



MASTER OF
THE ROLLS

THE RIGHT HON. SIR GEOFFREY VOS

The Relationship between Formal and Informal Justice

Hull University

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Introduction

1. I am very grateful to Diana Wallis for having invited me to deliver this talk at the re-launch of Hull University's Mediation Centre. It is very exciting to hear that the Centre will have a contract with Hull City Council so that students can observe and be engaged in the provision of the neutral third-party element for the Council's existing customer complaints process.
2. I think, as you have heard, that the title of this talk arose from the fact that Diana Wallis and I were involved in the production of a joint report in 2017 for the European Law Institute (of which she was President) and the European Network of Councils for the Judiciary (of which I was President) entitled "The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution".
3. That report set out in 21 carefully formulated principles a rather grandly entitled "Statement of European Best Practice in relation to the approach that Courts and Judges should adopt in interacting with all types of ADR processes". But, since then, things have certainly moved on in the UK at least. I will explain.
4. The approach to Alternative Dispute Resolution or "ADR" differs significantly across Europe. (I will return to the term itself.) ADR is generally most effective where the population trusts those that provide it. That is not always the case; particularly in parts of Southern and Eastern Europe. Moreover, in the UK, we are making significant strides towards online dispute resolution, which is not happening at the moment in most EU states. This development has a crucial significance for ADR, which I will come to shortly.

5. In this talk, I will concentrate on what is going on in England & Wales. In my new role as Head of Civil Justice, I intend to try to make sure that the provision of ADR is at the heart of all parts of the civil justice firmament. What I want to explore this afternoon is what that means in tangible terms.
6. First, I am keen to work towards the introduction of an integrated online justice system for civil claims, aligned with the systems operated for Family and Tribunals claims.
7. Secondly, I want to see the front-end portals that operate before proceedings are initiated talking freely to the online courts system to which claims that are not resolved will automatically progress. There must be a single data set.
8. Thirdly, and most importantly for these purposes, I want to see ADR integrated into every stage of what we call the dispute resolution process. The focus throughout ought to be on resolution rather than dispute. It is an easy thing to say, but a much harder one to achieve. My thesis today is that it can only be achieved if we adopt a much broader view of what constitutes alternative dispute resolution, how it is undertaken, and how it is delivered.
9. This means that my view of the relationship between formal and informal justice has moved on considerably since 2017.

Areas in which disputes need to be resolved

10. Let me start, however, by looking at the general areas in which large numbers of disputes that require resolution arise. This is really by way of setting the scene.
11. Broadly I want to consider briefly 14 separate subject areas: Money Claims Online (MCOL), Online Civil Money Claims (OCMC), the RTA Portal, the Whiplash Portal, Damages Claims Online, Possession and Property Tribunal Claims, Business and Property Claims, Claims dealt with by Ombudspeople, Family money claims, Family children disputes, Employment claims, Social security claims, Immigration claims, and claims brought online on eBay and Amazon.

12. Let me take a brief trawl through how ADR impinges or could impinge on each these.
13. Money Claims Online (MCOL) has been in existence for some years, and is mainly used by bulk claimants for claims up to £100,000. The year before Covid, there were 1.3 million such cases issued. There is no ADR process integrated into this system, which results in many County Court Judgments by claimants such as the utilities and local authorities each year. ADR could be integrated within the system to prevent damaging CCJs being awarded, and allow for delayed payment plans to be agreed before CCJs occur. It may be that, in reality, cases will migrate over time to the new OCMC portal, which I turn to consider next.
14. Online Civil Money Claims (OCMC) is a successful pilot currently aimed at litigants in person and currently limited to claims up to £10,000. Pre-Covid, there were some 70,000 such claims each year. It is planned to integrate ADR processes into OCMC programming. ADR could take the form of bots or human interventions at particular stages in the process. For example, if the claim is for £1,000 in respect of the failure to deliver 50 fencing panels, and the defence is that 25 were actually delivered, a bot could pop up and suggest that £500 be paid to settle the claim.
15. The Personal Injury Claims Portal deals with claims up to £25,000 and creates a pre-action process for small personal injury claims. Pre-Covid, there were some 689,000 cases going through the portal every year. The whole process is aimed at achieving a quick resolution between injured claimants and insurers. It has been extremely successful. Far fewer cases emerge from the Portal to progress to fully fledged county court personal injury claims. In due course when that does happen, the claims will pass from the Portal to the new Damages Claims Online facility that I will mention in a moment.
16. The Government's new Whiplash Claims Portal, which is aimed at LIPs, will launch in May 2021. It will create a pre-action process for small personal injury claims under £5,000. This too will be aimed at speedy resolution. It is hoped again that only a tiny percentage of claims will emerge and become county court claims that will be dealt with through Damages Claims Online.
17. So, those claims that do resist settlement within either the Personal Injury Portal or the Whiplash Portal will enter the new Damages Claims Online, which will launch soon, first for professional court users. The Damages

Claims Online process will have a similar form of integrated ADR to that envisaged for OCMC.

