

ADR and Judicial Review – Funding and options

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In this second of two related articles on the implications of *Cowl v Plymouth City Council*¹, Clare Collier, John Halford and Karen Ashton discuss how alternative dispute resolution (ADR) of the kind recommended might be funded and the most relevant forms of ADR in the social welfare law context.

FUNDING ADR

Giving judgment in *Cowl*, Lord Woolf indicated the Legal Service Commission should co-operate with the guidance given on the use of ADR to resolve public law disputes.

Access to Justice Act 1999 ('AJA')

Section 4 AJA is the starting point in establishing what is possible. It provides that the Legal Services Commission is responsible for securing (within available resources) that individuals have access to a Community Legal Service (CLS) that effectively meets their needs, including “the provision of help in preventing, or settling or otherwise resolving disputes about legal rights and duties.”² One of the objectives of the CLS is to “achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court”.³

Schedule 2 of the AJA excludes certain services from the general scheme but ADR is not mentioned. The question is whether ADR is amongst the Commission’s priorities for funding as set out in the Funding Code.⁴

The Funding Code

The Code describes a number of different ‘levels of help’ and what these entail. Paragraph 3A-004 states that neither Legal Help nor Legal Representation will cover the actual provision of mediation or arbitration services, though help may be given ‘in relation to’ either, and a mediator’s or arbitrator’s fees may be met as a disbursement. This means that a solicitor will be able to assist with mediation or arbitration under Legal Help up until the stage when Legal Representation is appropriate, that is to say

¹ *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, (2002) 5CCLR, [2002] 1 WLR 803

² Access to Justice Act 1999, section 4(2)

³ Section 4(4)

⁴ Section 6(1)

when legal proceedings are necessary. Such proceedings will be the main focus of the Legal Representation certificate, rather than ADR.

The Commission's Decision Making Guidance discusses its approach to these elements of the Code. A number of revisions have been made to Section 7⁵ in the light of *Cowl*. It begins by describing the Code as 'a flexible framework in which all forms of ADR can be accommodated.' Helpfully, the Guidance also makes it clear that the attendance at an arbitration or mediation hearing of a solicitor or counsel representing the assisted person may be funded. However, at arbitrations, the representative will be present in the capacity of a 'Mackenzie friend'.

Complaints systems, Ombudsman Schemes and early neutral evaluation (ENE) are also mentioned in Section 7 of the Guidance. Legal Help, it comments, can be used to cover those solicitor's costs involved in progressing a complaint which are justifiable, bearing in mind the benefit to the client. The opinion of a neutral expert which forms the cornerstone of ENE may be funded as a disbursement.

Difficulties with the Code and the Commission's Guidance

There are less positive aspects of the Code and Guidance which could well frustrate access to justice, whether through ADR or litigation.

First, there is no recognition in the scheme that pursuing ADR in a diligent way will rarely, if ever, call for less skill and experience than required were the same issues litigated. Yet the higher rate of remuneration payable when ADR is pursued following the grant of a Representation Certificate can only be accessed once litigation becomes necessary. Generally this will be when attempts at ADR have failed. This creates a perverse incentive for solicitors to avoid involvement in a case until the client has unsuccessfully attempted ADR of some kind without assistance. Few solicitors experienced in public law will be able, on financial grounds, to carry a large ADR-based caseload for which they are paid only at Legal Help rates.

This risk is exacerbated by recent revisions to the Guidance.⁶ The Commission's view is that,

"Lord Woolf's judgement emphasises that judicial review is a last resort which should only be used when any alternatives, including pursuing any available complaints system or use of ADR, have first been tried.... Lord Woolf asked that the LSC cooperate in support of this approach. We will therefore expect the section of forms CLS APP1 and CLS APP 8 headed 'Alternatives to Litigation' to be completed in detail ..."

The information entered on those forms will then be considered against harsher criteria for the grant of Certificates covering Representation in judicial review cases. There are two main amendments to the Guidance. First, in paragraph 3C-053, judicial review has been added to the list of "types of cases for which Legal Representation may well be refused if recourse to a complaints procedure is more appropriate than litigation and the

⁵ Paragraph 3C-051 onwards.

