THE ASSOCIATION OF DISTRICT JUDGES

THE FUTURE OF CIVIL JUSTICE

The Association's proposals for the future of the Civil Justice System

April 2005

The Association of District Judges

The Future of Civil Justice

1 INTRODUCTION

1.1 It is almost six years since the Civil Procedure Rules were introduced, following Lord Woolf's two reports "Access to Justice". The Rules have brought about a number of significant changes to the way in which the civil justice system operates in England and Wales, and Lord Woolf was particularly keen to see reductions in both cost and delay. Sufficient time has now elapsed to enable the impact of the Rules to be assessed, and to consider whether the civil justice system is in need of further revision.

1.2 It is plain that the landscape of the civil justice system continues to alter. In the county court the number of civil cases, based on Court Service statistics, is falling year-on-year:

	1999	**2000**	**2001**	**2002**	**2003**
Part 7 claims	1,711,641	1,587,365	1,461,105	1,354,192	1,317,206
fixed date	48,667	44,601	41,774	41,562	37,240
possession of land	240,029	239,957	236,211	231,025	217,530
Total	2,000,337	1,871,923	1,742,090	1,626,779	1,571,976

although personal insolvency work has increased:

Bankruptcy petitions	19,180	19,466	21,232	22,682	25,731
Companies Act winding up petitions	5,526	5,610	5,245	6,874	5,002

1.3 Yet whilst the number of issued cases falls, the demands which those cases that are issued make on the civil justice system continue to rise. Over the same period, 1999 – 2003, there has been an increase of 19% in the number of county court trials (i.e.1820 more trials). The division of work as between the Circuit and District benches has also altered over the last six years, the very recent survey across the London County Court group revealing that Circuit judges in London now consider that 20% of their work is suitable for District judges. The majority of this work is where Circuit and District judges exercise a concurrent jurisdiction.

1.4 This paper is intended to examine those parts of the new regime which have been successful and those which have not, and to consider how the civil justice system might develop in the future. Consideration is given to a number of initiatives which are already the subject of consultation, and some suggestions are put forward as to other procedural changes which could form part of an efficient and effective civil justice system.

1.5 The role of the District judge is crucial to the modern system of civil justice. Almost every case, large or small, comes before a District judge for case management directions, given either on paper or at a case management hearing. All claims in the small claims track (with a value of up to £5000) which come to a final hearing are decided by District judges, and such claims represent 77% of all final hearings or trials in the civil justice system. In many courts, most trials of cases on the Fast Track (with a value up to £15,000) are conducted by District judges, and cases on the Multi-track can increasingly be released to District judges for hearing. In many cases, particularly on the small claims track, litigants are unrepresented.

1.6 Because of this pivotal role in the civil justice system, District judges are well placed to comment on the strengths and weaknesses of the current system, and on proposals for change.

2 THE CIVIL PROCEDURE RULES - SUCCESS OR FAILURE ?

2.1 We firmly believe that, in the main, the CPR have improved the civil justice system. The pre-action protocols encourage a full exchange of information at an early stage, which frequently enables claims to be settled without the need for proceedings to be issued. Where court proceedings are issued, directions given at an early stage enable parties to focus on the issues, and a clear timetable, including a trial period, discourages delay and promotes resolution. The Part 36 procedure has been particularly successful in focusing the attention of insurers on a speedy resolution of cases once proceedings are issued. Those cases which do go to trial in the county court do so within a reasonable period with a minimum of delay.

2.2 While the issue of delay has been addressed successfully, we believe that Lord Woolf's hope that the new regime would reduce cost has not been met. The cost of civil litigation remains unreasonably high, and concerns about cost are widely expressed.

2.3 "Cost" in this context involves two distinct elements, namely the central cost of funding the civil court system, and the legal costs incurred by litigants. We propose to comment on each of these separately.

