

ODR Advisory Group Small Claims and ODR (January 2015)

1. Introduction

Current government policy focuses upon the delivery of a quality justice system, at a proportionate cost, within a reasonable time. In the report, 'Solving disputes in the County Court',¹ the government aspired "to deliver a [justice] system that prevents the unnecessary escalation of disputes before cases reach the court room". The Minister for Justice, Lord Faulks, has recently confirmed this statement remains government policy.²

The commitment of the government to mediation is matched by a concern to develop and incorporate consistent standards for the delivery of all mediation services. This paper considers how ODR can inform the direction and development of mediation services on the small claims track for cases up to a value of £10,000.

2. ADR as part of the civil justice system

The vision is for a civil justice system that delivers:³

- Disputes resolved in the most appropriate forum, with processes and costs being commensurate with the complexity of the issues involved;
- Citizens who take responsibility for resolving their own disputes as much as possible, whilst the courts focus on adjudicating particularly complex or legal issues;
- Procedures which are citizen and business friendly, with services focused upon the provision of timely justice; and

Citizens who are aware of the services open to them so that, where possible, they can take action early, make informed decisions and more readily access the most appropriate services.

This consultation suggested that all cases below the small claims limit (below £10,000) could be automatically referred to mediation before being considered for a hearing. Early intervention can be provided through more and better information; the

¹ Ministry of Justice, 'Solving Disputes in the County Courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales – the Government response' (Cm 8274, Feb 2012).

² Lord Faulks, 'Keynote Speech at the Civil Mediation Conference 2014': <https://www.gov.uk/government/speeches/mediation-and-government>.

³ Ministry of Justice, 'Solving Disputes in the County Courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales – the Government response' (Cm 8274, Feb 2012)

promotion of pre-action protocols and more formal interventions, such as telephone and paper hearings to try to prevent unnecessary escalation of disputes. Each of these serves to support the diversion of lower value claims away from a court hearing.

Mediation potentially provides these benefits for the courts:

- Reduction in time between claim and resolution for cases that settle;
- Reduction in court personnel resource generally;
- Less need for formal court hearings if cases are successful;
- More flexible and creative process and solutions available than at hearing;
- Availability of the process contributes towards a culture of settlement;
- Mediation costs less than going to a formal court hearing if the case settles.

3. Small Claims Cases

Cases are divided by allocation to track each of which is governed by specific rules under the Civil Procedure Rules (CPR):

Small claims track – less complex cases and those usually up to a value of £10,000; personal Injury and housing disrepair claims up to a value of £1,000.⁴

Fast-track – less complex cases and those with a value usually up to £25,000;⁵

Multi-track – reserved for more complex cases and those with a value of over £25,000.⁶

Mediation is generally encouraged in all civil justice tracks within the UK,⁷ and also used as an adjunct to a number of specific court schemes.⁸

The number of small claims going to hearing has decreased over the past 10 years from 51,046 in 2003 to 29,603 in 2013. Small claims cases make up almost 70 per cent of the total number of hearings in the civil courts and there can be more than a seven month gap between the issue of the claim and the hearing. If the Small Claims Mediation Service is successful and results in the case not needing to proceed to trial this figure can be reduced to 20 weeks.⁹

This data gives a glimpse into one of the main criticisms of the civil justice process: the time taken between issue of proceedings and trial, which adds to the cost and complexity of the litigation. The average time taken from issue to trial in a fast / multi track case is approximately 56 weeks.¹⁰

⁴ Part 27, CPR.

⁵ Part 28, CPR.

⁶ Part 29, CPR.

⁷ See further S Blake, J Browne and S Sime, 'The Jackson ADR Handbook', (Oxford: OUP, 2013).

⁸ For example, the Court of Appeal's Mediation Scheme and the MoJ Small Claims Mediation Service.

⁹ Figures supplied by the MoJ (Feb 2014).

¹⁰ Down from 59 weeks in 2013.

4. The development of small claims mediation

Cases with a value of up to £10,000 per year are now automatically referred to mediation, where both parties indicate it is acceptable on the Directions Questionnaire, sent to the parties prior to the case being allocated to track. Cases can therefore be directed to mediation in advance of being listed for hearing.

