

## Personal Response to CJC Consultation

### Introduction

I give this response as a personal one gained from my experience as a Deputy district judge dealing with a large number of personal injury and small claims, administrator of the Manchester Mediation Pilot and practising solicitor heading up the commercial litigation team at Southern solicitors, as well as being a director of ProMediate which is a certified ADR Provider under the ADR Regulations. I am also on the Court of Appeal Mediation Panel. Although I am a board member of the CMC this response is unconnected with that body.

### Responses

#### SECTION 10: QUESTIONS FOR CONSULTATION

##### General

10.1. The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?

Yes. In respect of small claims the free mediation service is patchy as there are only 16 “mediators” who are not CMC registered and they do not review the file before mediating. They cannot deal with demand. In the Fast Track and multi-track litigants (particular personal injury Lawyers) pay lip service to the Directions questionnaire in relation to ADR often saying that ADR is not suitable because there is a dispute over liability or quantum, which are not valid reasons for refusing to mediate, but the Courts do not do anything about this. From experience in operating the Manchester Mediation pilot to date, where parties are ordered to consider mediation with an “ungley order”, there has been little take-up from parties since it commenced on 25 September 2017. This may be because there is no compulsion to take part or to explore the mediation or ADR options, because it is still early days and orders need to feed through, or because the costs are too high (there is no subsidy from the Court even though settlement saves the Court system money). In the Court of Appeal, there are only a handful of Mediations taking place per annum. Having said that, it is possible that parties are bypassing these schemes and using their favourite mediators who receive the majority of instructions.

10.2. The Working Group has suggested various avenues that may be explored by Judges, by lawyers and by ADR professionals in order to improve the position. We will ask questions in relation to these proposals below. But do consultees think that the Working Group has ignored important questions or precedents from other systems or that there are other areas of inquiry with which we need to engage?

I consider that the working group has not appreciated that the ADR Regulations system could be tied in better with the Court system, to create a link between Pre-action conduct and issuing proceedings. The difficulty is that the ADR Regulations system is run by BEIS rather than by the MOJ which means that there is no co-ordination of approach. Most judges are completely unaware of the ADR Regulations system.

##### Making ADR culturally normal

10.3. Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

There is an ingrained culture of “enforcing rights” and “having your day in Court.” The recoverable costs regime encourages parties to pursue cases even if it is uncommercial to do so. In the small

claims court there is no incentive to use ADR before issuing as there is on the face of it, a free mediation service and no costs consequences for the losing party as the Courts are reluctant to impose sanctions for unreasonable conduct.

#### 10.4. How can greater progress be achieved in the future?

Encouraging ADR at source

#### 10.5. Is there a case for reviewing the operation of the consumer ADR Regulations? Why has their impact been so limited?

As I have submitted previously, the ADR Regulations system is broken and needs reviewing. As someone who runs an ADR Provider I can see that traders are simply refusing to use ADR, particularly retailers, lawyers and motor traders, with some notable exceptions such as Carpetright, Clarks and Auxillis, for whom we act as ADR Provider. Even solicitors are refusing to use ADR to resolve complaints, so confident are they that they are in the right. This causes considerable confusion and upset to consumers who receive information about ADR and are keen to use it. You only need to look at the Lawgistics website (motor trade lawyers) to see how opposed certain Motor traders are to ADR. Also please consider Sainsbury's and John Lewis which consider that their complaints handling system is so good that ADR is not required. We do our best for consumers by inviting traders to mediate and if they refuse, we issue a certificate for the consumer to show to the Court, to demonstrate unreasonable conduct, but there is no guarantee that the Court will make any disapprobatory order in due course. What is needed is a link between the ADR Regulations and the Court system, so that parties are obliged to confirm usage or at least that they have complied with the information provisions, before issue. The Claim Form could be amended to include this confirmation. Unfortunately BEIS run the ADR Regulations system rather than the MOJ and never the twain shall meet.

#### 10.6. Should the Courts treat a failure to use an appropriate conciliation scheme as capable of meriting a cost sanction?

Yes, the Courts should do this, for example in parking cases and financial services claims. They could also require use of the ADR Regulations procedures in consumer disputes. This should be made clear in the directions questionnaire and on the Claim Form. If defendants respond to a claim by saying that they are willing to use ADR, a case could be stayed in order for ADR to take place.

#### 10.7. Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out?

The Courts could impose implied contractual terms for disputes to be referred to ADR. The MOJ could reinstate the National Mediation Helpline, as recommended by Lord Briggs.

