

Professional Negligence Adjudication Pilot Group

Summary Sheet for Lord Justice Coulson

Background

A pilot group was set up in conjunction with the Master of the Rolls, Lord Dyson, and the Ministry of Justice initially with support from Lord Chancellor Grayling and Lord Edward Faulks QC.

The purpose of the proposal from the Professional Negligence Lawyers Association (PNLA – www.pnla.org.uk) was to try and find a way to mitigate the hardship for claimants in non-medical professional negligence case arising from the Legal Aid Sentencing and Punishment of Offenders Act 2012 Part 2 which abolished recovery of CFA success fees and ATE premiums from losing opponents.

The concept behind it is to implement a procedure similar to that introduced as compulsory in construction cases pursuant to the Housing Grants Construction and Regeneration Act 1996.

The group was initially chaired by Mr Justice Ramsey and launched in February 2015. Mrs Justice Carr and Mr Justice Fraser were appointed in December 2015 after the retirement of Mr Justice Ramsey and the scheme relaunched in May 2016.

Lord Briggs (as he now is) attended the May 2016 launch event and referred to the pilot in the Final Report for the Civil Courts Structure Review in July 2016 (notably paragraphs 6.29 6.98 and 6.99).

The group consists of a highly experienced team with many years of experience:

Ministry of Justice – Robert Wright, Tajinder Bhamra and Sam Hobbs

Claimant solicitors – PNLA members – Katy Manley of Manley Turnbull, Jonathan Sachs of Irwin Mitchell and Tim Constable of Dentons

Professional Indemnity insurers – Natalie Lardner of the Association of British Insurers, David Self-Pierson of AIG, Brendan Barry of Amtrust and Owen Thomas of Travelers

Defendant solicitors – RPC partners Peter Mansfield, Jo Bryant and Will Sefton

PNBA – Chairman Ben Hubble QC, former Chairman William Flenley QC and Ivor Collett

Advisers – Ben Patten QC (construction/drafting) and Nicholas Bacon QC (costs)

Independent feedback reviewer – Dr Masood Ahmed – Leicester University

There have been some changes in the identity of the attendees at group meetings over the years but the overall representation of the key groups has been maintained.

Further details of the background are included in the Pilot Pack which has been advertised on the PNBA and PNLA websites (copy attached).

Current position

Dr Masood Ahmed has prepared a report dated 28 November 2017 a copy of which is attached outlining the data available and his recommendations.

At a group meeting on 29 November 2017 the report was discussed and it was unanimously agreed that the pilot be referred to Lord Justice Coulson for implementation.

Summary of points arising on the report:

Paragraph 4: the ABI and PNLA to liaise with Dr Ahmed to double check the data which will as necessary be revised due to feedback coming in after it was drafted.

Paragraph 9.4 page 7 the sentence '(ii) parties cannot simply ignore the proposal to refer the matter to adjudication, this **may** (delete 'will') be considered as unreasonable conduct by the Courts

Paragraph 10 Recommendations

- Continue to collate data on the number of proposals made and by who – **agreed**
- Continue to promote and advertise the Pilot Scheme to the claimant and insurer market – sole or joint authorship of articles to be published in the Law Society Gazette and other professional academic journals. – **agreed**
- Working party to consider incorporating the Notice of Referral into the adjudication agreement – **not agreed because the Notice of Referral is as between the parties but the agreement is between the parties and the adjudicator.**
- Working party to consider the issue of neutrality and the need for provisions to be incorporated into the Pilot documents regarding adjudicator conflicts – **agreed**

In broad terms the group decided that more discussions should take place centred around apparent process transparency and management of conflicting interests of the PNBA as appointing body and panel membership including questions to ask (as is done by other adjudicator appointing bodies) and the way such questions should be framed. – to be taken forward by Ivor Collett to form a working party.

