

SETTLEMENT: IS THE FUTURE WITH THE JUDGES?

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It is a truth universally acknowledged that a dispute of almost any kind must be in want of an agreed settlement.

The question is how can this be done?

The object of tonight's talk will be to identify those means of achieving settlement that are of the greatest good to the greatest number. Beneficial as extra-judicial mediation may be it is not there that we shall find the solution.

We shall be looking at forms of case handling of various kinds before considering how matters stand in respect of the Online Court. I shall then consider extra – judicial ADR before taking a final view.

There is quite a lot of detail in what we are going to look at because the idea is to show you what works and why.

We start with the Civil Procedure Rules that govern all civil proceedings in England and Wales.

Rule 3.1 – (2) (m) reads:

“Except where these rules provide otherwise, the court may – (m) take any other step or make any other order [in addition to those listed above] for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

In *Lomax v Lomax* [2019] EWHC 1267 (Fam) [20 May 2019], having decided that the court had no power to order an ENE hearing under the rule, Mrs Justice Parker said:

“123. My conclusion does not disturb my view that this is a case which cries, indeed screams out, for a robust judge-led process to focus on the legal and factual issues presented by this case; and perhaps even craft a proposed solution for the parties to consider. Mediation (even by a legally trained mediator, if one could be found to assist where the issues are specialised,) is unlikely to approach the issues in an authoritative way, as Norris J said in *Seals*.”

Happily it was not long before the Court of Appeal came to the rescue with the clear finding that a court could make such an order in a case governed by the CPR and it did just that (*Lomax v Lomax* [2019] EWCA Civ 1467) on 6 August 2019.

So what does ordering an ENE hearing mean?

The question is of critical importance because there are two sorts of ENE with which we are concerned. One is little used and of little prospective use and the other is central to this talk.

The first type of ENE is the sort that was ordered by Mr Justice Norris in *Seals and Seals v Williams* [2015] EWHC 1829 (Chancery), [2015] 4 Costs LO 423. Like *Lomax* it was an Inheritance Act case.

The ENE that Norris J ordered was of the classical kind that we find described in the Chancery Guide of which relevant extracts (edited by me post *Lomax*) read:

“Early neutral evaluation

18.7 ... ENE is a simple concept which involves an independent party, with relevant expertise, expressing an opinion about a dispute or an element of it. ... The person undertaking ENE provides an opinion based on the information provided by the parties and may do so without receiving oral submissions if that is what they wish.

...

18.10 There is no one case type which is suitable for ENE. ... It is particularly suitable where the claim turns on an issue of construction, an issue of law where there are conflicting authorities or where the case involves the court forming an impression about infringement of intellectual property (“IP”) rights.

18.11 The Chancery Division does not have set procedures for ENE. The judge who is to conduct the ENE will give such directions for its preparation and conduct as he considers appropriate. The parties may consider that the judge will be in a position to provide an opinion about the claim or an issue based solely upon written position papers provided by the parties and a bundle of core documents. In many cases, however, it will be preferable for there to be, in addition, a short hearing of up to half a day. The opinion of the judge will be delivered informally.”

The reference to IP rights is important. Mr Justice Birss made effective use of the procedure when he was the judge of the Patents County Court between 2010 and 2013 see *Fayus Inc v Flying Trade Group plc* [2012] EWPC 43. But for the most part, this kind of ENE is rarely used. Norris J has made only two such orders including that in *Seals*. This is no great surprise.

It seems that the general view is that the process is expensive and unproductive. The ‘losing’ party will (correctly) not regard itself as bound by what has been said and the dispute might just as well be settled by the usual processes of settlement or go to trial for a binding decision.

And so we come to the second kind of use of ENE. And that is central to this talk.

Here ENE forms part of a dynamic process of conciliation that is used as a way of resolving disputes by agreement.

In *Les cours françaises et la médiation* Pierre Guerder says, “*Conciliation differs from mediation in that the conciliator involves him or herself in the search for a solution of the dispute ...*”

I think it clear that this is the type of involvement that the Court of Appeal had in mind when it ordered an ENE hearing in *Lomax*. The approach not only refers back to Parker J’s *cri de coeur* but also lies in the court’s comparison of the process with that used in Financial Dispute Resolution appointments (“FDR appointments”).