3 CENTRAL FUNDING

3.1 Successive governments have insisted on pursuing a policy of "full cost recovery" for the civil justice system, meaning that the entire cost of providing a system of civil justice, including the salaries of judges and court staff and the provision of court buildings, should be covered by the court fees paid by litigants. In common with all members of the judiciary, the Association of District Judges has consistently opposed this policy. We believe that the provision of an effective and efficient civil justice system is a fundamental obligation of government in any civilised society, and civil justice should not be the "poor relation" by comparison with the funding of the criminal or family

justice systems. The civil justice system acts to protect the financial and economic viability of the State, its very existence being an incentive to most citizens and companies to meet their contractual obligations as and when they fall due for payment. The civil courts are also at the forefront of defining society's rights in a fast changing world - for example, claims for deep vein thrombosis on long air flights are breaking new ground, even in cases allocated as Small Claims. A substantial part of the work of the Court of Appeal is actually making law which the legislators have left unclear. The Association therefore questions why the system should only be financed by those who use it when all members of our society benefit from its existence and everyone has an interest in its well-being.

3.2 At a time when further significant increases in court fees have been introduced, we believe that government has to recognise that continued increases in fees, often by amounts well above the level of inflation, amount to a denial of access to justice for the great majority of the population. The poorest sector are normally exempt from paying court fees under current regulations, and the rich are able to stand the increases, but the "ordinary citizen" is simply unable to bear the cost.

3.3 This policy has to be considered particularly critically at a time when the government, through the Department for Constitutional Affairs, is considering significant changes to the way in which debt claims and housing possession claims are resolved. The thrust of the proposals is that such claims should, in the main, be resolved outside the court system, by some form of alternative dispute resolution. While there is good sense in much that is proposed, the removal from the court system of a huge number of cases, and the fees which those cases currently produce, would have a massive impact on the fee income of the civil justice system. How is this shortfall to be met? In our view it certainly cannot, or should not, be met by increasing remaining fees to compensate.

3.4 The Association is not opposed to the principles of ADR. Indeed, in an appropriate case, the potential for mediated compromise of the issues is acknowledged by us. The District bench has proven skills to offer in this respect, and we would welcome proper

and early examination of the contribution which District judges could make in this field, as we suggest in this paper.

4 LEGAL COSTS

4.1 It was, and remains, a major objective of Lord Woolf's reforms that legal costs should be reduced. To a large extent, this has not happened. Legal costs, particularly in some smaller claims, have continued to increase, and are frequently out of all proportion to the amounts being claimed. More and more of the time of District judges is being spent in resolving arguments about costs, often where the claim itself has been settled amicably, and the cost of the assessment process can exceed the amount of costs in dispute.

4.2 We recognise that major attempts have been made, and continue to be made, to address these problems, particularly by the Civil Justice Council. The introduction of fixed success fees in an expanding range of claims will undoubtedly assist. However, we continue to have concerns about the funding of litigation, particularly in the light of proposals to reduce still further the availability of legal aid for civil litigation.

4.3 We recognise that the amount of funding available for legal aid in civil cases has to be carefully controlled. The number and type of cases for which any public funding may be available has been drastically reduced in recent years, and current proposals by the Legal Services Commission would reduce availability still further.

4.4 Some of these proposals assume that litigants would be able to enter into conditional fee agreements. We understand that this may not always be the case. Practitioners inform us that the number of insurers prepared to offer after-the event insurance for certain types of case, such as serious clinical negligence cases, is very limited, and such policies as are available may be too expensive for the ordinary citizen to afford, except by taking out a loan which then eats into any damages recovered. In our view it is essential that, before there is further erosion of the availability of public funding for civil claims, a detailed

analysis of alternative sources of funding is carried out. Failure to do this will deny access to justice to many people.

4.5 A direct consequence of the rise in legal costs and the lack of suitable funding arrangements is the increase in the number of litigants in person. District judges are particularly accustomed to hearing cases where one or both parties are in person, especially cases on the small claims track, but in larger cases, where the opposing party may well be legally represented, there is a real danger of a party being unable to present their case properly, and perhaps feeling that they are being denied access to justice.

4.6 Civil justice should not suffer a decrease in the amount of public funding available because more of the budget is being allocated to criminal cases. An appropriate budget should be set to provide adequate public funding for civil, family and criminal cases.

4.7 We believe that the Civil Procedure Rules provide appropriate controls for legal costs, and greater emphasis on accurate costs estimates, and the possibility of some form of costs capping in certain cases, may assist in controlling legal costs.

5 DEBT STRATEGY AND ENFORCEMENT

5.1 Current DCA policy is to remove as much "debt" work as possible from the county court system, leaving it to focus instead on the resolution of contested cases. Leaving on one side for a moment the question that arises as to how the system would be financed in the future, the Association believes the strategy to be inherently flawed in any event.