- Amend the Guidance Notes to draw attention to the parties' ADR obligations – **this should be in a form to be approved by the CPR Rules Committee**
- Working party to consider the issue of QOCs – **this issue was considered to be a matter for the Ministry of Justice and not the Pilot Group.**

8 December 2017

ADJUDICATION SCHEME TRIAL FOR PROFESSIONAL NEGLIGENCE CLAIMS LAUNCH DATE

25 MAY 2016

PILOT PACK

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INTRODUCTION FROM
MRS JUSTICE CARR AND MR JUSTICE FRASER

Pilot Scheme for Professional Negligence Claims

Adjudication has, in the construction sphere, been seen as a considerable success since its conception in 1996, helping to resolve a great many disputes without the need for the parties to become involved in litigation or arbitration. They still have the opportunity to do so, of course, but in a very large number of cases both parties are content to accept the decision of the adjudicator. They therefore have a decision much faster, and very much cheaper, than they would were they to litigate.

Due to these advantages a pilot scheme for adjudication in professional negligence disputes was launched under the supervision of Mr Justice Ramsey in February 2015. This scheme is now being re-launched in a much expanded version. The main changes are the availability of the scheme to claims against a wider range of professional, removal of the limit on the value of the dispute, which had been fixed at £100,000, and the introduction of “banding” in terms of the cap on the fee payable to the adjudicator. The Scheme Rules have been refined, and are now accompanied by detailed guidance notes. These notes provide useful explanation to those not familiar with the operation of adjudication.

These changes have been accomplished by a working party set up at the direction of Master of the Rolls and have included representatives from the Ministry of Justice, the Professional Negligence Bar Association, the Association of British Insurers and the Professional Negligence Law Association. Particular credit must go to Ben Patten QC who has borne the brunt of the re-drafting. Alternative Dispute Resolution in all its forms presents real advantages to parties involved in disputes. This scheme remains fully voluntary and both parties to a dispute must agree to adopt it.

We commend it.

Mrs Justice Carr and Mr Justice Fraser

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FEEDBACK

The Pilot Group very much hope that the Adjudicator and Parties for those that take place, but also those that make invitations or settle after engaging the Pilot will agree to provide feedback to

The Pilot Independent Reviewer:

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ADJUDICATOR PANEL CONTACT:

Professional Negligence Bar Association – Chairman - currently Ben Hubble QC – 4 New Square Chambers Lincolns Inn London WC2A 3RJ – Tel 0207 822 2000 – email: l.stewart@4newsquare.com

FOR ANY QUERIES CONTACT:

Professional Negligence Lawyers Association - Katy Manley – President
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RULES OF THE PROFESSIONAL NEGLIGENCE
ADJUDICATION SCHEME

Introduction

1. The following scheme applies where the parties to a dispute agree to refer that dispute to adjudication under the Professional Negligence Adjudication Scheme. Paragraphs 12, 14 and 15 provide alternative ways in which the scheme can operate, but the parties may vary the terms of the scheme as they see fit, subject always to the agreement of the Adjudicator.

Commencement of Adjudication

2. A “dispute” arises where:
 - 2.1. a claimant alleges that the defendant/respondent acted in breach of the duties owed by him to the claimant and seeks a remedy arising from that alleged breach of duty and
 - 2.2. the defendant/respondent denies that allegation and/or denies that the claimant is entitled to that remedy; and
 - 2.3. both the claim and the denial are contained in writing.
3. A dispute suitable to be referred to adjudication may:
 - 3.1. be the entire disagreement between the parties; or
 - 3.2. be a disagreement which is one of a number of “disputes” between the parties or which forms part of a larger “dispute”;
 - 3.3. involve more than one defendant/respondent and, if all parties agree, related disputes between a number of parties can be referred to adjudication together (save that any change in the Rules requires the agreement of the Adjudicator).
4. If both the claimant and the defendant/respondent agree in writing to be bound by the provisions of this scheme, which agreement involves identification of the dispute to be referred, a claimant or a defendant/respondent (“the Referring Party”) may refer a dispute to adjudication by serving a notice of intention to refer the dispute to adjudication upon the other party (“the Notice of Referral”).
5. The Notice of Referral shall:
 - 5.1. set out the dispute, identifying the disputed issues which the parties require the Adjudicator to determine;
 - 5.2. identify the parties to the dispute;

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5.3. attach a copy of the agreement in writing to be bound by the provisions of the scheme.

