

**Commission on Justice in Wales
Oral Evidence Session
1 February 2019**

Present:	Commission members	Secretariat team
Elizabeth Ashford, Monmouthshire Mediation (EA) Alyson Houghton, Monmouthshire Mediation (AH) Brian Evans, Lanyon Bowdler Solicitors (BE) Edward Perkins, Edward JH Perkins Rural Chartered Surveyors (EP)	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Dr Nerys Llewelyn Jones Juliet Lyon CBE Sarah Payne CBE Professor Peter Vaughan	Andrew Felton, Secretary to the Commission Dave Gordon Chris James

Question area: How can alternative dispute resolution (ADR) be used to address access to justice issues in Wales?

Lord Thomas asked those present to briefly describe their background and experience.

- EA: My background is as a civil litigation solicitor in private practice. We set up a bespoke mediation practice in Monmouth dealing with civil and commercial mediation claims and we've been doing that for the past five or six years. We have looked holistically at the way end users need to access justice. We have visited courts, spoken widely with solicitors, local law societies and the Citizens Advice Bureaux (CAB) to get a view on the way we can best serve the needs of the local area and the wider area of Wales and the border counties.
- AH: My background is also as a civil litigator practising in construction law but also extended to professional negligence and insurance. Latterly I became involved in the CAB as an advisor and gained experience in housing, employment and more personal civil dispute matters.
- BE: I grew up in rural mid Wales and I've worked for Lanyon Bowdler Solicitors in Shropshire for 26 years having done my articles with the firm. I qualified into litigation and did a mix of personal injury, contentious employment and general civil and commercial litigation work. The firm grew and I concentrated on commercial litigation and became the head of the dispute resolution team. In 2006 I trained as a mediator. I recognise the power of the mediation process and have been mediating for almost 13 years.
- EP: I'm a long standing agricultural valuer and auctioneer in west Wales. Most of my experience has been in agricultural property and tenancy law. I have done a lot of tribunal work under the Agricultural Holdings Act. I have been an arbitrator on the agricultural panel since 1977 and involved in a range of activities over the years.

Lord Thomas referred to the background note that EA and AH had provided about the proposal to establish a dispute resolution centre for Wales.

- AH: It came out of a research project promoted by an organisation called "Skills for Justice" which was funded by the Welsh Government. The object was to explore whether a dispute resolution / mediation centre of excellence could be established in Wales. Unfortunately, the team for this from Skills for Justice seems to have disappeared. They produced a report and we will give it to you. It proposed setting up a mediation centre of excellence to enable people to access justice in a different way. The project was looking at ADR and whether that could be used to improve access to justice across Wales. There was a call for a centre of excellence and a hub set up in Cardiff or Swansea. The spokes of the hub could be set up using say CAB centres or local government offices where information could be made available on ADR and mediation as a way of resolving disputes along with the court system. I can email the report. Nothing has happened. The Skills for Justice team has disbanded. Phase 2 plans to look at the viability of the centre didn't proceed

as funding was withdrawn and that was the end of it.

- EA: To be clear Skills for Justice as an entity hasn't disappeared. They work in collaboration with organisations in a number of sectors including education, prisons and so forth and draw together researchers to work on particular projects. Key people for this piece of work are those named in the report. We were part of the steering group contributing our views on how matters could be improved. There was a launch in April 2014 at the Wales Millennium Centre with a fanfare of a new type of justice in Wales. However, money was not ring-fenced and we assume that other things took priority. It didn't fail for lack of interest. Local business thought it would be an attraction for those coming into Wales to have access to a bespoke way of dealing with disputes, so it would be good for drawing business into Wales.

Lord Thomas asked who from the Welsh Government was involved.

- EA: We canvassed our local AM, Nick Ramsey. There was engagement with the University of South Wales, Cardiff University and Swansea University. As regards the Welsh Government we weren't involved at the level of funding for the project so we wouldn't have had engagement. There is a reference in the report to Amy Stewart but I don't know what her role is.
- AH: They gathered together research teams which are project specific, and this project seems to have ended at Phase 1.
- EP: I have little to add to the discussion on this topic.
- BE: I wasn't involved in the Skills for Justice project. In 2011 I was involved in a mediation information service which ran pilots in courts in England on a rota basis in Birmingham, Manchester and London, which tried to give people information about mediation and how they could access it. It wasn't terribly successful, and didn't come to anything after the pilot process.
- EP: Under the Royal Institution of Chartered Surveyors (RICS) dispute resolution procedures there is a big emphasis on mediation. There is an organisation called ARBRIX which is a group of arbitrators in commercial and agricultural matters and includes qualified mediation members.