Whatever the use of ENE, it seems to me that *Lomax* gives official authority to the position that in any case governed by the CPR the court may order an ENE hearing that will involve a process of conciliation of the kind employed in an FDR appointment.

Lomax cuts through concerns about whether mediation should be made mandatory and whether human rights are affected. The process is now part of the fabric of case management.

In addition to FDR appointments to which I shall come, there are Ch FDRs which are described in the Chancery Guide as follows:

“Chancery FDR (“Ch FDR”)

18.16 Ch FDR is a form of ADR in which the judge facilitates negotiations and may provide the parties with an opinion about the claim or elements of it.

18.17 Broadly the key elements of Ch FDR are: ... b) There will be a Ch FDR ‘hearing’, although it is quite unlike any other type of hearing. It is better described as a meeting in which the judge plays the role of both facilitator and evaluator. c) Ch FDR is non-binding

and without-prejudice. The court will try to lead the parties to agree terms but cannot make a determination. d) It is essential for the parties, or senior representatives in the case of corporate parties, to be present. e) The court will carefully set up the Ch FDR meeting by giving directions which will help it be a success. This may include directing the parties to exchange and file without prejudice position papers (and direct what is to be addressed) and to lodge a bundle. ... f) When the meeting takes place the parties are directed to attend before the meeting starts so they may hold initial discussions. The parties are then called in before the judge. The Ch FDR meeting is a dynamic process which has some similarities with an initial mediation meeting. The judge may express an opinion about the issue or the claim as a whole. [as edited by me post-*Lomax*] g) The court will not retain any papers produced for the meeting or any notes of it. h) The judge who conducts the Ch FDR meeting has no further involvement with the case if an agreement is not reached.

18.18 There is no one type of case which is suitable for Ch FDR. The origins of FDR lie in money claims in Family cases. It has been widely used in claims under the Trusts of Land and Appointment of Trustees Act 1996, inheritance and partnership claims. It is likely to have most application to claims in which there is strong animosity and/or a breakdown of personal or business relationships and trust disputes.”

And this brings us to the Financial Dispute Resolution appointments that feature so prominently in *Lomax*.

The function of FDR appointments is twofold. First they provide an occasion for the parties to resolve by agreement the financial aspects of a divorce. Second they are the time for directions to be given where there is no agreement.

At paragraph 14 of his judgment in *Lomax* Lord Justice Moylan, who has great experience of such hearings, said:

“The benefits of the FDR appointment for the parties, by promoting the early settlement of the case, and for the court by saving time, have been amply demonstrated in the thousands, I would estimate, of cases in which it has taken place since 2000. In her judgment in this case, Parker J rightly referred to the FDR appointment as having been proved to be “outstandingly successful”.”

In fact Mr Justice Moor, who is in charge of the London Financial Remedy Court, has put the figure at thousands of hearings per annum. Such hearings can involve millions of pounds and complex matters of property law. Moor J has described FDRs as “virtually” compulsory which means that, in practice, they are.

Although there is a degree of overlap with the description of FDRs in the Chancery Guide I think it worth reading some of the robust phraseology concerning the role of the judge that appears in the current Family Justice Council’s Best Practice Guidance that was produced by the Money and Property Committee of the Family Justice Council under the chairmanship of Mrs Justice Parker and came into force in 2012 with the clear reference to the use of ENE without stating any need for agreement.