6. The Referring Party shall, at the same time, send a copy of the Notice of Referral to the Appointing Body, together with either (i) a request for the appointment of an adjudicator or (ii) notice of the identity of an agreed individual who has agreed to act as the adjudicator. The Appointing Body is the Chairman of the Professional Negligence Bar Association.
7. Within five working days of receipt of the Notice of Referral the Appointing Body shall either:
- 7.1. nominate an adjudicator (“the Adjudicator”) and shall, at the same time, communicate the fact of that nomination to the parties; or
 - 7.2. if the parties have agreed upon the identity of an individual nominated to act as the adjudicator (“the Adjudicator”), shall write to the parties and to the Adjudicator confirm the nomination.

Unless otherwise agreed with the Appointing Body, the parties agree to the Adjudicator being appointed on the terms and conditions attached (“the Adjudicator’s Terms”).

8. Within five working days of his nomination the Adjudicator shall write to the parties:
- 8.1. confirming whether he is able to accept the appointment and on what terms (including his hourly rate);
 - 8.2. making any appropriate disclosures pursuant to paragraph 1.2 of the Adjudicator’s Terms;
 - 8.3. sending the Adjudicator’s Terms signed by the Adjudicator to the parties for signature by each of them and return to him.
9. The date of the Adjudicator’s appointment shall be the date of receipt by him of the Adjudicator’s Terms signed by all parties.
10. Within five working days of his appointment the Adjudicator shall write to the parties:
- 10.1. confirming his appointment, the date of that appointment and his agreement to abide by the Adjudicator’s Terms;
 - 10.2. giving directions for the exchange of witness evidence and/or submissions so that (subject to paragraph 14.3 below) he can provide a decision to the parties within 56 days of the date of his appointment (which period may be extended by agreement between the parties) or, in his absolute discretion, fixing a telephone conference to discuss such directions.

Conduct of the Adjudication

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11. The Adjudicator will decide the dispute on the facts and according to the law and:

- 11.1. may decide questions relating to his own jurisdiction (subject always, in the event the parties agree to be bound in paragraph 12 below, to the right of any party to challenge his decision as to his jurisdiction by legal proceedings or in arbitration);
- 11.2. may take the initiative in ascertaining the facts or law;
- 11.3. may call for the production of documents by either party;
- 11.4. will generally decide the dispute on documents alone but may, in an appropriate case, ask the parties to attend a hearing and/or to participate in a telephone conference;
- 11.5. will act as impartial adjudicator and not as the servant or agent of the parties;
- 11.6. will comply with the principles of procedural fairness.

12. The Decision of the Adjudicator:

- 12.1. will be in writing;
- 12.2. will be a reasoned decision, which tells the parties why they have won or lost;
- 12.3. [will be binding upon the parties until the dispute is finally determined by legal proceedings, by arbitration (if any relevant contract between the parties provides for arbitration or the parties otherwise agree to arbitration) or by agreement]
[will be binding upon the parties subject only to paragraph 17 below]*.

**Delete one of the two alternatives*

13. The Adjudicator may on his own initiative or on the application of a party correct his Decision so as to remove a clerical or typographical error arising by accident or omission. Any correction of the Decision must be made within five working days of the delivery of the Decision to the parties. As soon as possible after correcting the Decision in accordance with this paragraph, the Adjudicator must deliver a copy of the corrected Decision to each of the parties to the contract. Any correction of the Decision forms part of the Decision.