5.2 Most cases issued in the county court are undefended and proceed speedily to a default judgment. Thereafter the creditor will endeavour to enforce that judgment. That so little debt is then recovered is a severe blot on the civil justice system. A Rolls Royce system for dispute resolution offers little real assistance to the successful party in the recovery of the money ordered to be paid to him. The Department recognises this serious

defect and has been working on an Enforcement Review for several years. Whilst the content of any proposed legislation is not known, information revealed to date shows that the District bench will have a greater role in future in a much more sophisticated enforcement system. In holding the balance between creditor and debtor, the bench will have a central role in the supervision of, for instance, Data Disclosure Orders and the operation of fixed tables where Attachment of Earnings Orders are in place.

5.3 The intention has also been expressed that much housing work could be removed from the county courts. Whilst admittedly it is true that, for instance, a better Housing Benefit system would have an effect on the number of cases issued, it nevertheless must be a central principle of housing legislation that no one is the subject of an order for possession without the case being scrutinised by a judge individually exercising his discretion in the circumstances of that and every other case.

6 ALTERNATIVE DISPUTE RESOLUTION

6.1 It has always been an objective of Lord Woolf's reforms that the courts should only be used as a last resort to resolve civil disputes, and we support that objective.

6.2 It is enshrined in the Civil Procedure Rules that the court should encourage parties, even after proceedings have commenced, to attempt to resolve the case by some form of alternative dispute resolution. District judges regularly raise this as part of their case management function, and many directions given by the court, particularly in larger cases, include a specific requirement for the parties to attempt to settle the case before trial, with possible costs sanctions if a party fails to co-operate.

6.3 Some courts have introduced pilot schemes for court based mediation, which are currently being evaluated. These range from the system of Early Neutral Evaluation (ENE) adopted by the Commercial Court, to a scheme for small claims running at Exeter County Court. Other courts, such as the Central London County Court, have recently

introduced a pilot compulsory opt-out ADR scheme for cases selected at random, although we understand that this scheme may not continue after the pilot period. There are other schemes being piloted using commercial mediators.

6.4 The Department for Constitutional Affairs has published proposals for requiring debt claims and housing disputes to be resolved, where possible, by some form of ADR, and is considering greater use of ADR in small claims.

6.5 While we have already indicated that we support the objective of the court being a last resort for resolving civil disputes, in our view ADR should not be regarded as a panacea. It undoubtedly has a part to play, but in our view as part of a civil justice system, not in place of it.

6.6 We believe that judges can play an important role in dispute resolution. In ancillary relief cases in the family jurisdiction, it is already part of the procedure that all such cases should come before a District judge for a Financial Dispute Resolution hearing, at which the parties and their legal representatives are present. The judge does not impose any order on the parties, but gives a view as to the likely outcome, and assists the parties to reach a settlement. Some 83% of such cases settle without the need for a final hearing. If a final hearing is necessary, it is listed before a different District judge.

6.7 A similar procedure has been adopted on the East Group of the Western circuit in civil multi-track cases. A case management hearing takes place about 3 months before the anticipated trial date, and again the parties and their representatives have to attend. The parties outline their cases, "without prejudice" material can be discussed in the presence of the parties, and the judge can give an indication of the likely outcome. A significant number of cases then settle.

6.8 District judges are also well used to attempting to persuade parties to settle in small claims cases. This is done regularly in an informal way, but avoiding the need for parties to come back for another hearing if they cannot agree.

6.9 The scheme being piloted at Central London County Court operates after issue, but before any significant steps have been taken in the litigation. This form of ENE could be adopted as part of civil procedure, and District judges are already experienced in conducting such ENE hearings.

6.10 We believe however that it would be a mistake to assume that all litigants will be content to reach a settlement through some form of ADR. Some simply require a judge, as an independent third party, to hear their case and make a decision, even if the case goes against them. There has to be a place for determination by the court, and parties should not be denied this, as a last resort, by a prohibitive cost regime.

6.11 We have already referred to various pilot schemes which are operating in different courts to test different types of ADR. We believe that the results of such pilots have to be fully evaluated before properly informed decisions can be taken to require parties to participate in ADR.