In response to the area of questioning:

- AH: I'm not sure that ADR can be used to address access to justice, but it can be used to improve access to dispute resolution for certain groups of people. We set up a local group of mediators, the Association of Wales and Border Counties Mediators, which is listed on the Civil Justice webpage. Through that we receive a lot of enquiries made direct by members of the public and small businesses who are looking for quick and cost effective ways of dealing with disputes. There is a gap in the legal market for dispute resolution at that level. ADR and mediation can help to fill that gap. However, it's only effective to the extent that people understand what mediation is and what ADR is and how they work. People lack understanding of ADR and mediation but it's not their fault. There is nowhere they can go to find information. We end up acting as a triage service where people make enquiries and we have to explain what options there are for people. There was a national mediation helpline and provision of information on mediation was part of the service that it was meant to provide but the helpline has been withdrawn. It was funded by central government but the funding ceased. There is no similar service anywhere, not even online.
- EA: If, for example, you issue a money claim online the proforma takes you to a box that encourages you to consider mediation. It takes users to the civil justice Find a Mediator online list. There is no explanation for the user or information about where in the system mediation sits. It is an England and Wales wide online list and when a mediator applies to join the list there are a number of requirements. You must, for example, be a provider who is registered with the Civil Mediation Council and that provides the element of quality control. But you can choose where in the country you will be prepared to mediate. There isn't a refinement when searching the list that will produce a list of mediators and arbitrators based in Wales.
- BE: I think the starting point is how you define ADR and access to justice. ADR is some form of dispute resolution as an alternative to the courts. Processes can range from the very formal through to expert determination, early neutral evaluation, mediation, conciliation and at the very

informal end negotiation on a without prejudice basis. My experience is in mediation. In terms of access to justice, it's important to recognise the court system administers justice in accordance with the substantive law and procedural law. But justice can be a wider concept. Mediation can give parties a feeling they've been heard and that they have been able to tell their story. This can be a better experience for them compared to court where the exchange of witness statements often leads them straight into cross examination. In mediation it's easier for people to get things off their chest and they are in control of the resolution. Techniques that mediators use like active listening, reflecting back and so forth help parties feel that they have had access to justice. Mediation also allows parties a way to explore other issues between them that might not be explored in formal litigation. As an example, I dealt with a mediation where two siblings had a trust of land issue but there were other issues that the parties needed to get things off their chest about the administration of the estate of their deceased parents. Mediation is a cost effective option compared to litigation and helps with access to justice and mediation is available anywhere in Wales where there is a meeting room, meaning justice is available more locally than via the court system.

- EP: In arbitration parties and witness can feel overpowered. What little aspect I've seen of mediation allows parties to explain issues and details that they may not be able to explain in court. So often in a confrontation situation the person who presents the best evidence wins and not all facts may be at that party's disposal. Mediation could perhaps help in these cases.

Question area: Are there areas in Wales in which it is difficult to access ADR? What capacity and expertise is available within Wales to provide ADR services?