14. The Adjudicator:

- 14.1. [shall be entitled to direct one party to pay all or part of his own fees and disbursements or may direct that his own fees and disbursements be paid by the parties in whatever proportion he sees fit (and the parties shall be jointly and severally liable for those fees and disbursements notwithstanding any direction that one party should pay those fees and disbursements or that they be apportioned in any way), but shall have no power to award any party its other costs of and occasioned by the dispute.

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- 14.2. [shall be entitled to direct one party to pay all or part of his own fees and disbursements or may direct that his own fees and disbursements be paid by the parties in whatever proportion he sees fit (and the parties shall be jointly and severally liable for those fees and disbursements notwithstanding any direction that one party should pay those fees and disbursements or that they be apportioned in any way), and to direct one party to pay all or part of the costs and disbursements of the other party and shall do so either in his complete discretion or, where the parties have specifically agreed his jurisdiction, according to the terms of that agreement]*

**Delete one of the two alternatives. The Parties are directed to the Guidance Note for assistance as to how they might specifically agree the Adjudicator's jurisdiction to award costs.*

- 14.3. Unless otherwise stated, all sums payable by way of fees, disbursements or costs shall be paid within 28 days of the determination of the sums which a party is required to pay and the Adjudicator shall be entitled to require the payment of his own fees and disbursements before the Decision is released to the parties, in which event the 56 day period in paragraph 10.2 above shall be automatically extended until those fees and disbursements are paid.

15. All documents produced for the purposes of the adjudication, all statements made during the conduct of the adjudication and the Decision will be private and confidential as if the same were documents produced for, or statements made in, the course of a mediation save that:

- 15.1. [the Decision will cease to be confidential within 21 days of its release to the parties;]
[the parties may refer to the Decision in the context of enforcement proceedings under paragraph 17] *;

**Delete one of the two alternatives*

- 15.2. in the event that the parties have agreed in paragraph 12.3 to be bound until the dispute is finally determined, all documents produced for the purposes of the adjudication, all statements made during the conduct of the adjudication and the Decision itself may be disclosed in subsequent legal proceedings or arbitration as referred to in paragraph 12.3;

- 15.3. nothing in this provision shall be taken as requiring any party to disclose documents or reveal information which is the subject of legal or "without prejudice" privilege.

16. In the event that the Adjudicator resigns, the parties may seek the appointment of another adjudicator by the Appointing Body or dispense with adjudication.

Enforcement

17. The parties agree that any sum which the Adjudicator decides is payable by way of compensation or damages shall become due and payable with 21 days of the Decision. The Decision shall be enforceable by proceedings and an application for summary judgment in the Courts. On such application, subject to any challenge on the basis of jurisdiction or procedural unfairness, it is will be no defence that the Adjudicator erred in fact or law.

Rights of the Adjudicator

18. By agreeing to refer the dispute to adjudication under the scheme the parties agree that the Adjudicator may, in his own right, enforce those terms of the scheme which govern his entitlement to fees and disbursements and his limitation of his liability. Solely to the extent necessary to do so, he may refer to the Decision for that purpose.
19. The Adjudicator is not liable for anything done or omitted in the discharge of his functions as adjudicator, save (1) if and to the extent that he acts in bad faith and (2) that nothing in this provision shall prevent any party making a complaint to an appropriate Regulator concerning matters of service or misconduct.

Other Proceedings

20. The parties agree that, if in paragraph 12.3 the parties have agreed to be bound by the Decision subject only to paragraph 17 any existing legal proceedings shall be stayed. If in paragraph 12.3 the parties have agreed to be bound until the dispute is finally determined:
 - 20.1. any legal proceedings already commenced shall be stayed as soon as practicable after the Notice to Refer and no application to lift the stay will be made before 56 days from the date of the Decision;
 - 20.2. save for enforcement proceedings under paragraph 17, no proceedings shall be commenced, until 56 days after the date of the Decision, but nothing in this provision shall prevent a claimant from commencing proceedings when required to do so for limitation purposes.