Encouraging ADR when proceedings are in contemplation

#### 10.8. Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? How in practical terms could such a system be made to work? How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?

Yes, the Claimant should be asked on the Claim Form to confirm whether ADR has been offered and/or accepted. When acknowledging service, the defendant could say whether they intend to defend the dispute and/or whether they want to use ADR/mediation. In consumer cases, the consumer could be asked to provide confirmation from an ADR Provider under the Regulations that

they have offered ADR to the trader and that it has been refused or the claim has not been resolved through the process.

10.9. Can the prompts towards ADR in the pre-action protocols and the HMCTS Guidance documents be strengthened or improved? Should a declaration be included in the claim document in the terms of R9 (see paragraph 9.19 above)

Yes

10.10. Are MIAMs on the family model a practical solution at the pre-action stage? Have the Working Group over-stated the practical difficulties of introducing civil MIAMs? Have they understated the potential advantages of doing so?

I would advocate "MIAM lite" e.g. The parties should be obliged to contact an ADR Provider and an ADR official discuss ADR options with the other party over the telephone.

Encouraging ADR during the course of the proceedings

10.11. Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?

The best opportunity is when the claim is issued.

10.12. Do consultees agree with those members who favour Type 2 compulsion (see paragraph 8.3 above) in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?

Yes. The parties should at least discuss their case and ADR options with an ADR Provider.

10.13. If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?

There is no valid reason why clinical negligence and personal injury claims should not be included save for claims proceeding through the Portal.

10.14. Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?

Yes

10.15. Would it be beneficial to introduce a Notice of Mediate procedure modelled on the British Columbia system?

This might work.

10.16. Do consultees agree that the emphasis needs to be on a critical assessment of the parties' ADR efforts by the Courts in "mid-stream" rather than a process which simply applies the Halsey guidelines at the end of the day after the judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the court reasonably be expected to require the parties to attend purely to address ADR?

Yes. Mediation and ADR are often an afterthought at the CCMC or CMC. The threat of costs sanctions following judgement is so far down the line that it has little effect. Some parties with deep pockets do not care if they are sanctioned at the conclusion. What is needed is for them to be directed down the mediation track at an early stage. The Manchester Mediation Pilot demonstrates either that parties are going elsewhere for a mediator or they do not take the threat of costs sanctions at the end of the case seriously. As Halsey is not enshrined in the CPR explicitly, there is a lot of judicial inconsistency. Parties can argue at the end of the hearing, when there is often insufficient time, that even though they refused mediation there was a good reason.

10.17. Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases (Type 3 compulsion)?

Costs sanctions could be imposed at this stage. For example, the Court could consider whether to approve a Costs budget if there is no plan for ADR. It could also make an order for costs of the CCMC or CMC to be reserved if ADR is not in contemplation.

Costs sanctions

10.18. Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR issues?

Yes

10.19. Do consultees agree with the Working Group that the Halsey guidelines should be reviewed?

The Halsey principles are similar to the authorities on relief from sanction. The authorities conflict and put a gloss on Halsey. One day a Court finds that refusal to mediate is unreasonable and the next day a different court makes a different decision. Each case turns on its own facts and there is a lack of certainty. Judges appear reluctant to impose a penalty when, in their view, mediation might not have been successful. They undervalue the benefits and success record of mediation.

ADR and the middle bracket

10.20. Is there a gap in the middle-value disputes where ADR is not being used sufficiently?

Yes as lawyers do not appear to understand that there are cheaper ADR Providers than CEDR, In Place of Strife and Independent Mediators which dominate the market in high value disputes. They are unwilling to try unknown mediators. I would suggest that the Court could nominate a mediator in some cases so that parties are persuaded to use better value mediators.

10.21. Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?

No the problem lies with the instructing solicitors who prefer to use the same mediators, so 90% of Mediations appear to be carried out by 10% of mediators. There are plenty of mediators in the market and individual mediators offering to charge a proportionate fee such as ProMediate. It must be appreciated that there is a limit to any mediation fee as there are insurance and overheads which mediators have to meet, such as CPD and membership of the CMC. It is not feasible for professional mediators to act on a pro bono basis, just as judges are not asked to sit pro bono.

10.22. Could the ADR community do more to meet this unmet demand?

The ADR community could highlight mediators or providers which charge fees proportionate to these cases. The MOJ could set up a national mediation service or employ properly trained mediators as part of HMCTS. The MOJ could use DDJs who are trained mediators such as myself to sit as mediators for a mediation list.

Should the costs of engaging in ADR be recognised under the fixed costs scheme?