- EP: Appropriate Welsh language skills for mediators and arbitrators can be an issue, particularly in those parts of Wales where parties are likely to be more comfortable using the Welsh language to settle their dispute.
- EA: When we set up our practice we did some market testing about the perception of mediation and visited county courts across Wales and asked a series of questions of court staff. These were about the extent to which civil and commercial mediation were used in each court, how people were directed to mediation services, feedback on the National Mediation Providers Association helpline number, whether a local scheme for referrals would assist and so forth. We didn't get very far as the overwhelming response was "what's mediation?". Part of the issue is education. We have spent a lot of time talking to local groups, the local law societies, businesses and those that contact us to help them choose if mediation is the best option. We also talked to Cardiff and Swansea Universities. There are silos of good knowledge but the problem is they are not very well joined up. That is the challenge and parties need to be advised about the alternatives open to them. We have formed a group but we are also keenly aware there are other groups too. Quality control can be an issue as currently there is no requirement to be registered with a professional body. This should be improved as it is risky for clients.
- BE: I think there is capacity and expertise across Wales, especially for the larger value mediations where it is cost effective for mediators to travel. I've travelled across Wales to undertake mediations. This is typical for most commercial mediators in Wales. The position is more problematic for low value disputes where travel is not then cost effective. There are ways to deal with low value disputes to make sure capacity and expertise is available and telephone mediation can be an option but there needs to be better infrastructure to provide a service remotely. The national mediation helpline used to help. The court service small claims mediation service is effective for low value disputes but it is under huge administrative pressures because demand is greater than the available capacity. Some sectors build mediation into their dispute resolution procedures. The absence of a formal professional standard for mediators is an issue. Solicitors are very much the gateway for consumers at the moment, but if a person is not represented it may be difficult for them to know what service they will get. An accreditation scheme would help with this.

Question area: Are the costs of ADR prohibitive to the people who need it most?

- EP: There are various charging options for arbitrators. An hourly rate of £100 to £120 per hour is typical, sometimes they can be higher. I have split my charges sometimes depending on the nature of the work that I'm doing. There is a vision in some parts of Wales that arbitration costs are excessive. It does take time if you have a complicated arbitration and giving a full statement of reasons for a decision can take some time. I have charged up to £3,000. Others have charged more and it can therefore be expensive.
- EA: For us, it's really important to be transparent about cost as it's not something that is always clear in litigation. We tend to work on a fixed fee basis and we peg fees to those on the Civil Justice website where fees are on a scale based on complexity and value of the claim. It's not always the case that a low value claim will take less time as often there can be other issues between the parties. Typically a full day's mediation based on a 7 hour day tends to be in the region of £700 to £1,000 per party with an hourly continuation rate of about £100. A half day mediation has to be proportionate. Where the value of the claim is below £5,000 the fee is £50 per party per hour. In the case of higher value claims the fee will be higher. But it's very important for people to know what it will cost them to go to mediation and what the cost of other alternatives will be. We ask clients' representatives at mediation to have an estimate of the potential costs for attending court so they can bear this in mind when making their decision on the outcome of mediation. Legal cost insurance is another avenue people can look at as cover is often included in home insurance policies. In areas where civil legal aid previously provided entitlement we often will do a free mediation for parties. This is not an attractive proposition for mediators but there may be an argument that there is a correlation with having to provide this service because the legal aid system is so broken.
- BE: I would echo what has been said and the fee scales mentioned are typical for the work done by 80% of mediators. There is a rank of mediators who command very high fees, and probably the top 20% of mediators undertake 80% of mediations. Most mediators charge on a fixed fee basis. Fees are certainly lower than what solicitors would charge. I charge an hourly fee after a fixed period and I find this encourages parties to reach a settlement and focuses their minds. A case of the "carrot and the stick" encouraging people to make and accept offers.

Question area: Do courts and tribunals in Wales use ADR effectively?

- AH: In our experience and from talking to court staff and not judiciary good use is not made of ADR. We do have judge referred mediations but they are infrequent, I'd estimate only about 10% of our case work. There is capacity for referrals at earlier stages in the dispute resolution process. There is the telephone mediation service but we don't know how many cases go through this. Our experience is that for complex cases a referral for face-to-face mediation can be more effective than a telephone conference. We don't use video conferencing as the technology is not reliable, so mediations tend to be by telephone if not face-to-face. Broadband infrastructure in many parts of Wales could be improved as it is not reliable.
- EA: Through the National Mediators Providers Association (NMPA) and at the same time the Skills for Justice report was being done, members had permission to put NMPA posters in court regarding mediation. Armed with NMPA posters we went to local courts and received information that court staff didn't know about them and there was little footfall in courts in any event as people now issue claims from central centres, not local courts. The education side is therefore important for court staff and people generally about where mediation can fit into the process.
- AH: In my view there is a lack of an integration of ADR into the court process. The Skills for Justice report is another example of a project aimed at promoting ADR and mediation which does not come to fruition and it is very frustrating it's not been followed up.
- EA: I think it is unlikely that mediation will become mandatory and it shouldn't just become a "tick box" exercise. It's important that people are aware of it and this feels like a golden opportunity to draw the threads of all of the various organisations together as this is the first time that all of the different aspects of the legal system have been considered together. We are aware that whilst mediation is of interest to us it's only one of the pressing requirements that takes people's

attention. Perhaps responsibility lies with the court service to send out information or to incorporate it in their various interfaces with the legal professions and court users to help them have access to justice.