Other

21. The parties may only adapt these Rules by agreement in writing. If the change is made before the appointment of the Adjudicator it should be drawn to his attention and his agreement is required if he is to act. If the change is made after the appointment of the Adjudicator his agreement is required if he is to continue to act.

Ben Patten QC - after discussion with PNLA - PNBA – MOJ – ABI – RPC

ADJUDICATION SCHEME FOR PROFESSIONAL NEGLIGENCE CLAIMS

GUIDANCE NOTES

1. These Guidance Notes are intended to provide guidance in respect of the “Rules for the Adjudication Scheme for Professional Negligence Claims”. In the event of a conflict between the Guidance Notes and the Rules, the Rules take precedence.

Introduction

2. The Adjudication Scheme for Professional Negligence Claim (“the Scheme”) is an idea based upon the statutory adjudication scheme which enables parties to a construction dispute to obtain a swift interim decision on disputes. The intent behind the scheme is to enable parties to a professional negligence dispute to obtain a quick adjudication of their dispute, at relatively minimal cost, which will be binding upon the parties unless one or both of them are so dissatisfied that they wish to take the matter to a court or arbitration hearing. It should be seen as a form of ADR. It is not intended to supplant other forms of ADR (although it may do so) and it does not oust the jurisdiction of the court or arbitral tribunal, but in an appropriate case it does offer parties to a professional negligence dispute the opportunity to obtain a reasoned decision which will either resolve the dispute or steer the parties towards resolution.

Essential Elements of the Scheme

3. Detailed guidance on the Scheme is provided below, but its critical elements are as follows:
 - 3.1. the parties must agree to be bound by the Rules (participation in the Scheme is entirely voluntary, but once committed the parties are required to see the process through);
 - 3.2. once the parties have agreed to participate, an Adjudicator will be selected by the Chairman of the Professional Negligence Bar Association from a panel of barristers who specialise in professional negligence disputes;
 - 3.3. the Adjudicator will ask for evidence and written submissions from the parties; she/he *may* request a short hearing;
 - 3.4. within 56 days of her/his appointment the Adjudicator will provide a reasoned written decision;
 - 3.5. that decision will be legally binding upon the parties unless and until altered by a court or arbitral tribunal (unless the parties have opted for finality);

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- 3.6. the parties will be jointly liable for the Adjudicator's costs, which will be within a set limit, but the Adjudicator will have the power to require that the losing party pays all or most of her/his costs (the parties may agree that she/he will have a broader power to award costs);
- 3.7. unless the parties agree otherwise, the Adjudicator's decision will not be confidential.

Which Disputes are Appropriate for the Scheme ?

- 4. The Scheme is intended for "professional negligence" disputes. There is no precise definition of "professional negligence", but as a generality the Scheme is intended to apply to disputes between professional persons such as lawyers, valuers, accountants and so forth and their clients. In the usual case the professional person is likely to be represented by solicitors appointed by insurers, but that is not always so. "Professional negligence" disputes are thought to be particularly suitable for a scheme of this kind because usually, but not always, the facts are reasonably clear from documents and usually, but not always, the issue of whether a breach of duty has occurred can be ascertained without the assistance of experts or with very limited expert assistance.
- 5. "Dispute" within the meaning of the Rules is deliberately broad. It may mean everything that a claimant complains about. It may mean one aspect of the claimant's complaint. If the disagreement between the parties is made up of a number of discrete areas of contention the parties *may* decide that only one or some of these should be referred to adjudication. Thus, for example, a claimant's case against a professional person may involve a large number of disputed issues, but the case may stand or fall by the resolution of one of them. Alternatively, the resolution of one aspect of the claimant's overall "dispute" may unlock settlement.
- 6. However, not every "professional negligence" dispute will be suitable for the Scheme.
 - 6.1. Disputes which *genuinely* require complex expert evidence to enable a decision to be made on issues of breach of duty (or, possibly, causation) may not be suitable; for these reasons the Scheme is not thought to be suitable to many medical negligence cases;
 - 6.2. disputes which *genuinely* require witness evidence (and extensive cross-examination) to enable a decision to be made on issues of breach of duty (or, possibly, causation) may not be suitable; for example, disputes which centre upon allegations of dishonesty are probably unsuitable;
 - 6.3. disputes where, for some other reason, the losing party to an Adjudication is reasonably likely to think that Adjudication did not offer a fair platform for that party to present its case may not be suitable; professional negligence disputes vary enormously and there may be disputes which are unsuitable because of unusual facts (for example, disputes where the evidence of a third party is genuinely critical); the Scheme is only likely to be effective as a