This is what it says:

“Role of the judge

29. A concern sometimes expressed (by both legal representatives and lay clients) is the absence of structured judicial intervention. That said, it is well to remember that in some cases it may be positively disadvantageous for such intervention to be too robust, or too distinctly in favour of one party rather than the other. The role of

the judge falls into two phases: early neutral evaluation followed by mediation in an attempt to bridge remaining gaps between the parties. Although the precise approach will differ from case to case, it is suggested that the following is likely to assist:

- i. Provide a concise overview of the broad principles to be applied;
- ii. Identify, if appropriate, any factual matters of a ‘magnetic’ importance [i.e. the principal issue(s)] and/or (if in dispute) the determination of which is likely to lead to a particular outcome at trial plus any matters in issue the determination of which is unlikely to impact on the outcome at trial;
- iii. Identify and (where possible) comment upon any differences between the asset and income schedules produced on each side;
- iv. Identify the remaining issues between the parties based upon consideration of their most recent offers;
- v. When appropriate (see above), express an opinion as to the possible/probable outcomes on each of the remaining issues between the parties or give reasons why it is not possible (or, perhaps, desirable) to do so;
- vi. Consider and express a view upon the proportionality of continuing litigation in light of the issues and amounts remaining in dispute.

Save in the most exceptional case, at this point it is suggested that the court should insist on further negotiations taking place. It is rarely appropriate (at this stage) simply to proceed by default to give directions. Before negotiations resume, specific reference ought sensibly to be made to the costs already spent on each side and to a realistic assessment of the costs likely to be spent if the matter

proceeds to trial. Imprecise assertions that costs are likely to ‘double’ by the date of trial are probably not as effective as each solicitor being asked to provide an estimate of what each party is likely to have to spend (including, for example, on counsel’s brief fee). The possibility and/or desirability of mediation should also be raised ... ”

It may be thought that, in contrast with mediation in civil disputes, this proactive approach goes some way to addressing concerns about inequality of arms between the knowledgeable and powerful and those less advantaged, although such differences still have consequences.

There is an increasing use of those who are not sitting judges in conducting FDR appointments.

One therefore finds a flexible situation in which parties have the benefit of a State provided service with the opportunity to use non-judicial neutrals if they wish.

Now we move to the developing role of conciliation in Employment Tribunals.

The position is well described in an article written by the President Employment Tribunals (England and Wales) Judge Brian Doyle in an article in the Judicial College Tribunals Edition 2 – 2018. Having set out the general background and referred to the pivotal role of ACAS, the article continues:

“Judicial mediation

The other major area of ADR in the ET concerns judicial mediation. Judicial mediation by selected and specially trained EJs was piloted in 2006 and rolled out nationwide in 2009. All salaried EJs and some fee-paid judges are approved as judicial mediators. A judge who mediates in a particular case may thereafter continue to deal with its case management, but will not conduct the final hearing.

EJs identify potential cases as part of routine case management. In suitable cases, the ET informs the parties of the availability of judicial mediation. If both parties are interested, the Regional Employment Judge assesses suitability and lists the matter for a private hearing. Typically case management orders are then suspended, although listing of a final hearing is maintained.

An offer of judicial mediation will only be made if both parties are committed to ADR. Offers are made only where it is anticipated that there will be at least three days of final hearing. Originally, only discrimination cases were eligible, but the scope of the scheme is now considerably wider. An important consideration might be whether there is a continuing employment relationship or a non-monetary dimension (such as a return to work or reasonable adjustments for a disabled employee).

As originally introduced, the mediation judges used the facilitative method. ...

The limitations of that have been recognised. The parties regularly wanted the mediator judge to be more interventionist. They sought his or her input on matters such as what the issues would be at the hearing, which party would have to prove what matters, how a tribunal would approach those questions and what remedies might be forthcoming (and in what amount) in a successful claim. The parties wanted the judge to assist them in assessing the risks of litigation and the benefits of settlement.

Many mediator judges in the ET also chafed at the restrictions imposed by the facilitative method. What was the sense of using an expensive judicial resource merely as a conduit for shuttle diplomacy? More recently, therefore, the judges will switch to an

indicative mediation method, if facilitative mediation has been exhausted and if the parties agree. The indicative or evaluation method assists the parties to reach a resolution by expressing an opinion on the strengths and weakness of each side's case and by making recommendations or suggestions for settlement.

Judicial mediation is successful, although we cannot be certain how many cases would have settled in any event. ...”

