Response to the Civil Justice Council's consultation about the Terms of Reference for a consultation about the Pre-Action Protocols

1 Who we are

1.1 DisputesEfiling.com Limited (DEF) was founded in 2015 to introduce effective IT into the ADR sector and to promote constructive debate about how civil justice could best work for lawyers and their clients.

1.2 DEF seeks to support change in civil jurisdictions including England and Wales, Scotland, Greece, Nigeria, the State of New York and elsewhere across the globe. DEF builds on the civil justice reform work undertaken by the Director of DEF since 1995.

1.3 Our Director, Tony Guise, has for the past 25 years been closely involved in many of the most significant reforms in civil justice in England and Wales. In his many different roles, whether as President of the London Solicitors' Litigation Association, member of the Law Society of England and Wales' Civil Justice Committee or co-founder and Founding Chairman of the Commercial Litigation Association, he has influenced thinking and introduced changes from the establishment of the Civil Justice Council (1997) through to the, now compulsory, Electronic Bill of Costs (2016).

1.4 As a practising solicitor until 2016 and founder of GUISE Solicitors in 2003 his firm led the way with new approaches to the client-solicitor relationship in terms of estimating costs and the form of the solicitor-client retainer. Many of the innovations which started life in his firm are now a compulsory feature of every civil litigator's practice.

1.5 Collaborating both with Lord Woolf and Sir Rupert Jackson he has brought about or significantly contributed to reforms ensuring that the civil justice system in England and Wales remains relevant and enduring.

1.6 His current focus is on the introduction of effective IT into the civil justice system.

1.7 DEF firmly believes that any consultation about the PAPs should be undertaken with a programme of research. Thereby recommendations for change would be made with greater credibility than recommendations made in a vacuum, as it were. We recall that Lord Woolf's Final Report benefitted from the results of empirical research in not one but a number of respects.

2 Scope of this response

2.1 On 27 October 2020 the Civil Justice Council issued a call for contributions to *"… a preliminary survey to obtain feedback and suggestions about what ought to be the focus of the review, and the priorities for reform"* concerning the operation and nature of the PAPs.

2.2 We are not able to comment upon or respond to a number of the Terms of Reference nor to reply to all questions in the online survey. Our contribution is made from the experience and expertise gained as described in paragraph 1 of this submission.

2.3 Apart from one or two asides in relation to other issues we confine our response to the issues identified at paragraph numbered 8 and 10 in the call for contributions:

8 Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?

10 Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitalisation of PAP steps and guidance?

3 DEF's response

3.1 Issue 8 and other issues (other than issue 10, as to which see below)

Each of the 16 PAPs and the Practice Direction (PD) on Pre-Action Conduct and Protocols addresses ADR and has a paragraph saying this or closely similar (taken from the PAP for the Resolution of Package Travel Claims):

Alternative Dispute Resolution
14.1 Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of Alternative Dispute Resolution ("ADR") might enable them to resolve their dispute without commencing proceedings.

14.2 Some of the options for resolving disputes without commencing proceedings are—

(1) discussions and negotiation (which may or may not include making Part 36 Offers);

(2) mediation or conciliation - a third party facilitating a resolution; and

(3) early neutral evaluation - a third party giving an informed opinion on the dispute.

14.3 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but unreasonable refusal to consider ADR will be taken into account by the court when deciding who bears the costs of the proceedings.

14.4 Information on mediation and other forms of ADR is available in the Jackson ADR Handbook 2nd Edition (available from Oxford University Press) or at— www.civilmediation.justice.gov.uk/

3.2 In the Practice Direction (PD) on Pre-action conduct and protocols similar words appear together with these statements:

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.