Small claims mediation -April to October 2013 ¹¹		
Total number of referrals to mediation	Number of mediations	Percentage of settlements at mediation
26, 670	5,792	65%

In 2005, the Department of Constitutional Affairs (now the Ministry of Justice) piloted a free mediation service for the small claims court after experimenting with three very different models, analysed against government criteria that considered both settlement rates and user satisfaction. In the first pilot, conducted at Manchester County Court, one mediator was employed to resolve disputes through mediation conducted both in-person and on the telephone.¹² In Reading, the priority of the pilot was upon the provision of advice and information offered to litigants-in-person in small claims proceedings.¹³ In the pilot at Exeter County Court, local lawyers conducted mediations.¹⁴

The current model used by the courts was principally based upon the pilot conducted in Manchester, found to offer both high user satisfaction and high settlement rates.¹⁵ It began formally offering mediation nationwide in 2007. The aim of small claims mediation, as advertised on the Ministry of Justice website, is to save people the time and expense of attending at court.¹⁶ For Her Majesty's Court and Tribunal Service (HMCTS), this service also serves to reduce the number of small claims currently going through the court process that would otherwise result in trial and so saves judicial

¹¹ Figures provided to author by Ministry of Justice (February 2014).

¹² M Doyle, "Evaluation of the Small Claims Mediation Service at Manchester County Court" (Department of Constitutional Affairs, 2006).

¹³ Craigforth, "Evaluation of the Small Claims Support Service Pilot at Reading County Court" (Department of Constitutional Affairs, 2006)

¹⁴ S Prince and S Belcher, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court*, (Department of Constitutional Affairs, 2006).

¹⁵ V Reid and M Doyle, 'Small Claims Mediation – Does it do what it says on the tin?' (Advice Service Alliance, 2007). Presented at the Hart Conference 2007: http://sas-space.sas.ac.uk/3432/1/Reid_Val_and_Doyle_Margaret_-Revised_Paper-070618_Hart_paper_final.pdf (Accessed 20th March 2014).

¹⁶ Ministry of Justice website (Accessed 30th March 2014)

time. The service is open to all small claims except personal injury claims, road traffic accidents and housing disrepair cases.

HMCTS now employs 17 mediators and several additional support staff as part of a nationwide service to offer a free, one hour mediation to those parties involved in small claims disputes. Mediators are civil servants with no judicial or necessarily legal experience who have been trained and accredited by mediation providers recognized by the Civil Mediation Council.

Originally, the small claims mediators operated from individual courts and mediated disputes face-to-face. However, this led to gaps in the service as not every court had their own mediator. The Small Claims Mediation Service (SCMS) soon moved towards telephone mediation and in 2014, the service was centralized.¹⁷ Now, even though mediators are based in court regions, mediations are handled centrally so that a mediator based in Somerset could be mediating a dispute that would be listed for a court in Lancashire.

5. The Small Claims Mediation Process

The following description is based upon an observation of a small claims mediation in January 2015.¹⁸

The mediation is given an allotted time span, during which the parties commit to being available on the telephone. They receive a mediation agreement and other paperwork in advance, explaining the mediation process, and requiring each side to be familiar with the relevant documentation for their case. The mediators have no information about the individual dispute other than basic details as to the amount of the claim and the names and contact details of the claimant and defendant.

The mediator first phones the defendant to confirm their attendance at the mediation. S/he will then ring off and phone the claimant, explain briefly the mediation process: confidential, no legal advice given, etc and then ask the claimant for a short summary of the details of the claim that the claimant would like to have put before the defendant. At the end of the summary the mediator checks his/her own understanding of the details, confirm that the claimant wants this information to be relayed to the defendant and state that the role of the mediator is to find a position that both sides will find acceptable. The mediator asks the claimant to spend a few

¹⁷ 'Mediation by telephone aims to speed up small claims', *The Guardian*, 9th February 2012.

¹⁸ Observed 20th January, 2015.

moments thinking about how they would like the situation to be taken forward or resolved while s/he phones the defendant. S/he will then ring off.

The mediator then phones the defendant and gives the same information as to the nature of the process and asks the defendant to make his/her own statement. The mediator summarises what has been said, explains that the claimant wishes to seek resolution and asks the defendant if they would like to make an offer or suggestion to the defendant to try to resolve the issue. The mediator then rings off to phone the claimant.

The claimant has had a few minutes to think about possible pathways to settlement and in the next call, the mediator puts the offer forward that the claimant has made. The mediator steers each of the parties towards thinking about the consequences of going to court and the risks involved in putting their case before a judge. Questions arising from either side as to whether the mediator can advise how to proceed are dealt with swiftly as being outside the realm of the mediation.