In an email to me dated 17 October 2019 Judge Doyle said:

“You might be interested in the latest "headlines" from judicial mediations in the Employment Tribunal., courtesy of my co-lead judges, EJ Michael Ord and EJ Vincent Ryan. We continue to break all records for mediations. We have conducted over 500 mediations year to date. More than in any previous year. Of those 68% resulted in settlement on the day which compares very well to mediation “industry standards”. We have saved over 2000 days of hearings from our mediations this year to date. The savings to parties, and to the service, is enormous.”

Case management in the ET shows both the similarity with and the difference from FDR appointments.

The similarity is the proactive nature of the role of the judge in each area. The difference is the selective nature of the choice of dispute in ETs and the need for consent to the process.

If for a moment one thinks of the difference of approach needed in disputes concerning children and those concerning property in family matters, one can see how the need for a different approach in the types of dispute addressed in ETs as against those involved in FDRs.

In each case there is an acknowledgement of the need for a process that is tailored to the nature of the dispute.

We now move on to Germany and the role of the *Güterichter* or conciliation judge. The position was described by Anne – Ruth Moltmann – Willis (Judge of the Court of Appeals Coordinator of Mediation at the Civil Courts of Berlin) at a seminar in November 2014 called “Extra-judicial and Judicial Mediation and Attempt of Settlement as a Prerequisite for Bringing a Dispute to Court”. The part of her talk that is relevant to us reads:

“3 Judicial Mediation

Court mediation done by judges has been exercised in some German federal states since 2002; in Berlin, where I work at the Court of Appeal (Landgericht), since 2006. These projects, initiated by judges and promoted by the respective ministries of justice, were motivated by the idea that a conflict can best be solved by the conflict parties themselves even after the conflict had been brought before the court.

Judges organized and paid for their own training. They had to convince their colleagues to give cases into court mediation and the parties and their lawyers to agree to a mediation process. Expert evaluations stated that overall, judge mediation was highly successful with a success rate of about 70% and that it is effective in lowering the case burden of the courts.”

The judge then goes on to describe the considerable flexibility that is to be found in the overall process and continues:

“There is no exclusive list of cases that are appropriate for mediation. In Berlin at the court of appeals, one third of our cases deal with construction and work compensation matters. But also cases involving public authorities are prominent examples of court

mediation. The parties can suggest themselves to go through a judicial mediation and they can even choose a mediation judge from the court where the case is pending. Often, mediation in court takes place at a very early stage of the case, but there are also cases that come to mediation after many years of court proceedings.

In Berlin there are about 600-700 cases in all civil courts (11 lower courts, 1 court of appeal, 1 Kammergericht [highest state court]) that are dealt with in mediation proceedings, 500 of those at the court of appeals. The court of appeals success rate has been approximately constant at 70% since 2009. This is about 5% of all cases in the Landgericht [Regional Court] Berlin.

Judicial mediation is a story of success, but will only be accepted on a rather small basis of all cases brought to court.”

But it is not only disputes of the sort described above that attract such treatment. Monika Rhein is Presiding Judge of the Regional Court, Munich. At the EU Intellectual Property Office Mediation Conference this year she described how she had been involved in the conciliation of IP cases. In one instance the numbers present were so great that special accommodation had to be found and two judges were used.

And now we come to the last and I think in many ways the most interesting of the situations at which we are looking tonight.

The story starts with this extract from the Civil Courts Structure Review: Final Report by Lord Briggs. He says:

“2.17. There is a form of small claims conciliation (to use an umbrella term) carried out by District Judges in certain County Courts hearing centres in the Hampshire, Dorset and Wiltshire area, and also in Romford. It works in the following way.

2.18. First, all cases in the small claims track are routinely called in for a conciliation and case management session. Attendance is compulsory, and parties not attending have their claims (or defences as the case may be) dismissed or struck out, with liberty to restore which is only very rarely exercised.

2.19. The DJ conducting the list (which will include up to twelve cases in a morning's session) then invites each pair of parties to consider settlement, and provides assistance in the form of informal early neutral evaluation, in much the same way as is done at financial dispute resolution hearings in the Family Court.