18. Possession Claims Online (PCOL) has been in existence for some years. Before Covid, there were 100,000 such cases issued each year. That will in due course be replaced by a more extensive Online Possession Claims that is in the course of development. There are no current plans to integrate Property Tribunal Claims with online possession claims, but that should certainly be an ultimate objective since many of them involve the same parties as possession claims. The MoJ has just invested £3 million in providing a mediation pilot for possession claims. At the moment, the only problem is that defendants to possession claims need to know whether or not they have the right to stay in their property before they can be expected to reach a mediated settlement. The multi-disciplinary possession committee headed by Mr Justice Robin Knowles is tackling that issue at the moment. Meanwhile, within the HMCTS reform programme, an all new system called Online Possession Claims is being developed for launch later this year. It will talk to OCMC and Damages Claims Online and have the same built-in alternative dispute resolution approaches.
19. The next major category of claims are Business and Property, now heard in the Business and Property Courts that I used to have responsibility for as Chancellor. There are some 20,000 of these claims each year across London and 7 regional centres. Formal mediation and early neutral evaluation, about which I will say more in a moment, are currently the most common forms of ADR employed in the B&PCs. I believe that we should engage a wider variety of ADR methods.
20. Next, let me consider briefly, cases that are dealt with by ombudspersons. The figures are interesting. The Financial Ombudsmen Service resolves nearly 300,000 complaints each year, and the Housing Ombudsmen closes some 15,000 cases annually. The communications ombudsman dealt with more than 20,000 cases every year, and the energy ombudsman some 57,000 cases. Ombuds processes are all, of course, designed to achieve resolution. Indeed, there is no judicial determination. If the parties do not agree to what is proposed, the case has to be brought as a claim in court.
21. I will deal with Family Money Claims and Family Children Claims together. There are obviously large numbers of such claims brought every year. For these purposes, family is really ahead of civil in that you cannot make any kind of application to a family court without having attended a Mediation Information and Assessment Meeting or MIAM. These meetings are

conducted online and explain different ADR approaches that might be more suitable than court proceedings. There is no doubt they have been successful. In addition, once an application for financial relief is made, the parties have to attend a Financial Dispute Resolution appointment at which the District Judge will try to suggest ways in which the dispute might be resolved. This is, in effect, a very successful form of early neutral evaluation which is conducted on an end to end without prejudice basis. A mediation pilot for ongoing private family cases is also being considered imminently by MoJ.

22. There are also thousands of employment claims made each year to the Employment Tribunals. Claimants have to notify the Advisory, Conciliation and Arbitration Service (ACAS) before they make a claim. They have to serve an early conciliation notification on ACAS. ACAS then explains the possible approaches to conciliation and asks the claimant if they want to participate. If they do not, they receive a certificate enabling them to proceed to issue a claim in the tribunal. Again, the process has been successful. In addition, once an Employment Tribunal claim is begun, the tribunal can recommend its judicial mediation scheme, which started as a pilot in 2006, and is now available throughout England and Wales. Over 65% of cases mediated reach a successful settlement on the day of mediation, and more are settled before the hearing as a result of the impetus created by the judicial mediation.
23. The two other areas of bulk claims are those brought in the Social Entitlement Chambers and in the Immigration Tribunal, where ADR is perhaps more challenging, but needs consideration.
24. Finally, of course, Ebay and Amazon successfully resolve over 60 million claims every year online. They use artificial intelligence and have very high user satisfaction.
25. These 14 areas of dispute across civil, family and tribunals show the range within which ADR has a major part to play. There are several million of these disputes every year in the public sector and as many if not more that are resolved within the private sector or by arbitration.
26. Let me say something now about the culture of dispute resolution.

The culture of dispute resolution

27. In many of the areas I have mentioned, the participants are badly disposed towards compromise. For example, in small claims in the County Court, once the claimants pay their court fee, they often feel they are entitled to a judicial determination, and will opt out of any suggested ADR. For that reason, ADR interventions need to be carefully targeted if they are not to be made compulsory. I will say something about compulsion in a moment. Some projects have stalled because of lack of take up.
28. My theory is that almost every dispute has a sweet spot when it is amenable to consensual resolution. But that sweet spot will occur at different times for different disputes, and in many cases will be hard to identify. That is why I am so much in favour of online dispute resolution processes that allow mediated interventions to be suggested frequently at almost every stage of the resolution process.
29. It is to be noted that the culture is not so much different in the UK as it is in other countries. But here we are fortunate that ADR providers are generally trusted, which is not always the case, as I have said, in Southern and Eastern Europe. Trust is central to ADR as it is to court-based dispute resolution.
30. To return briefly to compulsion, this is highly controversial. In the landscape I have already described, there are areas of compulsion. For example, you need to attend a MIAM before you start private family proceedings, and you need to talk to ACAS before you can start a claim in the Employment Tribunal. But otherwise, mediation and ADR is not generally compulsory in England and Wales. The Civil Justice Council, which I chair, is looking at whether it is desirable for any, and if so what, forms of ADR to be made compulsory, and if so in what circumstances. The sub-group's report should be available shortly.