11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

3.3 Courts have imposed costs sanctions in reliance on para 11. The most recent cases (all from 2020) are summarised in the Appendix to this submission with reference to a relevant case from 2018. However the effect of the Court of Appeal's decision in Halsey v Milton Keynes NHS Trust [2004] EWCA Civ. 576 continues to influence Judicial decision-making despite the cases summarised in Appendix. In Patel & Patel v Barlows Solicitors et al. [2020] EWHC 2795 (Ch.) HHJ Mithani held that a qualified refusal to mediate did not attract the soft sanction of a costs order. We understand, anecdotally, that the use of the "qualified refusal" to escape sanctions is becoming widespread. The idea of "qualified refusal" providing a defence to a costs sanction is a concern if the Council's intention is to have much more ADR with much greater integration of ADR in the civil justice system. It is also contrary to the approach taken in the most recent CJC Report on ADR (November 2018) which recommended that the grounds for escaping costs sanctions for not engaging in ADR should be narrowed not widened. See, Recommendation 21:

The Halsey Guidelines for the imposition of costs sanctions should be reviewed and should narrow the circumstances in which a refusal to mediate is regarded as reasonable.

https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018-2.pdf

3.4 There are differences of approach and of presentation in each PAP which may not be helpful. These are worthy of consideration as to whether these are justifiable or not, a concern rightly raised by issue 3 of the call for comments on the review but is worth noting in the context of issue 8 too. This is evident in the PAP for Construction and Engineering Disputes (2nd edition) where this appears;

4 Compliance
4.1 If proceedings are commenced, the Court will be able to treat the standards set in this Protocol as the normal reasonable and proportionate approach to pre-action conduct. It is likely to be only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of this Protocol, that the Court will impose cost consequences on a party for non-compliance with this Protocol.

3.5 The use of the so-called "soft sanction" of costs for failure to comply with this PAP being the exception rather than the norm is something which strikes us as contradictory. We consider that if the PAP's behaviour code is the normal approach then any deviation from it should normally attract sanction. For example parties should expect sanction for not undertaking ADR in the PAP stage as that is required by virtually every PAP to be the default (implicitly) with litigation being said to be "the last resort". Also compare the decision in Patel v Barlows, above.

3.6 Other differences between the various PAPs appear, for example, in the PAP on Debt Claims where there is reference to finding a mediator via the directory maintained by the Civil Mediation Council (CMC) but no reference to the Jackson ADR Handbook. The reference to

the Jackson Handbook is also missing from the PAP on Media and Communications Claims. A full analysis of differences of presentation, phrasing and substantive content is not the aim of this response but this brief review shows the merit of including issue 3 within the proposed Terms of Reference.

3.7 The PAP for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 provides a structured settlement process entirely supported by a platform for the resolution of such disputes outside the civil courts. The CPR support this approach by addressing the costs issues arising from this PAP see Part 45.16-45.29L.

3.8 This PAP says:

Preamble
2.1 This Protocol describes the behaviour the court <u>expects</u> of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed. [our underlining]

In 2019 there were 50,402 users from 5,683 registered organisations including claimant solicitors and Insurers. According to the Claims Portal's Annual Report for 2019 approximately 792,000 cases concerning claims for personal injuries arising from RTA, PL and EL causes were commenced on this platform during 2019. The Claim Portal's Report for 2019 states that ca 181,000 cases were settled which is more than a fifth of the total cases submitted to the Claims Portal in 2019.

These settlements represent:

- 181,000 fewer cases entering the civil courts;
- A significant reduction in the costs associated with such cases;
- 181,000 claimants receiving their compensation much earlier than they would otherwise; and,
- A significant reduction of the demands on Court time and administrative resources.

It should be noted that our one-fifth assessment is not entirely like-for-like as some of those cases settled in 2019 were commenced before the report period (01.01.19-31.12.19) and some would settle after that period but is, for the purposes of this submission, a reasonable indicator of the Claims Portal's success as a method of ADR.

The Claims Portal was hastily deployed but on any view has been a success in terms of resolving disputes via means other than in court. This may be measured not only by the number of cases commenced but also by the way in which its jurisdiction has expanded over the years to include EL and PL claims.

There are other issues to consider about the need for ADR neutrals to facilitate settlements in a wider range of claim types and this is something to which we will return in our submission to the Consultation proper.