6.12 More detailed proposals for court-based and judge-led ADR are annexed to this paper as Annex 1. In essence, we propose that a Dispute Resolution Appointment (DRA) should become part of the case management timetable in any Fast Track or Multi Track case where the parties request it, or compulsorily in any Multi Track case that has not settled 28 days before trial or commencement of the Trial window. The parties and their legal advisers would be required to attend, and would have to provide the court with certain prescribed information prior to the DRA. The judge would act only as a neutral evaluator and would attempt to assist the parties to negotiate a settlement.

6.13 If no settlement is achieved, all of the prescribed information will be returned to the parties, and the judge who has conducted the DRA will take no further part in the matter.

6.14 We also suggest the introduction of a duty judge scheme, where a judge would be available to assist parties to resolve disputes in either civil or family cases.

6.15 We firmly believe that a scheme such as that proposed is consistent with the government's aim of reducing the number of disputes requiring a full trial, but also makes far more appropriate use of the court buildings and the experience of the judiciary.

7 USE OF THE ESTATE

7.1 The major savings for HMCS in the operation of the civil justice system rest in the centralisation of work currently performed in each and every one of the 200+ county courts in the country. It is a truism that, whilst computers have improved certain of the tasks carried out by court clerks, the core systems operated in each county court have barely altered over the 160 years since their introduction. There are clear economies to be achieved if the "back office" processes are centralised in regional centres, as the Immigration Appeal Authority has clearly shown to be the case.

7.2 We recognise that the best use must be made of court buildings, which are expensive to provide and maintain. However, the development of regionalised "back offices" creates unused space in the existing courthouses. Work could be brought into those buildings, rather than many of the courthouses being closed which merely excludes from access to justice many of those involved in disputes. We do not think that this would be in any way inconsistent with government strategy, particularly in debt and housing cases, to reduce the number of disputes requiring a formal trial, because agencies offering advice, such as Citizens Advice Bureaux, could operate within the court building. This would be coupled with appropriate ADR provided by the judiciary, such as that suggested in Annex 1. A civil justice centre, offering a range of advice and assistance, and the ability to have disputes resolved by a variety of methods, would be an important local amenity. HMCS itself enhances the ability to look across the range of tribunals and courts to ensure the best overall use of the estate.

8 A UNIFIED CIVIL COURT

8.1 Lord Woolf's report "Access to Justice" discussed the unifying of the civil courts. Currently cases can be conducted in the High Court or the County Courts as courts of first instance, although there are restrictions on the types of cases that can be issued in the High Court.

8.2 The government has now embarked on consultation about unification of the civil court, although without any commitment to such unification. In principle we fully support the idea of a unified civil court. We can see no basis for preserving the unnecessary anachronism of two separate courts now that all civil procedure is subject to a common set of Rules. We recognise that there will still be a need for different tiers of judges within a unified court, but consideration will need to be given as to how cases should be allocated to the different tiers. Monetary value may not be the most appropriate yardstick. Allocating a judge with the right experience and expertise for a particular case may be more appropriate. We believe that District judges, with their experience of case management, are ideally equipped to act as gatekeepers and decide which cases should be allocated to particular levels of judge.

9 INFORMATION TECHNOLOGY

9.1 One of the major failures in implementing Lord Woolf's proposals has been the lack of funding for the necessary IT support. It was always envisaged that a high level of IT support would be required to enable the reforms to operate effectively, but funding has not been made available. In our view this has been a great mistake.

9.2 The current civil justice system operates on the use of a paper file for every case. At the very least, an electronic document management and filing system to replace the paper based files is a priority. District judges have been at the forefront of judicial use of such

technology as has been made available, including the use of templates designed by some District judges for production of case management orders. The introduction of additional IT holds no fears for the District bench, and would improve the civil justice system. However we believe that a piecemeal approach is much less satisfactory than the provision of the necessary funding for a fully integrated system, so that the judiciary and the Court Service can operate the same system.

9.3 Proposals have been put forward for centralising much of the Court Service's administrative work, with the use of suitable IT, in a number of administrative offices, thus removing much of the administrative work from within each court. A pilot scheme at Walsall was not successful but rather it highlighted the insuperable problems of trying to further the centralised back-office approach without electronic file management. We accept that it should be possible to centralise much of the court's administrative work if suitable IT is provided, but the necessary funding has to be made available. We would urge the Department, if work is not already underway, to commence an urgent and immediate appraisal of what systems need to be developed and piloted to provide the building blocks for successful bids in the Spending Review 2006 and 2008 bidding rounds.