- AH: Part of our practice is working with housing associations. We help clients with neighbour disputes where there is a long history of violence and a danger of escalation. We give people a forum where their complaints and issues can be heard. People rise to the challenge of being dealt with as a “grown up”. In terms of capacity, there are still community mediation services who deal with neighbour disputes. Mediators in an area could provide support for small value community type mediations in a similar way to pro-bono work elsewhere in the justice system.
- EP: I believe it is fair to say that matters can be settled before they go to court because the costs of litigation can be prohibitive.
- BE: At a high policy level there has been a lot of encouragement to use mediation. The Court of Appeal has been clear on this and the courts will penalise parties that unreasonably refuse mediation and ADR. At a practical level there are two issues. First, court staff do not always have the knowledge and understanding. Second, by the time a matter reaches a District Judge it can be quite late in the day. Mediation had a higher profile back in the day of the national mediation helpline. When claims are issued, a directions questionnaire will come out to the parties. In the small claims questionnaire there is a question about mediation, but this is not clear in other cases. Many solicitors are pro ADR and use it as an effective tool whilst others are not keen on ADR processes because perhaps they don't understand how they can be utilised fully and they pay lip service to the requirements in the directions questionnaire. The key thing is that parties know early enough what their options are. The approach in the Republic of Ireland may be worth considering where the Mediation Act 2017 requires solicitors, before issuing proceedings, to advise clients about mediation. Also in the sphere of family mediation there has to be a mediation and assessment meeting before parties can issue. There is now more family mediation as a result.
- EP: An arbitrator has substantial powers of discovery and so forth. A mediator is required to have skills to extract information from the parties involved. People can therefore hide information.
- BE: In a sense the mediator needs to work between the parties. The mediator can encourage disclosure in order to help settle matters.

Question area: What can be done to develop ADR services in Wales?

- BE: Reference has been made to community mediations and effort can be made to ensure the partnership between the public and private sectors and the court service is working well. There are fewer community mediation services out there than there used to be. They can help resolve matters before they escalate to court. Better education of dispute resolution procedures will also help. Some form of mediation accreditation and a register too. If this was all joined up it would help.
- EP: In the agricultural sector organisations encourage members to take up ADR training. Examples are the RICS and the Agricultural Law Association (ALA). The ALA has legal discussions for its members.
- AH: Local government could be encouraged to make more use of ADR. An example is West Sussex District Council and its use of mediation. It was very successful for them. If the public sector uses something it often normalises the process. This seems like an easy place to start to get more of a joined up approach.

Nerys Llewelyn Jones asked about the use of the Welsh language in the provision of ADR services.

- EA: We are Welsh non-Welsh speakers. We would refer cases on to a mediator with Welsh language skills if the case required that resource.
- EP: There should be Welsh speaking arbitrators in Wales. This has been the case but there are only two, myself and John Jones from Machynlleth and we are over 70 years of age. We have stopped and there is no one on the RICS panel with knowledge of the Welsh language. This is unfortunate. Professionals are not coming forward as they don't see profit in doing so for the

amount of work they have to do.

- BE: I speak Welsh as a second language. I don't do a whole mediation in Welsh but I will use it on occasion and it can put the parties at ease and help them. It is clear that first language Welsh speakers can be more comfortable mediating in Welsh.

Question area: What legal issues affect farmers whose farms cross the England and Wales border? What is the impact of divergence between the law in England and the law in Wales?