2.20. Those cases which do not settle there and then are given the benefit of case management directions designed to enable the parties to prepare for a final hearing much more effectively than is customary in the Small Claims Track.

2.21. Statistics kept by the originator of the scheme in the Hampshire, Dorset, Wiltshire area (now HH Judge Dancey, but then a DJ) suggest that 25% of the entire small claims track list is disposed of due to non-attendance, 50% at the conciliation hearing, and a significant proportion of the remaining 25% settles before trial, due (anecdotally) to progress towards settlement achieved at the conciliation hearing.

2.22. This scheme bears an interesting relationship with the Small Claims Mediation service. While it is operated by judges, at much greater expense per hour to the court service than that provided by the small claims mediators, it brings about settlement of a much higher proportion of the small claims issued and deals in half a day with more than double the number of cases dealt with by a typical small claims mediator in a whole day.

2.23. I have found no convincing explanation why this form of judicial conciliation is being practised only in a small number of specific parts of England. It is possible that there are other parts where it is being practised, of which I remain unaware. The main argument against its more general use which has prevailed to date appears to be that cases which do not settle by means of this process therefore have to receive two doses of judicial attention, one at the conciliation hearing, and the other (which has to be by a different judge) at the trial. This is, of course, correct as far as it goes, but it does not follow that the overall economic analysis ought to be regarded as adverse to the use of this form of judicial conciliation.”

When preparing this talk I asked HHJ Dancey how things were at present and he sent the following reply:

“Settlement is very much alive and kicking here:

- FDRs – of course as required
- PTSHs – pre-trial settlement hearings in every multi-track case about 10 weeks before trial and run on FDR lines
- Small claims conciliation hearings listed pre-statements in all cases where both parties are local (exc insured RTAs) and again privileged – started here in 2006
- Judicial conciliation in private law cases which I ran as a DJ between 2010 and 2015 – see attached article from Family Law in 2013 (I still use the same approach whenever appropriate in private law cases)
- Settlement hearings in public and private law cases (run in accordance with protocol guidelines)

Our common experience is that these approaches are highly successful and achieve better outcomes for parties overall than imposed decisions.”

What a wealth there is to consider.

We have looked at the small claims procedures through the eyes of Lord Briggs and in a moment I want to consider PTSHs but we will now look at judicial conciliation in private law cases as described by Judge Dancey in the article written in April 2013 (Family Law [2013] Fam_Law 472) from which the following are extracts:

“To some extent or other, all district judges are used to conciliating in private law children cases, particularly at the first hearing dispute resolution appointment (FHDRA). So a more formalised judicial conciliation scheme may be seen as no more than an extension of this function. Judicial conciliation has been offered as an alternative to conventional litigation at Bournemouth Combined Court since July 2010 and what follows is the model that has developed as a result.

What is judicial conciliation?

It is a non-confidential but informal hearing before a conciliation judge at which the parties (with or without their lawyers and with or without new partners or other family members) are given an opportunity to air the issues and concerns that they have. Evidence is not taken and the agenda is largely (but with some guidance from the judge) set by the parties. No decision is taken by a conciliation judge who will only make agreed orders. The focus in conciliation is not so much on the arrangements for the children as the relationship between the parents and in particular their communication. The message is given to the parents that if they can get those fundamental building blocks right the arrangements stand a better chance of falling into place and when

inevitably the arrangements have to change, the prospect of the parents reaching their own agreement without applying back to the court should be enhanced.

...

How does judicial conciliation work?

Practitioners or Cafcass may come to the FHDRA suggesting conciliation or a judge may suggest it. A conciliation hearing allowing 1 1/2 hours is listed, normally within 4 weeks. Sometimes that will be the only further hearing listed, or it may be that the litigation timetable (statements, reports, further hearings) will be fixed in addition to avoid delay in the event that conciliation is not successful. ... “

The judge then describes the informal and constructive way in which the hearings take place and continues:

“Does it work?”