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means of ADR if the participating parties go into it believing it offers a real prospect of providing a fair result;

- 6.4. parties to disputes involving construction professionals who *may* have the availability of the statutory scheme should give very careful consideration to the desirability of the Scheme.
7. The Scheme is thought to be particularly useful for disputes where the input of an experienced practitioner who is entirely independent of the parties might assist where a crucial point at issue has become an obstacle to settlement. The Adjudicator's decision on the issue then provides an answer which is binding unless and until the "losing" party takes the matter further after the Adjudication.
8. Some disputes may be unsuitable for the Scheme unless it can be adapted (with the agreement of the Adjudicator). For example it may be that a critical dispute involves three or more parties – typically a claimant and a number of separate professional persons. The Rules are not drafted with "multi-party" adjudication in mind, but there is no reason why the parties cannot agree to adapt the Rules so that this is possible. The Scheme is entirely consensual.
9. It would be wrong to be prescriptive about the kinds of disputes which are particularly suitable for the Scheme. However, as a generality, the Scheme may be a particularly attractive ADR option in the following circumstances;
- 9.1. disputes where the *real* financial value of the claim is modest, so that the legal costs of taking the claim all the way to trial or arbitral hearing (particularly disputes which are at risk of becoming disputes about costs) will be disproportionately high;
- 9.2. disputes where one or other party lacks the financial resources to take the claim all the way to trial or arbitral hearing;
- 9.3. disputes where mediation has failed or is likely to be ineffective because there is such a difference of opinion on the merits that the chances of consensual resolution are slim;
- 9.4. disputes where, perhaps for costs reasons, the parties prefer adjudication to mediation;
- 9.5. disputes where there is a difference of legal opinion as to the proper meaning of a document, or the legal significance of a series of well recorded events.

When can the Scheme be used ?

10. The Scheme can be employed at any time during the course of a dispute. Plainly the chief benefit of the Scheme as a means of ADR is that it can be employed early and in time to effect costs savings, but in just the same way as the parties may decide to go to mediation after disclosure or exchange or witness statements or exchange of experts' reports, the Scheme is available as a form of ADR at any point.
11. The Rules presuppose that a "dispute" has been, or can be, clearly identified. That indicates that, absent unusual facts, the parties will generally wish to pursue the pre-action protocol process at least to the stage of identifying a dispute (and the reasons for a dispute) before they consider proceeding with the Scheme. The Rules envisage that this has happened, although there is nothing to prevent the parties adapting the Rules if the circumstances justify that course.

How is the Scheme Engaged ?