Conversations continue in this fashion until the mediation either reaches settlement, or the parties decide that they cannot reach any form of compromise and so the case will continue. The case has already been listed and if the mediation settles up to 10 days before the hearing date the claimant can have their hearing fees refunded. At all times the mediation is time-limited to one hour and so, the clock is ticking throughout the process. At the end of the mediation, the mediator will remind the parties that everything said has been confidential and the parties cannot raise the mediation during the hearing. If the case settles then this is recorded on a mediation settlement agreement and it is emailed to both parties and the court. The court will place a copy of it on the court file and vacate any listed hearing. The case itself is stayed for three months so that either side can reinstate the claim to a hearing in the event of a breach. If there is no breach, the court will strike out the claim automatically after that date.

The process is similar to a face-to-face shuttle mediation in that the mediator moves between the parties but there are no initial introductions and the parties never speak directly to each other. If the mediation fails to settle there is no suggestion of further help for the parties, or referral to any other settlement or advisory options to help prepare for the hearing.

ODR could assist the mediation service as described by offering a more streamlined service that situates the mediation within an environment offering and connecting information and interactivity, links and direction for each of the parties. If the mediation fails to settle, parties could be directed towards help in hearing preparation and other possible debt or advice online services. ODR offers the possibility of educating parties as to the process of mediation before participation. If a mediation fails, there is also the opportunity to offer the parties online information about

hearings or further settlement. Alternatively, if it settles there can be help with enforcement processes.

6. Data and settlement rates

The number of mediations taking place is quite small in comparison to the number of cases that actually mediate. Of the 79114 cases that were referred to the small claims track in 2011, only 10 per cent went to mediation, rising to 21 per cent in April – October 2014. In the year 2008 – 2009 the settlement rate for the SCMS was 71 per cent. This has dropped over time and stood at approximately 65 per cent in 2013 / 2014.

7. Saving judicial time

HMCTS has indicated that the Small Claims Mediation Service has so far saved over judicial time saving of 6170 hours between April and October 2014. This is an increase of 9% for the same period last year. The estimate is that a SCMS saves 79 minutes of judicial time.

The cost of the court case is saved if the case settles at mediation. However, there is a lack of information as to whether a number of these cases would have settled anyway and the length of time that settled cases would have been listed for in the court. For example, savings will be reduced if a case that would have been scheduled for an hour in the court, takes one hour at mediation and still does not settle. There is a significant cost for those cases that do not settle at mediation and go on to a hearing.

Since April 2014, there is now a single management structure for the SCMS. A central administrative team based at Northampton supports the team of mediators. The staff cost of the service is approximately £1.2m. This pays for 17 mediators and 21 support staff who book appointments and arrange the logistics. Considerable efforts to improve efficiency and streamline processes has meant that the number of mediations has increased year-on-year by over 1,000 mediations and the time taken between claim and mediation has been reduced.

65% of cases going to mediation originate from the Bulk Centre and are therefore being brought by large businesses / utilities. ODR allows for the possibility to link information on debt and how to access help and advice for defendants in need of such support. This could be financed by a potential surcharge for bulk issuers using the SCMS.

8. ODR and Small Claims

How ODR could improve the small claims mediation service:

- Increase visibility of the SCMS as there is no easy to access online portal.
- Supports the concept of a standardised national mediation service with standardised ODR provision.
- Provides links between MCOL and SCMS.
- Increase links to information on mediation and small claims more generally which could further save judicial time.
- Potentially increase the number of defendants agreeing to take part in the process by taking them through an information process which assists with their decision-making / gives information which would increase the number of referrals that actually result in mediation.
- Helps with scheduling and managing of small claims mediation process itself which could potentially reduce the time between claim and mediation.
- Allows opportunity for Skype / video or tele-conferencing as well as telephone mediation.
- Can link paperwork with the mediation itself and also email connections with the parties to enable communication.
- Allows ease of scheduling so that parties can list a number of times they are available on standby. This allows mediators to quickly pick up an alternative mediation in the event that the scheduled mediation is cancelled due to one party not turning up / sickness, etc.
- Allows for those parties involved in mediations that do not settle at mediation to be directed to online resources on preparing for hearing or other settlement options.
- Allows for those mediations that do settle to be directed towards enforcement materials or other helpful information to help with enforcement.

Sue Prince
University of Exeter