Yes, this is the proposal put forward by Jackson LJ, but it would be difficult to fix a recoverable mediation fee. If it is too low then mediators will not agree to mediate at this cost.

10.24. Anecdotal evidence suggests that the various fixed fee schemes are not receiving any very great take up. Is this the experience of providers? What kind of volumes are being mediated under these schemes? Why, if they are unsuccessful, are they not being used?

We have a fixed fee scheme. The problem is often in identifying what scale each case fits into in terms of value.

10.25. What pricing issues have arisen as between consumer mediation, the civil mediation website fixed price scheme and schemes such as those operated by CEDR and Clerksroom? Are there inconsistencies and confusions?

Yes. We often get enquiries through the Civil Mediation directory and also enquiries through our ADR certified scheme, for example concerning building disputes. Builders are traders who have to comply with the ADR Regulations and so our consumer pricing applies. However, that pricing contradicts the pricing on the Civil Mediation directory website under fixed fees which was set over 10 years ago. We are obliged to charge consumers a nominal fee and so the mediation costs are not simply split between the parties. I have pointed this out on numerous occasions but have been studiously ignored. This highlights the problem of the ADR Regulations being run by BEIS separately from the MOJ/HMCTS.

Low value cases/litigants without means

10.26. do consultees think that a further reform or development of the Small Claims Mediation scheme is required?

The success of the free Court based mediation service has been overstated. People frequently cannot access it and then the “mediators” are not CMC registered at all and do not have access to the Court file. If the service was expanded it should involve employing DDJs who are also mediators to carry out mediation lists. There is no funding available, as demonstrated by the Mediation Pilots which are completely devoid of any funding.

10.27 making ADR available for lower value disputes? What do Consultees see as being the challenges in dealing with this area?

See above comments on the uptake of ADR by traders. In small claims, the process is relatively informal anyway and unreasonable costs are rarely awarded. There is no real risk to litigants and therefore mediation is eschewed because of the cost. The unreasonable conduct rules could be amended to explicitly state that unreasonable conduct in a small claim is evidenced by a refusal to use ADR.

10.28. How can we provide a sustainable, good quality, mediation service for this bracket? Is pro bono mediation viable?

ProBono is not viable because mediators are already struggling to make a living as it is. There are costs involved in telephone mediation for example. There are overheads to meet such as administrative costs, insurance, professional memberships and CPD. Although some mediators appear to be “trustafarians” or retired people treating mediation as a hobby, that route is not open to most mediators. A sustainable good quality service is already provided by organisations such as ProMediate which charges low and nominal fees. In addition, in our experience parties who do not pay for mediation do not take it as seriously as those that pay and also expect the same level of commitment from the mediator, if not more. They have no “skin in the game.”

10.29. What are the other funding options available?

Litigation funders and insurers can and do pay for mediation but there is no incentive for them to do so if the other party is not funded. Funded parties have a tactical advantage over unfunded parties. Mediation/ADR could be included in the terms of instruction or SLAs between insurers and solicitors.

10.30. Do consultees agree that special ethical challenges arise when in particular mediators are dealing with unrepresented parties?

Yes – unrepresented parties are at a disadvantage in proceedings. They need processes to be explained in more detail. For example, they may not understand about costs or the mediation process itself owing to unfamiliarity. They often are unable to evaluate the prospects of winning or losing their case.

The on-line opportunity

10.31. In the digital sector how is the Tier 1 prompting for mediation going to work? Can the same prompts be used outside the Online Solutions Court when digital access becomes possible across other jurisdictions?

There should be a triage system whereby cases suitable for mediation should be referred out to a certified ADR Provider or dealt with in house by a registered CMC Mediator (not the current SCM system) Mediation should not be carried out by legal advisors. This would devalue the skills and training of registered mediators. Alternatively DDJs who are registered mediators could be booked to undertake telephone online or face to face mediation at the Court. I am a DDJ and registered mediator and feel that HMCTS is failing to use my skill set as a mediator. I do deal with Family First Appointments which are akin to ENE or mediation. Courts could list Mediations just as they do hearings. In fact in small claims cases certain courts have begun listing cases for an initial hearing at which settlement is encouraged. This could be changed to a telephone mediation appointment.

10.32. Is the use of ODR techniques going to lead to unfair advantages for litigants with digital access?

Clearly there is an issue where as is often the case, elderly people in particular do not have access to the internet or an email address. Digital assistance is required in those cases. There may be issues as to identity of parties and some security features or questions will be required.