10 LOCAL JUSTICE

10.1 We believe that the centralisation of administrative work should not be a prelude to the closure of smaller courts. Proper access to justice requires access to local courts, and we would oppose attempts to try and locate all court hearings into major trial centres. It would also be a mistake to assume that all litigants would be content to use online services for the conduct of proceedings. There are many litigants who have no access to computers, or are insufficiently competent in IT skills to be able to conduct business in that way. There remains a need for litigants to have access to court offices on a local basis. In rural areas, public transport is often very poor. Justice should be accessible.

10.2 We accept that hearings could be conducted locally in buildings other than dedicated court buildings, but careful consideration would have to be given as to the suitability of such buildings and to the provision of proper recording facilities and security.

11 FUTURE CHANGES

11.1 Currently the financial limits for different categories of civil case are £5,000 for small claims (except those involving personal injury or housing disrepair, where the limit is £1,000), and £15,000 for fast track, with all other cases (including cases valued at up to £15,000 but lasting more than one day) being allocated to the multi-track. Those limits have not altered since the introduction of the Civil Procedure Rules in 1999.

11.2 We believe that it is appropriate to reconsider these financial limits.

11.3 Since it is a central part of the small claim system that neither party is generally entitled to recover anything other than minimal costs, cases involving personal injury and housing disrepair valued at over £1,000 were excluded from the normal financial limit as it was felt that litigants in such cases should not be excluded from being legally represented with no prospect of recovering their legal costs. We can see the force in the argument that the same considerations continue to apply, but we believe that the £1,000 limit may now be too low, and, provided that there is no denial of justice, a revision for these exceptional cases to, say, £2,500 should be considered, but a full consultation process would be required. We welcome the work being undertaken by the Department to take forward the various issues raised by the Better Regulation Task Force.

11.4 On the other hand, we do not think that the overall £5,000 limit for small claims should be increased. £5,000 is a substantial sum for many litigants, and depriving litigants claiming amounts above that, or defending such claims, of an entitlement to recover costs is unreasonable.

11.5 We do think that the fast-track limit should be increased to £25,000. Unfortunately statistics are not presently available to show the amount of work which would be transferred into the fast track if the limit were increased to £25,000 but the number of trials would be modest, the figures for the cases disposed of by amount of award between 1999 and 2003 being

	1999	2000	2001	2002	2003
£,1000 or less	1010	350	720	820	660
£1,000 to £3,000	2280	2290	2030	1800	2010
£3,000 to £5,000	1550	1460	1340	1540	1720
£5,000 to £7,500	1160	1670	1010	1130	1450
£7,500 to £10,000	670	990	780	660	770
£10,000 to £50,000	1310	1890	1950	2070	1720
Over £50,000	430	640	640	580	700
Non monetary	4810	4960	4240	3370	5080
Total	12770	14250	12710	12330	14110

11.6 The above statistics need to be approached with a degree of caution as they are based on a two month sampler exercise carried out by Court Service but, on their face, they indicate that in 2003 the total number of trials in the band £10,000 - £50,000 was only 1720. That would tend to suggest that the number between £15,000 and £25,000 would be relatively modest.

12 TRIAL JURISDICTION

12.1 We have indicated above our support for a unified civil court. We believe that better use of resources could be achieved by simplifying the range of judges available to hear civil trials. Inevitably, despite attempts at ADR, some cases will still require a trial.

12.2 We recognise that there will be cases of national importance or significance, or of great complexity or value, which will require to be heard by a High Court judge. Some of these cases may be suitable for release to an experienced circuit judge or equivalent. However, we believe that the great majority of cases coming to trial, including those currently allocated to multi-track, could and should be tried by District judges.

12.3 District judges have extensive trial experience as a result of hearing small claims and fast-track cases. Many multi-track cases are of no greater complexity, but of higher value. In May 2004, CPR Practice Direction 2B para 11 was amended to extend the trial jurisdiction to any multi-track case which a Designated Civil Judge released to a District judge. Some Designated Civil Judges have been prepared to give a "blanket release" for cases within certain criteria.