- BE: The big issue is Land Transaction Tax on cross border holdings and the fact that both Land Transaction Tax and Stamp Duty Tax can be payable on a transaction. The calculation process for Land Transaction Tax itself can be quite unclear and the guidance on it does not always help. We find ourselves having to contact the Welsh Revenue Authority (WRA) and ask it specific questions and often its officials can't answer from the guidance and have had to refer to in-house lawyers. This causes delay. When the cross border factor is added in to this it creates further complication. It is for the client to decide where the border sits for the purpose of apportionment. This has to be done on a "just and reasonable" basis and the chargeable consideration apportioned accordingly between the land falling in each tax jurisdiction. The guidance provides that this must be done on the relative value of the land that falls in each tax jurisdiction and not simply on the area of land. This doesn't give rise to a just and reasonable apportionment because it's acknowledged that part of the land may be more valuable due to its location, access, use or development potential. That exercise of apportionment is very complex and problematic. It means gathering all of the facts and collating and recording them in the event of subsequent investigation into the apportionment. It leads to complexity, uncertainty and increased costs. Other issues include the diverging planning regimes which impact on cross border development proposals. The Agricultural Wages Board applies in Wales, the national minimum wage in England. Rates of wages therefore differ cross border. There are implications in respect of where businesses are based and where their workers work cross border. There can therefore be some uncertainty and this gives rise to issues about whether businesses in England have an advantage in terms of labour costs because the national minimum wage is lower, conversely whether Welsh businesses may be more attractive to potential workers because wages are higher and holiday and sick pay is better. Turning to agricultural support, the Basic Payment Schemes (BPS) are different cross border and this can cause problems with subsidies for farms with cross border holdings. In terms of practice it's largely a question of knowledge. The codification of Welsh law is helpful in this regard. But apportionment issues cross border lead to complexity in the transaction and higher costs. Finally tenancy and succession disputes go to the Agricultural Land Tribunal in Wales, and the First-tier Tribunal in England. Their approaches are diverging. If there are cross border holdings this might give rise to some interesting questions as well.
- EP: I can see difficulties. BPS is one as BE has said. The legal divergence around nitrate vulnerable zones is another issue. How this will impact is difficult to say and doubtless will cause difficulty as we go on. In terms of other issues animal health is significant and the differences in approach to TB management between the Welsh Government and DEFRA. It can be a big issue for cross border farms if there is an animal health issue.

Closing questions

Lord Thomas asked about the Wales and Border Association.

- EA: The Association has nine members simply because we have come together and we are one of a number of different organisations and other groups of mediators. There are groups of people who may not just be mediators. Civitas Chambers is an example.
- BE: I am aware of an organisation called Commercial Mediation Wales. It is no longer operating, although its former members still practice independently as mediators. I'm not aware of anything in North Wales. There are other mediators who don't belong to mediation organisations. I don't know the name of the other organisation but you'll find it online.

Lord Thomas asked about the Ombudsmen and the Welsh Chartered Institute of Arbitrators.

- EP: There's a branch of the latter in Cardiff.
- BE: I'm aware of NOMINET that holds domain name registrations and has a dispute resolution service for matters that relate to intellectual property. E-bay, for example, has an ADR scheme.

Lord Thomas asked about professional services in the arc from Wrexham to South Wales. How do we get professionals to work together?

- BE: This has always been an issue in the legal sector in mid Wales. My firm has an office in Oswestry and people have always travelled to Shrewsbury from mid Wales for legal services. Firms like ours must provide services in Welsh law and English law as they diverge. We have a meeting room in Conwy. We cultivate a referral system with other professionals to service need. But it's not a service based in communities. As a firm, we have identified the need for legal services in Wales. Conwy is not a fully staffed office but we are testing the waters to provide services more locally.
- EP: In West Wales the access we have for services is along the M4 corridor. There are small communities. The amount of business supports services of limited scale and the more full service professional offerings are provided by firms in cities to the East with more business. People tend to leave and go where the work is. There is a business luncheon club in Pembrokeshire that acts as a networking opportunity for business and professional people.
- BE: Informal networking of professionals is important and the North Wales Business Club is an example. This draws professionals together and helps to keep work in local areas. Direct Welsh Government help is limited. Local government provides some infrastructure like the Conwy Business Centre operated by Conwy County Borough Council. But local and national government does support the economy, for example the "Growing Mid Wales" initiative, and professionals need economic activity in order to thrive.
- EP: There is limited professional education for professionals in Wales. In the case of the RICS, most is outside in England. Services in local towns like banks are being lost. This is having a major effect on local communities.

Lord Thomas asked if EA and AH could provide the documentation that they referred to.

- EA – I will send this through to the Commission.