Generally speaking, yes. About 75% of cases resolve the issues to the point that further hearings are not required. If one or both of the parties is so unreasonable that the case cannot be conciliated, that is usually apparent early on and not much time is wasted. Informal feedback from practitioners suggests that parties appreciate the ability to be heard in a more informal and less threatening environment ...

...

Is conciliation a proper use of judicial resources?

It is suggested that it is. It gives some parties the 'day in court' that they seem to need. It is more directive than mediation in that judicial guidance as to likely outcome can be given to the parties direct. It is just another tool in the box of otherwise blunt tools that the court can make

available to parties to resolve these issues. Without being able to give empirical evidence, it is suggested it represents good value for money. Where successful, judicial conciliation may offer a better outcome for both parents and children. Importantly, because the procedure is informal, it works well for self-represented parties. Litigation can be like getting on a merry-go-round at a fairground which will not slow down enough for the parties to get off. Judicial conciliation, like mediation, offers an opportunity to get off.”

Given the unique place of contested private law children cases, I have found it impossible to get an idea of the numbers involved, but what is clear is the intensity of emotion that such disputes involve and the poverty of financial resource available to help their ordered resolution. The approach described by HHJ Dancey goes a long way to tackling the problem.

And now we come to the entry, *PTSHs – pre-trial settlement hearings in every multi-track case about 10 weeks before trial and run on FDR lines* and the answer to my next question to the judge which was “no” this was not some recent innovation. The system had been in operation ever since HHJ Anthony Thompson QC had become the Designated Civil Judge for Hampshire and Dorset in 1999.

District Judge Lindsay Powell has sent me a very helpful email in which she explains the procedure in the Southampton Combined Courts Centre. As slightly edited by me she says:

“a. The 'Pre CCMC' [Costs and Case Management Conference] tick box form is used to direct the parties to do their budgets, try to agree them and set the case up for a CCMC. I have attached them because you will see that we direct the parties to budget at the PTR [Pre Trial Review] stage for a PTSH. Practitioners in the area have now got used to this and if we get anyone from out of area who has not

budgeted in this way we deal with it at the CCMC so that there is sufficient budget at that stage for counsel's involvement and fee earner time in doing a proper PTSH.

This is important because many cases settle just before the PTSH. Parties and their legal teams typically schedule a round table meeting, mediation or other types of out of court resolution BEFORE the PTSH. We then see the Tomlin order. Simply listing a PTSH with those directions prompts the parties to get on with trying to settle outside of court.

b. I have attached the DCJ area tick box form for basic MT cases. ... We often hand them out to local practitioners so that when they file suggested directions they use our wording [including that for] the 'PTSH' For cases that progress to a PTSH [the directions] are very effective in focusing minds on the day - some cases settle on the day with the last bits of horse trading taking place. Those that do not settle often settle in the 1-2 weeks thereafter when the parties have had a little bit of thinking time.

It is also important that the PTSH is about 10 weeks before trial. We do not want parties at a PTSH having already incurred costs for leading up to trial - many cases do not settle because of costs.

...

My experience is that only a minute fraction of cases proceed to trial and [they] settle by or on the PTSH. In my view it is the PTSH that focuses the parties on settling at that stage.”

Like Lord Briggs, I do not know what happens elsewhere, but this does not detract from what we do know. While Hampshire, Dorset and Wiltshire may not produce multi-track cases on a par with the great conurbations of England and

Wales, one may fairly think that there have been quite enough cases to show that this is something that has stood the test of time. In its own way the procedure has a significance similar to that which so attracted Lord Briggs in respect of the small claims conciliation procedures.

Judge Dancey has told me that no special judge days are allocated by the circuit to the procedures that I have set out. The circuit administrator and the presiding judge allocate the judge days and those involved get on with what they receive.

What we see in all these methods of case management is a practical approach that eschews the doctrinaire and embraces the successful.

A remarkable aspect of all these procedures is that there is no need for any type of formal imprimatur for what Judge Dancey and the District Judges do – no Statute or Statutory Instrument or Practice Direction. Nice as it might be to have additional funds the system works without them.