12.4 Circuit judges are also required to hear criminal and family cases. In family work, much of the jurisdiction is common with that of the District bench, but the Public Law protocol imposes a timetable on the resolution of public law family cases which is not currently being met. We believe that it is a more appropriate use of judicial time to allow circuit judges to concentrate on crime and family work solely within their jurisdiction.

12.5 We recognise that there will be concerns as to whether District judges are competent to try higher value cases. Not all District judges would wish to do so, and Designated Civil Judges would have a role to play in identifying those District judges in whom they had confidence. A significant number of District judges already sit as Recorders to hear civil cases, and have thus been recognised as competent by virtue of their appointment. There seems to us no reason why a system could not be devised that ensured that cases were allocated appropriately for trial before a suitable judge.

12.6 It is well-known that, despite encouragement to settle cases at an earlier stage, many trials settle at the door of the court. A significant advantage of trials being listed before appropriate District judges would be that they could be easily redeployed to other work, including boxwork, at any court where they were sitting. This is not generally an option

for Circuit judges or Recorders other than District judge Recorders, except in the larger trial centres.

13 SPECIALISATION

13.1 As an Association, we recognise that in many courts there are informal arrangements for specific types of work to be handled by certain judges. We also accept that more formal ticketing of judges is appropriate for certain types of work, such as the conducting of final hearings in public law cases. We would wish to be closely involved in developing an acceptable procedure for the allocation of tickets, and in monitoring any proposed extensions of the present ticketing regime.

13.2 There is very considerable expertise in specialist areas within the District bench. We have recently proposed that those District judges with a special interest and expertise in costs should be available to sit as regional costs judges to deal with the larger assessments of costs outside London, and this idea has been broadly welcomed by the Senior Costs Judge.

14 CONCLUSION

14.1 We believe that the proposals put forward in this paper would enhance the civil justice system, and would ensure that there is an efficient and effective system to meet the needs of the public in the 21st century.

14.2 We recognise that there are significant concerns about the costs incurred in civil proceedings. We are aware of the work being done, particularly by the Civil Justice Council, to review all aspects of the cost of litigation, and we welcome any opportunity to contribute to the debate on the reform of costs.

14.3 The Association would welcome the opportunity of discussing this paper to amplify what is stated above.

For and on behalf of the Association

District Judge David Oldham
Chairman, Civil Committee

15 April 2005

Annex 1

THE ASSOCIATION OF DISTRICT JUDGES

Judicial Neutral Evaluation

The Dispute Resolution Appointment

INTRODUCTION

1. This paper proposes a scheme for District judges to act as neutral evaluators to facilitate the early resolution of civil disputes and avoid the cost of trial. The paper comes from the Association of District Judges, and has informal support from the Civil Justice Council. The Association of District Judges ("the Association") recognises the benefits (as prescribed by Lord Woolf in his Report Access to Justice) of the early resolution of disputes in a modern civil jurisdiction. It strongly believes that negotiation assisted by the views of experienced judges who are neutral and enjoy high public confidence would be an efficient form of ADR. The participation of full time judges rather than outside ADR mediators will add effectiveness, value and reduce cost and delay. It would also make a considerable contribution towards the present Civil Justice Public Service Agreement 3 (PSA3) target (as revised within Public Service Agreement 5) to reduce the proportion of disputes resolved by resort to the courts by 5%

2. The Court has an overriding duty to help the parties settle the whole or part of a case. A highly successful precedent for members of the judiciary acting as neutral evaluators can be found in the family jurisdiction ancillary relief scheme.

THE ANCILLARY RELIEF SCHEME

2.1. With effect from 5 June 2000, all applications for ancillary relief are subject to the procedure set out in the Family Proceedings Rules 1991 (as amended). All applications go through three stages, unless otherwise directed by the court. The first stage is strictly timetabled by the rules. The other stages are also timetabled and judge managed rather than party driven.

2.2. The principal aims of the new procedure are to promote the earlier resolution of ancillary relief claims, whether by agreement or determination by the court, and to ensure that the process is case managed in such a way as to define the issues at each stage and save costs. The rules are underpinned by the overriding objective and a pre-action protocol. Proportionality is the watchword.

2.3. At every stage the court must be presented at the start of the hearing with a statement of costs from each party, setting out costs incurred so far, and amounts paid on account.