3.9 The Claims Portal is a successful example of de facto compulsory ADR prior to the commencement of litigation.

3.10 A more recent innovation has arisen in connection with the reactivation of residential possession claims stayed during the first Lockdown. The filing of a "reactivation notice" at Court leads the Court to list the case for a Review Day (R Day) at which the parties are expected to have settled by negotiation between themselves or to engage in mediation on or before that day. HMCTS is, we understand, commissioning research to better understand how the R Day is working in practice.

3.11 The R Day process is of significance in the context of issue 8 for the terms of the guidance issued by the Master of the Rolls (prepared by his Working Group on Possession proceedings a cross disciplinary body bringing together all interests under the chairmanship of Knowles, J.) that explains how to deal with possession cases that have not settled one way or another and where the Landlord claimant has not engaged with ADR.

3.12 That guidance (entitled the "Overall Arrangements") says:

If the case is not resolved by agreement, the Judge will consider the bundle provided by the claimant and the Court file. If the claimant's documents are in order the case will proceed to a Substantive Hearing 28 days later. If the claimant's documents are not in order the Court can be expected to dismiss the claim (with liberty to apply for reconsideration at an oral hearing) or may give directions." (para 54)

3.13 As to the contents of the bundle these are set out in para 49 and include the requirement to:

"…confirm to the Court that the claimant will be available during the Review Date to discuss the case (by telephone would be sufficient) with the defendant or a duty scheme (or other) adviser."

3.14 The expectation of Judges that they will dismiss a case for non-engagement with ADR is an important development and of relevance to issue 8. The Review Day was devised in response to a specific emergency, the Pandemic. The Claims Portal was devised to cope with the rising tide of claims that were disproportionate to pursue through the Courts. The proposed consultation affords the opportunity to look at such initiatives and judge how far they have wider application to ensure proportionate justice is readily available for all citizens. Especially in the context of a rising Pandemic induced Backlog which is not confined to Possession cases but is to be found in almost every jurisdiction especially in the Small Claims Track and the Fast Track.

3.15 The success of the Claims Portal is, we believe, attributable to two factors. Firstly the "expectation" in the PAP that all claimants will use it (see para 3.7, above). Secondly that there is a dedicated process (in the form of a platform) through which this form of ADR takes place. Process, as always, moulds behaviour and platforms such as the Claims Portal manage behaviour really well hence the huge numbers using it. This point is also highly relevant in the context of the mooted further digitisation of the PAPs which forms part of the matters raised for consideration in connection with Issue 10.

3.16 There are other aspects to consider but we hope these brief observations are sufficient to demonstrate the importance of Issue 8. Other issues we shall address in submissions to the PAP Consultation itself concern, for example:

- the use of opt-out or opt-in ADR processes in the light of experience;

- experience from overseas jurisdictions such as the State of New York, Greece, Scotland, Northern Ireland, Nigeria and Turkey;
- The optimum time of any attempt at engaging with ADR;
- The nature of the structured settlement approach used in the Claims Portal and whether this could be used in a wider range of claim types; and,
- The experience of MIAMs in Family cases and other compulsory pre-litigation ADR requirements already deployed in the civil justice system of England and Wales, also see below.

3.17 To conclude: we support the inclusion of issue 8 amongst the Terms of Reference and look forward to making detailed submissions in due course.

3.18 Issue 10:

Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitalisation of PAP steps and guidance?

3.19 A number of either compulsory or de facto compulsory pre-action ADR requirements already operate in the civil justice system of England and Wales. These require a form of ADR to be undertaken before applications may be made in Court or Tribunal. In summary these are:

a) Claims Portal, see above, de facto compulsory;
b) Mediation in disputes about Special Educational Needs and Educational Health Certificates: compulsory;
c) Adjudication in construction cases: quasi-compulsory;
d) ACAS' early conciliation in employment claims: compulsory;
e) Mediation Information and Assessment meetings (MIAMs) in Family applications relating to finance and children: compulsory;
f) PAPs – all make clear litigation is the last resort yet only a small number of ADR events take place when compared with the number of contested cases issued each year: in light of that fact is ADR under the PAPs truly de facto compulsory?