10.33. How should ODR techniques be introduced? Which techniques are going to be appropriate? Could a system of online blind bidding be beneficial? How are they being introduced within the wider digital provision?

A system whereby parties can make offers to accept or pay less than the sum demanded on a without Prejudice basis would be advantageous, so upon filing the claim they could be asked whether they would accept any lesser sum and the defendant if they file a defence could be asked whether they wish to make any offer.

A greater role for conciliation/ombudsmen during the currency of proceedings

As I say, DDJs who are also mediators could conduct mediation in person online or by telephone. DDJs with mediation qualifications are underused.

10.34. Is consumer conciliation still underused? How could its use be expanded? Should it be used alongside civil proceedings to a greater extent?

As aforesaid the consumer mediation ADR system should be linked in with the HMCTS system and run by the MOJ not BEIS. Consumers and traders should be required to demonstrate that they have complied with the ADR Regulations and contacted an ADR Provider (some funding required as providers could not meet the cost of dealing with these queries) Each query costs in excess of £1 to deal with. This is where the national mediation helpline recommended by Lord Briggs should be reinstated, to deal with those queries. Ideally the Regulations should be amended to ensure that the traders engage with the providers if only to explain why they will not use ADR. Again, query how this would be funded.

Challenges for Judicial ENE

10.35 ENE - providing a free ADR service with no regulatory/quality risk?

Yes, as aforesaid there are many DDJs who are also qualified mediators. Just as it is possible to obtain a specialist ticket for judicial work such as private family law and chancery, it should be possible to obtain a mediation ticket and to hear mediation lists. The judicial college could sub contract with ProMediste (once registered as a training provider with the CMC) to provide mediation training to judges. It is not accepted that there are no risks if judges who are not qualified mediators are used.

10.36. Do consultees feel that a loss of party autonomy and the narrowness of the legal enquiry are disadvantages of the system and if so how can this be mitigated?

Prior to the mediation or ENE, the parties would need to have filed a claim and defence. ENE is not binding so no real prejudice suffered by parties.

Challenges for online dispute resolution

10.37. Do consultees agree that ODR has enormous potential in terms of delivering ADR efficiently and at low cost?

Yes

10.38. Do consultees agree that specified standards for ODR would assist its development and help deal with any stakeholder reservations?

Yes

10.39. What are the other challenges that the development of ODR faces? How else can ODR be rendered culturally normal?

Parties are still reluctant to use ODR. What needs to be done is to build trust into the system as was done with AirBnb which has revolutionised the short term rental/holiday rental market. The founder of AirBnb explains that by building trust into the process, people are now willing to rent their homes to complete strangers and over 700,000 bookings take place every day. In order to build trust into the system, there should be transparency as to the identity of the mediator or decision maker with reviews and feedback as to their decision making. People need to have the same trust in the ODR process as they do in the Court institution.

#### Challenges for Mediation

10.40. Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?

Yes, very much as evidenced by professionals' reluctance to instruct anyone that they have not used before and by the slow take up of the Mediation Pilot and the Court of Appeal Pilot.

10.41. How do consultees think that these concerns can be reassured and addressed?

CMC registration should alleviate their concerns about standards and the new complaints procedure may assist also.

10.42. Is there a case for more thorough regulation? How could such regulation be funded and managed?

Clearly if "mediator" became a protected name, mediators would be obliged to join a regulatory body as with the Ombudsman industry where they are required to be members of the Ombudsman Association. This would increase funds for the body (the CMC) to pay for regulation and standards.

10.43. What other challenges are faced by mediation?

There are too many mediators training for too few mediations and it is likely that the profession will lose support if more people qualify when there is a lack of demand. This is similar to the problem experienced by the Bar with pupillages. The training courses are expensive and some advertising about the opportunities is misleading.

The way in which mediators are instructed leaves a lot to be desired in terms of discrimination in respect of sex and age. There is little gender equality in the mediation profession. Appointments are made behind closed doors and appear to be based partially on nepotism and stereotypes, reputation and word of mouth. This leaves little opportunity for new mediators to increase the diversity of the profession which is largely white male.

There is still no obligation to register with the CMC in order to practice as a mediator. Anyone can call themselves a mediator and it is not a protected name, unlike the name "Ombudsman".

If we leave the EU single market this could present a challenge as a lot of the impetus to promote mediation has emanated from the EU Parliament and the Commission. I fear that there will be a



return to the old ways of litigating and the ADR Regulations may be repealed, being seen as additional “red tape” for traders.

**Peter Causton**