Methods of mediated intervention

31. There are many different ways of resolving disputes. An understanding of the wide range of available ADR methods is critical to early resolution and effective resolution.
32. I have already mentioned online interventions. There is, of course, also the classic formal mediation conducted by an independent trained mediator.

That is a suitable approach for some entrenched disputes, but is certainly not appropriate in all cases. For formal mediation to work well, the parties require to be advised of their rights, so that, for example, a spouse cannot be expected to give up a shared asset, and a tenant cannot be expected to agree to become homeless, unless, at least, they have their rights properly explained to them and they are in receipt of independent legal advice.

33. For simpler disputes, simpler solutions can work well. For example, a pilot in Birmingham and in other centres started listing small claims for a half-hour direction hearing before a District Judge instead of for a full 2-hour disposal hearing. 80% of the cases were resolved at, before or after that hearing, because the District Judges were able to tell the parties whether the claim was good bad or indifferent. It has operated as an extremely effective kind of early neutral evaluation. I have asked the Civil Justice Council to look at this too with a view to rolling out best practice across the country to reduce the backlogs in the resolution of small claims.
34. Ombuds processes are also extremely successful for disputes between consumers and utilities and public and other authorities. They operate on a tier structure with recommended solutions proposed for acceptance to the parties. Vast numbers of claims are settled by these processes without the need for legal proceedings. Indeed, Professor Chris Hodges, who writes extensively on European ombuds resolution, once told me that the courts would become redundant because of the success of this form of ADR. I think he may have been exaggerating a little, but he was right about how successful ombuds can be.
35. The way I see all these ADR interventions is that they need to be entirely integrated with both court-based dispute resolution and all other dispute resolution processes.

Integrated dispute resolution

36. So, as you can see from what I have said already, there is a fantastic amount of good work going on across a range of subject areas. But what we are lacking, I think, is the ultimate integration of ADR into the dispute resolution process. As Head of Civil Justice, this is what I am hoping to achieve in the months and years to come.

37. There is perhaps a linguistic problem: why do we keep on talking about **Alternative** Dispute Resolution? Dispute resolution should be an integrated whole. Mediated interventions should be part and parcel of the process of resolving disputes wherever they arise in our society – whether between businesses and consumers, amongst families or between the citizen and the state. There is nothing **alternative** about either mediation, early neutral evaluation, or judge led resolution.
38. What I hope to achieve is take the “alternative” out of ADR, to focus on hard data and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise. This can be done very effectively online and I believe that the onset of online dispute resolution in most bulk areas will allow far more cases to be resolved far earlier and far more cheaply.
39. It is important to understand that speedy and effective resolution of disputes, whether in the family, civil or tribunals context, provides massive economic advantages. An efficient debt recovery system can be the difference between solvency and insolvency for literally thousands of consumers and SMEs alike. The psychological toll on individuals involved in family, civil and administrative disputes makes them less efficient in their work and can cause health and other social problems.
40. ADR and effective dispute resolution generally have a much bigger part to play in economic prosperity than most people realise.
41. Moreover, this is an opportunity for the UK to lead the world in showing how a mature first world justice system can make full and effective use of technology to allow legal rights to be cheaply and quickly vindicated.
42. In this connection, I would also like to see a central website to which anyone can go to be directed towards the most appropriate method of dispute resolution for their problem. It could direct parties to ombuds, mediators, the courts, arbitration and many other types of resolution.
43. An integrated approach to dispute resolution would, I think grow trust in our courts and tribunals, making our citizens realise that the government and its institutions are dedicated towards allowing problems to be sorted out speedily, economically and effectively.

Conclusions

44. Let me then try to draw a few of the threads together.
45. First, there is already a huge amount of work going on to find effective ways to resolve problems and issues without the need for too many formal hearings in courts and tribunals. This is commendable, but we can never be complacent. There will always be more to do.
46. Secondly, we need to adopt a far more holistic approach to dispute resolution. It is no good saying, for example, that because a personal injury claim has not been resolved in the Personal Injury Portal, it must inevitably run its course to a final hearing in the County Court. There must be continuing attempts at mediated interventions as cases progress. The integration I am talking about will involve schemes, like the MIAM hearing, making sure that options are explained to the parties before cases begin, followed by targeted and repeated technological and human interventions aimed at resolving the dispute.
47. In short, mediation is not an end in itself. ADR is not alternative. Dispute resolution needs to become an integrated process in which the parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution.
48. Coming back to your own Mediation Project here in Hull. I hope that you will be able to see, from what I have said, how a project like yours fits into the bigger picture. Every such project is critical to the delivery of a holistic approach to dispute resolution. The Hull University Mediation centre will be an important part of the far wider delivery of justice to consumers, families and businesses alike.
49. I look forward to being able to answer some of your questions.