2.4. The role of the judge is pivotal. Accordingly it is essential that he or she has had a chance to read the key material in advance.

2.5. Upon issue, a date is fixed for a First Appointment hearing twelve to sixteen weeks ahead, before a District judge in most cases. At least 35 days before that hearing, the parties should file and serve a detailed statement of means, in a prescribed form together with standard confirmatory documents such as bank statements. Two weeks before the hearing each party should file and serve a statement of issues, a chronology, and any request for further information.

2.6. If at the First Appointment hearing there are outstanding questions or disputes over property values, directions will be given for these to be dealt with by a stated date, and a date will be given for a Financial Dispute Hearing (FDR).

2.7. If there are no outstanding issues, the First Appointment can be used as an FDR.

2.8. The purpose of the FDR is for the parties to use their best endeavours to reach agreement on the matters in issue between them. Details of offers and counter-offers made up to that point must be supplied The District judge has a key role in attempting to facilitate an agreement, by indicating how he or she would decide the case on the information available. The judge will also point out to the parties the costs already incurred and likely to be incurred if the matter is not settled. The parties will be given time for further discussion without the judge being present. If agreement is reached, a consent order can be approved or at least heads of agreement recorded.

2.9. The scheme has successfully been in force for many years.

2.10. The settlement rate is very high.

2.11. If the parties, despite every effort, are not able to reach agreement, the case will be listed for a final hearing before a different judge. The evaluation remains strictly confidential, all the privileged documentation is excised from the case file and handed back to the parties. In many cases, even where settlement is not reached at the FDR, the case settles before the final hearing after the parties have absorbed the "steer" given at the FDR.

THE PROPOSAL

3. **Early neutral evaluation —** Represented parties engaged in negotiations under a recognised Pre Action Protocol or in issued civil proceedings allocated to the Fast Track or Multi Track may apply at any time for a Dispute Resolution Appointment (“DRA”) before a District judge.

4. **Compulsory and voluntary DRAs.** A DRA will only be compulsory in cases allocated to the Multi Track that have not settled 28 days before Trial or commencement of the Trial window. It will be automatically listed by the Court as a milestone date. [1]It will be similar in form to the FDR Appointment in Family proceedings for Ancillary Relief. In all other cases a DRA will only be listed if both parties agree. Only if the parties could satisfy the court that the case contained some novel or exceptional point, which required to be considered as a test case, would the DRA be dispensed with.

5. **Sanctions for non-cooperation.** However, a party who unreasonably refuses a request or recommendation, coming from a judge or another party, to attend a voluntary DRA may face adverse costs consequences.

6. **Negotiation, not mediation.** The DRA is primarily a meeting between parties and their lawyers to negotiate a settlement of a claim assisted by a judge who will act as a neutral evaluator only.

7. **Judge's duty.** A judge will not give legal advice but will give an evaluation of the likely outcome of specific issues identified by the parties after considering the parties' brief summaries of the relevant information and key submissions.

8. **Venue.** A DRA must take place at Court. The parties must either attend in person or be represented by persons with irrevocable authority to settle the case. It will focus the parties' minds under the judicial gaze. It is a safe and neutral venue. It may be a more efficient use of time than protracted meetings at outside offices with professional mediators paid by the hour.

[1] There might be some benefit in empowering the Court to list a DRA in heavier or more complex Fast Track cases. However, this would have a significant overhead in cost and delay and might be considered when the scheme has bedded in.

9. The DRA need not take place at the ultimate Court of Trial to facilitate and expedite hearings and avoid conflict or listing problems in smaller courts. This will also facilitate the listing of DRAs before specialist judges.

10. **The role of the lay party.** It is essential that lay parties must be present at every DRA to play a full part in the negotiations and authorise settlement. A lay party would include a person fully and irrevocably authorised to make a settlement.

11. **Prescribed information.**

11.1. The parties must provide the judge with prescribed information summarising the case, the issues and relevant settlement offers previously made set out in a standard Questionnaire.