This is no land of legend. What is done here can as much be done in Cardiff or Birmingham.

It seems to me that the types of case management that I have now described are of application far beyond their immediate context. And always in considering their more extended use, the type of dispute must be matched with the type of management.

However, there is one type of case that Judge Dancey does not mention. These are the numerous fast-track cases. It seems to me that the limited amount of the sums in dispute and the restrictions on the recovery of costs must make them peculiarly resistant to extra – judicial mediation. But I see no reason for despair.

Given that small claims are subject both to the regime described by Lord Briggs and to a small claims mediation scheme that is virtually State run and given that multi-track cases are dealt with as described by Judge Dancey and District Judge Lindsay Powell, I think there must be a method of judicial conciliation

that can be applied to fast-track cases. My instinct suggests that such an approach would lie in developing the small claims model with possibly more time per claim.

The benefits of the procedures that I have described are helpfully summarised at paragraph 8.12 of the Interim Report of the CJC ADR Working Group (“the Working Group”) as follows:

- “(a) Confidence in the quality of the neutral.
- (b) Sustainability and accessibility of supply.
- (c) A consistency of process.
- (d) The intervention is cheap or free [in fact free] as far as the litigant is concerned.
- (e) The commitment of time is not disproportionate.”

It also seems to me – as it did to the Working Group - that it is these same methods of management that fall to be considered when deciding how to proceed at Tier 2 of the new Online Court.

You will remember that the new court involves three stages or tiers. The first truly online tier is to be used to identify and refine the issues. Assuming that the dispute survives that stage, the next tier is to be used to try to dispose of the dispute by settlement between the parties with the assistance of a third party, with directions for a hearing being given in the event of no settlement. The last stage is to be used to determine any surviving disputes by judicial decision.

The current steps to implement Briggs appear to be found in the Online Civil Money Claims Pilot which is subject to CPR PD 51R.

Earlier in the year I received an email from Sam Allan, the Private Secretary to the Master of the Rolls, in answer to my inquiry as to what was happening. In it

he told me that he had received the following response from “the relevant team”:

“I have discussed this and there isn’t really anything published we can direct him towards I’m afraid, we have provided a couple of lines around the upcoming mediation pilot in OCMC, to allow Nick Chambers to reflect the current position accurately ... :

“HMCTS will launch a mediation pilot in spring [2020] that requires parties to “opt out” of mediation. Currently cases under £10,000 are asked if they would like to “opt in” to mediation (small claims mediation service operated by HMCTS). Initially the pilot will be for defended claims up to £300.””

In fact it appears that, under the Schedule to Section 20: Table A of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, in respect of money claims in “preferred courts” for £300 or less there is a power in legal advisers (case officers) to direct parties to contact the Small Claims Mediation Service but only where the parties have not opted for mediation but the legal adviser considers it may nevertheless be appropriate.

One may ask whether these are not rather limited ambitions.

And I think it must follow that, if prompt steps are to be taken to aid the settlement of disputes in the courts, they must be found elsewhere.

And so we come to consider extra-judicial ADR in the course of litigation.

The position can be simply described.

Settlement by agreement of all disputes – whether legal or not – has universal support.

Mediation is a good way of trying to settle disputes.

Pursuing the aim that disputes should be settled and embracing the fact that mediation is a good way of settling disputes there has arisen the assumption that extra-judicial mediation should be driven forward both by the courts and other concerned bodies as the prime method of achieving the settlement of cases. As the Working Group said at paragraph 3.3 of its Final Report, “[*Mediation*] is the principal process for us to consider”.

I believe that this heavy dependence on mediation has obscured the need properly to identify the subject matter of its use and its ability usefully to deal with that subject matter in any extended way.

Let us look at the position in the civil courts.

The Eighth CEDR Mediation Audit dated 10 July 2018 says, “... we estimate that the current size of the civil and commercial mediation market in England & Wales is now in the order of 12,000 cases per annum”. The report comes with the comment, “It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field that we have very loosely defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council ... [We] do not include the statutory ACAS service or the HMCS Small Claims Mediation Service”.

