government's decision to reject the Ombudsman's findings has been made by four of those affected by the wind up of their pension schemes.

The full report of the Public Administration Committee is available on:
www.publications.parliament.uk/pa/cm200506/cmselect/cmpublicadm/1081/108102.htm

ADR news

Mediation UK

In October 2006 Mediation UK, the umbrella group for community mediation services in the UK, went into voluntary creditors' liquidation.

Community mediation services are involved in the provision of many different types of mediation. They are mainly known for mediation in neighbour disputes, but they are also involved in restorative justice (victim/offender mediation), mediation in special educational needs disputes, peer mediation schemes in schools, and workplace mediation services. Mediation UK has also managed the Disability Conciliation Service (DCS) funded by the Disability Rights Commission (DRC), which offers conciliation for disputes over the provision of goods and services, as well as education, under the Disability Discrimination Act.

Local community mediation services are funded separately from Mediation UK, and are still operating as before. However, the closure of Mediation UK will have a number of effects. The most significant is the temporary suspension of the DCS. The DRC has put a statement on its own website saying that *"the Commission's partner, Mediation UK, responsible for delivery of the Disability Conciliation Service (DCS) is experiencing some difficulty. Consequently we have suspended the facility to refer to DCS from all sources, including the DRC Helpline. The Commission is now working hard to resolve this difficulty and expects to restart referrals in the very near future."*

Other functions of Mediation UK will also be affected:

- The Mediation UK website was the best place to locate your local community mediation service. The website is currently still on-line, but it will not be updated*.
- Mediation UK accredited community mediator training through the National Open College Network and through approved local mediation services.
- Mediation UK operated the competent mediator scheme, which accredited individual mediators.

Mediation UK trustees hosted a meeting in December 2006 to discuss the future, to explore whether funding could be found to establish a new umbrella body, and to think about what its primary responsibilities might be. No further decisions have yet been made.

*It is worth noting that that Resolute Systems, the organisation which designed the Mediation UK case management system, has now set up a new on-line community mediation directory. It is being developed and tested until the end of January 2007, and will provide a searchable database of community mediation services in the UK, which will be kept up-to-date. The directory is on:

www.intermediate.org.uk

Mediation UK:

www.mediationuk.org.uk

DRC statement about the DCS:

www.drc-gb.org/about_us/conciliation_service.aspx

New ADR schemes

Compulsory dispute resolution schemes for tenancy deposit disputes

From 6th April 2007 it will be compulsory for all landlords to be a member of a tenancy deposit scheme. This will apply to around £1.2bn of assured short hold tenancies in the private rented sector in England and Wales.

Three schemes have been approved by the government. All three schemes will offer a process for resolving disputes about tenancy deposits at the end of a tenancy, and will include various forms of alternative dispute resolution.

- There will be one 'custodial' scheme, where the scheme will hold the tenancy deposits paid to landlords, and will be financed from the interest on the money held. This scheme will not charge landlords to be a member, and will take responsibility for paying out deposits appropriately at the end of a tenancy, once any dispute has been resolved through the scheme.
- There will also be two insurance-based schemes; in these schemes the landlord will retain the deposit money, but will pay a fee to be a member. The scheme's insurance policy will guarantee to pay out deposit money once a dispute is resolved.

All three schemes will be free to use for both landlords and tenants. Details of the schemes and how they will operate will be available later in January – a summary will be available on the ADRnow website.

A news release about the schemes can be read on the Communities and Local Government website:

www.communities.gov.uk/index.asp?id=1002882&PressNoticeID=2293

Waterways ombudsman

A new ombudsman scheme to deal with complaints about British Waterways has just been approved for membership by the British and Irish Association of Ombudsmen (BIOA). Full BIOA membership means that the scheme is deemed to be independent, effective, fair and publicly accountable.

British Waterways is responsible for running and maintaining rivers, canals and reservoirs in England, Wales and Scotland. The Waterways Ombudsman will investigate complaints from people using the waterways (living or travelling on narrow boats, for example) or from those who live or work near the waterways. The ombudsman will also accept complaints from small businesses or charities.

A summary of the scheme can be found on the ADRnow website:

www.adrnow.org.uk/waterwaysombudsman

Details of the scheme can be found on the British Waterways website:

www.britishwaterways.co.uk/accountability/waterways_ombudsman/waterways_ombudsman.html

ADR consultations

What is good administration?

Providing effective services? Acting proportionately? Putting mistakes right quickly? The Office of the Parliamentary and Health Service Ombudsman (OPHSO) has drafted six principles of good administration, in order to make clear the tests the ombudsman will apply when deciding whether a public body has been guilty of maladministration or service failure. The OPHSO is currently consulting on whether these principles are relevant, helpful, clear and comprehensive.

The six principles are:

Getting it right

- Acting correctly, according to both law and good practice
- Providing effective services through trained, competent staff

Being customer focussed

- Dealing with people helpfully, promptly, sensitively and flexibly

Being open and accountable

Acting fairly and proportionately

- Treating people with respect and courtesy, and without bias or discrimination
- Ensuring that decisions and actions are proportionate to the circumstances and individuals concerned

Putting things right

- Making sure people know how to complain
- Putting mistakes right quickly

Seeking continuous improvement

- Welcoming feedback and learning lessons from complaints
- Using both to improve services and performance

According to the OPHSO, the impact of an organisation's actions on an individual is central to assessing any complaints made to the ombudsman. However, the guidance notes to the first principle state that "*when taking a risk-based approach to decision making, public bodies should ensure that it operates fairly and reasonably and does not result in actions that are disproportionate to the circumstances and individuals concerned.*" On what criteria should a public body assess whether the effects of its actions are proportionate or disproportionate? This seems to beg a number of important questions, which need to be addressed.

The principles and details of the consultation can be found on the OPHSO website on www.ombudsman.org.uk/news/index.html

The consultation period is open until Friday 12th January 2007.

ADRnow website

ADRnow - a million page requests in 2006

During the past year, the ADRnow website has had 1,234,415 page requests – an average of 102,868 each month. I am in the process of checking and updating the information on the site for 2007 – please let me know on val.reid@asauk.org.uk if information about your scheme needs to be amended.

Have a look at the site on:

www.adrnow.org.uk