11.2. Prescribed information will include:

- copy Statements of Case,
- a summary of evidence,
- a summary of medical evidence,
- a chronology and statement of issues,
- a summary of Part 36 offers/payments into court
- brief submissions from each party (to include the primary and secondary relief sought.
- any further information requested by the judge dealing with the DRA

11.3 Prescribed information must carry a Statement of Truth.

12. A judge's evaluation may be given orally or in writing.

13. In cases that do not settle, the judge who deals with a DRA must return the prescribed information and recuse himself or herself from any further conduct in the matter. In smaller courts there will have to be arrangements for judicial pooling or for DRAs to be heard elsewhere.

14. **Duty Judge Scheme.** Each part of each Court region will make arrangements for at least one Duty DR judge to be available each day to deal with requests for assistance during PAP negotiations or at any time during proceedings. The judge should be able to impose strict time limits on submissions in proportion to the value and complexity of the case and the supporting written evidence should likewise be strictly limited. A duty Judge could be available to deal with other similar evaluatory work, e.g. FDRs in Family proceedings and assist in resolving minor secondary disputes that might be preventing the parties from concluding an agreement. He or she could combine this with case management boxwork and other urgent business, (e.g. without notice emergency or procedural applications, last minute applications to suspend warrants of possession or execution, arrests and committal applications) taking pressure off other judges' lists frequently disrupted by such business. These business benefits and efficiencies will probably outbalance any loss of judicial sitting time. Experience in the field of family law has demonstrated that time spent in judicial neutral evaluation is amply repaid by the reduction of Trial listing time by ensuring that only Trials that are highly unlikely to settle are set down.

15. Incentives to settle at the DRA.

15.1. A DRA may resolve disputes at an early stage before commencement of proceedings and, in conjunction with the predictable costs schemes be an attractive commercial cash flow benefit for lawyers funding CFA litigation.

15.2. The current policy in refunding trial fees ought to be reviewed. To discourage the waste of court resources in listing trials that only settle at the eleventh hour, the pre-trial checklist or trial fee should in Multi Track cases only be refunded in

cases settling on or before the compulsory DRA appointment but not later in any circumstances.

15.3. A failure to beat a Part 36 offer made on or after the DRA appointment may carry punitive sanctions in either interest or costs within the existing scope of Rules 36.20 and 36.21.

15.4. An unreasonable or unjustifiable refusal to attend a DRA appointment or comply with its procedural requirements will carry adverse costs consequences in either interest or costs, within the expanded scope of Rules 36.20 and 36.21. Parties persisting in serious and inexcusable breach could have their claims or defences stayed, debarred or struck out.

16. Exclusions

16.1. Where both parties are unrepresented — such partied are unlikely to be able to summarise their cases and submissions skilfully or fairly and the judges' role is as evaluator and not as legal advisor.

16.2. Small claims and Fast Track cases – in line with current policy.

16.3. Where the Court excuses the parties from attending a compulsory DRA.

17. **Fees** – a DRA will carry a prescribed court fee on a sliding scale proportionate to the stage of proceedings.

18. **Which judges?** DRAs will, in the first instance, be conducted by a cadre of volunteer District judges in each Region willing to undertake this work. A District judge will act as a gatekeeper and may refer a complex or specialist case to a more senior or experienced Judge. If the DRA is undertaken as a judicial function under the CPR it is submitted that the views expressed will be subject to Crown immunity. Judges will be trained in mediation by the JSB or, resourced by the Department's ADR budget,

encouraged to become accredited CEDR panellists. They may be subject to peer evaluation procedures following each DRA successful or otherwise.

19. **The business case/risk analysis.** It is submitted that the proposal involves very little risk other than the limited cost of training judges. All the work will be undertaken by judges within existing budgets in HMCS accommodation. Such cost would be negligible compared to the cost of funding outside professionals to undertake mediations, a cost that is likely to escalate as demand increases. Experience in the Family Courts indicates that Court and judicial time devoted to such hearings is more than amply made up by Court time saved in avoiding lengthy Ancillary Relief trials. Multi track trials are rarely listed for less than one day. One hour's work under the proposed scheme could save at least five hour's actual or abortive trial time. It will promote greater listing efficiency, avoid wasted judicial time and might significantly reduce parties' costs in stubbornly contested litigation. Subject to careful piloting, the proposal represents a low (if negligible risk) that will pay huge dividends by helping the Department achieve its public targets at almost nil cost.

20. The Scheme must be approved by the Rules Committee, fully piloted and carefully and independently evaluated to verify its efficiency and cost benefits.

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