⁶ The LSC Manual. Release 6. April 2002.

client has neither first pursued a complaint nor given a satisfactory explanation in the application form why he or she has not done so.” Second, in paragraph 3C-173, the Code now states, “The issue for the Commission will be whether a reasonable private paying client would go to court rather than seek to pursue alternatives, taking into account the likely effectiveness of those alternatives (compared to what might be obtained on judicial review), the urgency of the case, the attitude of the opponent and all the other circumstances.” More positively, the guidance also recognises that the tight time limits for applying for judicial review may make it impracticable to pursue ADR prior to making the application but states that where that is the case, ADR should be considered after service of the Defendant’s evidence. This may mean that *Cowl* has little effect on the actual number of applications for permission, but the routine inclusion of applications to stay proceedings while ADR is attempted.

There are many scenarios which are not covered by the Guidance. The interests of a particular potential claimant for judicial review may be served well enough by pursuing ADR, but what if there is a significant wider public interest in the matter being pursued through the courts? Once litigation is underway, what will be the Commission’s approach to applications for the costs limit on a certificate to be raised in order that ADR can be pursued? A reasonable privately paying client might well pursue ADR in parallel with litigation if there were some prospects of it being fruitful. It is unlikely they would do so if the other party were wholly intransigent.

ADR OPTIONS

The type of ADR that may be available is affected by whether or not proceedings have already been issued. Some options are ruled out automatically since their operation is expressly halted once legal proceedings are either deemed appropriate, or are being contemplated or have been issued. Others, typically those which require both parties to submit to the process (mediation, conciliation, ENE, expert determination) are available throughout, if not to resolve the whole case then at least to narrow the matters in dispute.

Negotiation

Although not always classed as ADR, the most common dispute resolution mechanism is negotiation. In most cases before a client approaches a solicitor s/he will already have tried to negotiate with the public authority and may have had assistance from a community advocacy service in doing so. However, it is unlikely that the Legal Department will have been involved. Sometimes approaching a lawyer on the other side can bring a swift negotiated settlement. This may be the best course of action where the case is sufficiently strong. Negotiations can of course be pursued prior to litigation and at any stage of the proceedings. However, negotiation by itself will not normally be considered sufficient to satisfy *Cowl*.

Mediation

Mediation is becoming increasingly common in the fields of community care, education and other social welfare law contexts, though some authorities are still unwilling to

fund it. Some of the advantages are the potential to break down log-jams in negotiation, the opportunity to focus on strengths and weaknesses of a case, a practical result for the client outside the limitations of a court order, and lower costs. Mediated agreements may be less likely to poison relationships between users and providers of services which must continue long after litigation has come to an end. Sometimes a public authority will agree to fund all the fees of mediation since they hope thereby to save the costs of legal proceedings.

Disadvantages include the pressure to settle, possible intransigence on the part of the opponent (or a client) and delay in commencing court action if it turns out to be unsuccessful. Unlike judicial review, the result only affects the single client and it is unlikely to achieve a change of policy. Mediation cannot authoritatively resolve disputes about discrete points of law.

Mediation is available at any time subject to an appropriate mediator being identified though some community mediation services will not accept disputes that are the subject of legal proceedings. Interestingly, the Commission's Guidance includes a list of bodies which may be funded to provide mediation⁷. These include the Centre for Dispute Resolution, the ADR Group, and Mediation UK.

Some courts have run pilots of Court-annexed ADR schemes. The commercial court has an ENE by judges scheme. Some readers may be familiar with the Central London County Court mediation scheme in which a mediated agreement can be turned into a Consent Order to make it enforceable. There is nothing similar in the Administrative Court.

Conciliation

Conciliation has many of the same pros and cons as mediation but differs in that an impartial third party will usually make active suggestions as to how the dispute can be resolved. Frequently the parties will not meet but the conciliator will work with them each separately, over the telephone, to attempt to find a mutually acceptable solution. At present conciliation is most commonly – and effectively – used in ACAS's conciliation of employment disputes.

Some statutory complaints procedures, such as that operated by the NHS, make provision for conciliation.

Other methods

In ENE an independent third party evaluates each side's claims and issues an opinion. The third party can be an expert where there is a factual dispute or a judge or counsel for a legal argument. The opinion is not binding on the parties but can be used as a basis for a settlement. ENE is better suited for cases involving evidential disputes, than public law ones.

⁷ See paragraph 3C-057

Arbitration and expert determination, or any other form of ADR in which the result is binding on the parties, are not usually appropriate in community care or social welfare cases. The fundamental problem is that public law disputes involve the performance of duties or the exercise of discretions which cannot be delegated by the public authority concerned to any third party, including an arbiter.