Regardless of the precise nature and status of the disputes in question, the figure of 12,000 encounters difficulties when contrasted with those that concern us tonight.

Published 2018 Civil Justice figures (some final and some provisional) record:

Cases allocated to track:

Fast-track: 70,477

Multi-track: 13,550

Total: 84,027

Trials of both Fast-track and Multi-track: 17,701

Therefore 66,326 or 79% of the total of fast and multi-track cases did not proceed to trial.

(There were also 42,212 trials of small claims.)

Taking 12,000 mediations at the most, this is a fraction of the number of fast and multi-track cases in question.

Although carefully covering a number of methods of ADR that do not involve mediation, the Interim and Final Reports of the Working Group largely constitute a considered identification of problems in the take up of mediation with a series of thoughtful proposals to meet them of which the general effect may be to improve the position but is almost certain never to resolve it.

Underlying the well meant court rulings is the assumption that those involved have the means and ability to engage in mediation. But, without it being expressly stated, much of what is said is only really relevant to multi-track cases that, whether because of the amounts in question or the importance of the dispute to the parties, may respond to the urge that they be mediated. Almost all those involved in this approach have never seen a mediation or know what it involves in practice. Mediations are time consuming exercises in patient coaxing with the uncertainty of outcome inherent in all such activity.

Although I do not have a precise figure, it is apparent that last year probably over ten thousand fast-track cases went to trial. That is cases worth between £10,000 and £25,000 with an estimated hearing time of not more than one day.

The cases were handled under a regime designed to provide swift justice at limited cost. There is no sign that either those cases that went to trial or the very much larger number of cases that were settled before trial were, to any material extent, subject to mediation wherever it might have been found.

The cases that settled must mostly have done so by direct negotiation as has ever been the way.

It is perhaps forgotten that the main reason why the vast majority of civil proceedings settle before trial is because of fixed trial dates firmly adhered to.

Except for the potential provided by the Online Court, I think that the high moral endeavour of those concerned with the settlement of disputes by agreement has often obscured the need for Benthamite practicality in addressing the great numbers of disputes that go to court of whatever nature, complexity and value. Far better the rough and ready which is largely successful than a fastidious insistence upon a perfection that most ignore.

And quite apart from the statistical position there is an ethical one.

I think that one may fairly ask why a party that is engaged in a State structure that charges fees for the disposal of disputes should be pushed on pain of sanction to go outside that structure and engage from its own resources (and often in ignorance) in a process of which the State entirely washes its hands.

It is as if the NHS (free at the point of entry) were to tell a patient in the course of treatment that he or she should go private as part of their care.

But now let us leave numbers and fly up into the forensic stratosphere. Think for a moment of what might have happened if there had been a court ordered FDR type ENE hearing before the trial in *Excalibur*; a vast case whose fatal flaws of analysis and management were laid bare in judgments of lethal elegance (*Excalibur Ventures LLC v Texas Keystone & Ors* [2013] EWHC 2767

(Comm), [2013] EWHC 4278 (Comm), [2014] EWHC 3436 (Comm), [2015] EWHC 56 (Comm)).

So where are we?

It seems to me that the models at which we have looked tonight show that in many thousands of disputes of varying complexity settlement is achieved by judicial involvement with the parties that includes a robust use of ENE.

This is particularly the case where the final settlement of the dispute will be achieved by an act or series of acts such as the payment of money.

Disputes that involve a continuing relationship between the parties tend to require an approach that is more sensitive to their needs and of those others involved such as children but also responds to an appropriate use of ENE.

In some areas there is a requirement for agreement before the process is engaged but, in most cases, that is not so.

Most individual litigants will only ever be involved in one dispute that goes to court. Deep in ignorance and fraught with trepidation they will engage in a procedure due to end with a trial that they would rather not endure.

What all the models at which we have looked tonight have in common is that they bring parties face to face in systems that, with the court's assistance, are designed to bring an ordered resolution to conflict.

These established and successful models are capable of an extended application that responds to the needs of litigants in a way that involves no threat of stick or need for Government action. They are the future.