12. The parties must agree *in writing* that a dispute will be referred to Adjudication under the Scheme. Agreement here presupposes agreement to two things: (1) the parties must agree what "dispute" is being referred and (2) they must agree to be bound by the Rules. Both aspects of the agreement require some commentary.
13. One of the risks in this process is that Party A will understand that it has agreed to refer dispute X to Adjudication whilst Party B will understand it has agreed to refer dispute Y. The disagreement may simply be a matter of presentation/characterisation but it may also be a matter of substance. Although the Rules accord the Adjudicator the power to determine questions relating to his own jurisdiction, it is plainly undesirable that an adjudication proceeds against the background of a dispute as to what it is about. There is no magic formula for preventing such disputes and it would be undesirable for the parties to have to elaborate every argument they intended to advance in order to identify what it is that is to be decided by the Adjudicator. It is recommended that parties take care to attempt to define the dispute. It may be desirable to do so by reference to identified parts of the pre-action correspondence.
14. In agreeing to be bound by the Rules the parties need to bear in mind that the Rules provide alternative options as to the finality of the Decision, the Adjudicator's power to award costs and confidentiality. These *must* be completed as part of the agreement in writing. A copy of the completed Rules should be provided to the Appointing Body. Agreement to be bound by the Rules does not mean that the Rules cannot be adapted subsequently (for example should one party decide that it wishes the Decision to be confidential). However, at that stage changes can only be consensual and a row about what was intended could derail the process. The Adjudicator has no power to change the Rules and it is critical that the parties give full

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consideration to the way in which they intend the Adjudication to proceed before they agree to engage in the Scheme.

Who is the Adjudicator ?

15. The Adjudicator will be a senior barrister experienced in professional negligence disputes. Subject to the matters below, she/he will be selected by the Chairman of the Professional Negligence Bar Association from a panel drawn up for the purposes of the Scheme. She/he may be either a “senior junior” barrister or a QC, depending upon the nature of the case and the value of the claim. She/he will be someone unconnected with the parties. Before undertaking the appointment the Adjudicator will consider the nature of the dispute and the time limits and by accepting the appointment confirms that she/he is competent to provide a Decision and (subject to unforeseen issues) can do so within the time envisaged by the Rules.
16. The identity of the members of the panel will be publicly available and the list will be updated from time to time. That means that the parties can inform the Appointing Body if there is someone whom (for whatever reason) they do not wish to be appointed. It also means that they can express a joint preference for who they would like to appoint, although there is no guarantee this person will be available. Parties are encouraged to provide the Appointing Body with such information as to the nature of the dispute and – importantly – any financial restraints under which they may be operating, so that the Appointing Body can select the right person.
17. There is nothing to stop the parties bypassing the Appointing Body altogether if they have jointly agreed on an Adjudicator and that person has agreed to act.

What will it cost ?

18. This is an important consideration and it is raised at this point because (a) the Appointing Body will attempt to nominate a barrister appropriate to the financial realities of the dispute and (b) any Adjudicator agreeing to act will provide the parties with her/his hourly rates on appointment.
19. One of the key drivers behind the Scheme is that it should be a cost-effective way of enabling parties to resolve disputes. The cost of the Decision is a critical element. In an ideal world, cases of modest value would “cost” modest sums to resolve, but the reality is more complicated. Modest cases may involve substantial quantities of documentation, or extremely difficult points of law. If the Adjudicator decides she/he requires a hearing (see below) that can add to the costs. By contrast, Decisions in larger value cases may involve a relatively short, if knotty, point of law or construction.

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20. As a matter of general approach, parties considering Adjudication under the Scheme may wish to do their best to agree with each other, and then inform the Appointing Body, of their cost anticipation.

The following guidance may be helpful:

Category of Dispute	Decision Cost Ceiling	Comment
“A”	£5,000 (excl VAT)	Cases with small value and where the parties (or one of them) faces resourcing difficulties. Parties may have to accept that an Adjudicator trying to deliver a Decision within this cost bracket is going to be less senior may spend less time than he or she would ideally like to in reaching the Decision
“B”	£10,000 (excl VAT)	Cases with greater value, but where the likely legal costs of proceedings are none the less significant when considered as a proportion of the value of the claim.
“C”	Unlimited	Unusual cases falling into neither “A” nor “B”. This is not an invitation to the Adjudicator to charge what he or she wishes, but there may be cases where, because of their complexity, the issues involved and/or the seniority of the Adjudicator the parties are prepared to go over the £10,000 ceiling