3.20 In relation to each there is no online platform to facilitate this pre-action activity. The exception is the Low Value RTA PAP which has been online since its inception in 2013.

3.21 We believe the compulsory pre-litigation ADR steps and the PAPs could and should be taken online as a platform will mould the behaviour of parties to adapting the PAPs more effectively.

3.22 In 2015 DEF built a Platform that enables the online management of four types of ADR: arbitration, adjudication, mediation and neutral evaluation. In 2016 we added a Pre-Action module which facilitates each of the 16 PAPs. It is ideally suited to the volume management of cases. Cases started in Pre-Action can have data transferred to any of the ADR modules via DEF's Convert function.

3.23 If DEF were integrated with Online Civil Money Claims and the County Court Online Pilot (PD 51S) via APIs then DEF's Pre-Action module could make a major contribution to increasing the amount of ADR taking place and effectively working to reduce the Backlog.

This would deliver a process that is baked-in to civil justice. ADR would become the first resort not the last as it so often seems to be at present for most civil cases.

3.24 The limited empirical evidence of the success of opt-out in the Small Claims Track is that unrepresented litigants prefer to opt-out than engage in ADR because they feel, at an early stage, that they wish to have their "day in Court". The Designated Civil Judge for Greater Manchester (HHJ Nigel Bird) is of the same view; based on his experience of the developing Backlog in his Courts. Using DEF's Pre-Action module could change those behaviours.

3.25 On 17 December 2020 Litigation Futures reports on a BLM study of Compensation Recovery Unit statistics showing a rise in COVID related claims in particular of Employer's Liability cases. This was anticipated in the conclusions of our White Paper published in July 2020 and this trend can only accelerate during 2021. Hence the need to introduce de facto compulsory ADR swiftly and probably at three points:

- PAP;
- Between the filing of a Defence and any Directions event; and,
- In the month before trial.

Our White Paper is here:
https://news.disputesefiling.com/2020/07/01/breaking-the-backlog-and-overcoming-the-tsunami-of-civil-litigation-in-england-and-wales/

The Litigation Futures report is here:
https://www.litigationfutures.com/news/covid-related-claims-gaining-momentum-warns-defendant-firm

3.26 To conclude: our view is that Issue 10 is an important issue and should be included in the Terms of Reference of the proposed consultation on the PAPs. We look forward to responding to that Consultation in due course and addressing in more detail the issues raised by Issue 10 including reference to the experience in those overseas jurisdictions with which we are familiar.

4 Contact point

For further information about this Response or for any other enquiries please contact us, in the first instance, via tonyguise@disputesefiling.com.

18 December 2020

Appendix

Summaries of decisions in 2020 imposing costs sanctions for failing to participate in ADR, see para 3.2 above.

EAXB v University Hospitals of Leicester NHS Trust [2020] (D96YJ039 – Kings Chambers' website)

Judgment 06.01.20: D refused costs for failing to make any offer at a JSM (Counsel's note)

BXB v Watch Tower and Bible Tract Society of Pennsylvania & Ors [2020] EWHC 656

Costs judgment 11.03.20: indemnity costs against D for period after D's refusal to engage in ADR

DSN V Blackpool FC [2020] EWHC 595 (QB)

Costs judgment 20.03.20: indemnity costs against D from point Court ordered ADR

Wales v CBRE and Aviva [2020] EWHC 1050 (Comm.)

Costs judgment 30.04.20: Ds recovered reduced costs from C because Ds refused to mediate

It is worth noting that in 2018 the High Court ordered costs to be paid by a Defendant who offered to settle but did not also offer to pay the costs incurred in complying with the PAP in circumstances where the underlying claim was admitted leading to proceedings being issued, inter alia, for such costs:

John Ayton v RSM Bentley Jennison & Ors. [2018] EWHC 2851 (QB)
https://www.lawgazette.co.uk/download?ac=31829