Statutory complaints procedures

Strictly speaking complaints procedures are not ADR mechanisms since they are usually operated by one of the parties to the dispute. However, they were clearly part of what Lord Woolf had in mind in *Cowl* and are usually the most accessible alternative to litigation particularly in a community care context. Although pursuing a complaint does not prevent legal action being pursued later (subject to time limit issues) some complaints procedures are terminated or suspended once an intention to bring legal proceedings has been mentioned. For example, the NHS complaints procedure specifically provides that any investigation must be abandoned if the complainant indicates an intention to litigate.

Most practitioners in social welfare law will have experience of local authority complaints procedures. The advantages are that the process is free, a legal representative is not needed, the procedure is much more informal than going to court and disputes can be resolved locally. The main disadvantage is that it can be very slow and problems can arise with actual or perceived lack of impartiality of complaints handlers (since they are employed by the organisation which is the focus of the dispute). In *Cowl*, a modified complaints procedure was devised which included a review panel made up of entirely independent members. This kind of ad hoc approach may be the only way of achieving a practical solution where ADR is mandated but there is no appropriate mechanism in place. However, it requires high degree of co-operation between the parties and a great deal of flexibility on the part of a public authority which may be unwilling to set up a special scheme in respect of a single claimant.

Ombudsmen's schemes

The advantages of the various statutory ombudsman schemes centre around the inquisitorial nature of the process which can be more helpful to both parties than the adversarial nature of court action. The ombudsmen have powers to compel disclosure of documents, and may be more willing to determine factual disputes. Compensation is available, albeit indirectly, and the outcome of a successful complaint can include recommendations for changes to administrative systems.

All ombudsmen have a broad discretion in deciding whether they will investigate or not and it will often be impossible to predict how this may be exercised. Most schemes expressly provide that there should be no investigation where a legal remedy (such as judicial review) is available, and it is 'reasonable' that the complainant pursue this instead, bearing in mind, for instance, the costs of proceedings, whether the facts are settled or whether an individual litigant is likely to come forward. Where the central contention is that a public body has acted unlawfully, rather than merely

maladministratively, an ombudsman may refuse an investigation. In practice, in the case of the Local Government Ombudsman, reliance on this exclusion⁸ is rare.⁹

Like other forms of ADR, a key disadvantage is that ombudsmen cannot interpret the law definitively. There is also no interim relief available, and an ultimate finding of maladministration may be little consolation to someone who has gone years without an important benefit or service. Though most statutory ombudsmen now recognise the need for certain investigations to be fast tracked, they will normally only intervene once a public body's complaints procedure has been exhausted, or at least attempted. The investigation itself can take some time. Any judicial review of a decision which forms the subject of a complaint to an Ombudsman will almost inevitably be out of time. Judicial review of ombudsman decision making is inherently difficult, and there have been few successful cases.

Conclusion

Cowl undoubtedly requires lawyers to think more creatively about ADR, particularly when a case can only be pursued with the Commission's support. However, the courts and the Commission would do well to remind themselves that there are limits to the role that ADR can or should play in the public law arena.

First, there are classes of public law cases which are inherently ill-suited to ADR. As Lord Woolf himself commented in *R v Commissioner for Local Administration ex parte Croydon LBC*,¹⁰ '[i]ssues whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an inquiry are more appropriate for resolution by the High Court than by a commissioner, however eminent'. There are other cases in which ADR can play no role whatsoever. For example, where a public body does not have the power to alter its own decision (it is *functus officio*) the only way that an unlawful decision can be set aside is by a quashing order of the court.

Secondly, there is a risk that an increased use of ADR may in fact lead to more protracted and costly disputes. Practitioners in public law know that sending a well-drafted letter before claim, threatening judicial review, brings a rapid resolution in the majority of cases. It is by no means certain that forcing larger numbers of cases into pre-litigation ADR will be cheaper for the Commission.

Lastly, and perhaps most importantly, is the danger of undermining the vital constitutional role of judicial review in controlling the exercise of State power. There is a risk that the current ADR trend will take us to a point where judicial review becomes as rare a form of litigation as it was 40 years ago. For those who are responsible for the court service budget this might seem to be a not entirely undesirable objective, but the rest of us may find the prospect a little more troubling.

⁸ Local Government Act 1974, section 26

⁹ *R v Commissioner for Local Government ex parte Liverpool City Council* [2001] 1 All ER 462.

¹⁰ *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 All ER 1033

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Further information on mediation can be obtained from Mediation UK tel. 0117 904 6661 or the ADR Group tel. 0117 946 7180. The Advice Services Alliance publishes a helpful guide, 'Advising on ADR: The essential guide to appropriate dispute resolution' by Margaret Doyle. Advice Services Alliance, 2000.