21. If the Appointing Body has this kind of information, it can be guided as to who to appoint and that person appointed can, if appropriate, raise the issue of her/his fees at an early stage with the parties.
22. Of course another element of cost (and one which may be as important) is what the parties choose to spend on contesting the Adjudication. This will depend entirely upon their resources, their perception of the need to expend legal costs and the issues relevant to the dispute. It is to be hoped that parties will bear in mind the importance of proportionality in expending costs. For most professional negligence disputes Adjudicators are likely to wish to see critical documents and short written submissions. Occasionally they may be assisted by oral submissions. There may be cases where, exceptionally, an adjudicator chooses to ask for a short evidential hearing. By and large it would serve to undermine the utility of adjudication as a form

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of ADR if the parties chose to treat it as a form of litigation. This sentiment is reflected in the way in which the Rules treat costs (see below).

How will the Adjudication Proceed ?

23. The Adjudicator is appointed once the parties have signed her/his terms and conditions. Once appointed the Adjudicator will contact the parties so as (1) to confirm her/his appointment (2) give the parties details of her/his hourly rates and (3) give directions or fix a telephone conference so that directions can be given.
24. The directions will be appropriate to the nature of the dispute. In the usual case the Adjudicator will set a timetable for the service of evidence and submissions. She/he may express a view on what form “evidence” might take. It could consist of the provision of a solicitor’s file. It could be witness statements attaching documents. Whilst the Rules do not envisage a conventional process of disclosure they do permit the Adjudicator to call for one party to provide documents. It is very important to bear in mind that the Adjudication will take a maximum of 56 days from the date of appointment. The Adjudicator is likely to fix tight deadlines. There will be little or no room for slippage. The parties are encouraged to anticipate this process by ensuring that they do not agree to refer a dispute to Adjudication unless they are ready willing and able to provide evidence and submissions within a few weeks of the appointment. It is likely to help if the parties give some thought at the outset to an agreed bundle of the key documents which can form the core of the evidence which the Adjudicator will require.
25. The Adjudicator has broad powers enabling her/him to come to a decision. She/he can decide what is in dispute and what is not. She/he can pursue lines of argument which are not pursued by either party. She/he is constrained by the rules of procedural fairness so that the parties know if and when this happens, but she/he is not bound either to disregard an argument because one party did not press it, or spend a long time considering a particular facet of the dispute just because one party thinks it important.
26. The Adjudicator will decide procedure. She/he may decide for simultaneous exchange of evidence or submissions or she/he may decide for sequential exchange. She/he may decide to ask for a short hearing for submissions, or a telephone conference, or the exercise may be conducted entirely on the documents. In some circumstances it may be appropriate for there to be a short hearing or a site inspection.
27. At the end of the process and within 56 days of appointment the Adjudicator will produce a reasoned written Decision. The Decision may not cover every single point raised, but it will address the most important points and will enable the parties to tell why they have won or lost. Adjudicators will be acutely aware of the importance to the parties of the Decision being seen to be fair and (in so far as is practicable given resources) comprehensive.

What is the status of the Decision ?

28. What distinguishes Adjudication from other forms of ADR such as early neutral evaluation is that the Decision is binding. If the Adjudicator decides that the claimant is entitled to compensation, compensation has to be paid by the defendant/respondent within 21 days of the Decision. If payment is not made the sum payable is a debt which can be enforced summarily in the Courts. If the Adjudicator decides that the claimant's claim fails the claimant has no entitlement.
29. There is no appeal, but (unless the parties have elected for finality) the Decision is only temporarily binding: it stands unless and until the dispute is determined by a court or an arbitral tribunal. That means that the losing party has to live with the consequences of the Decision unless and until a court or arbitral tribunal gives a different ruling on the dispute. In practice this means that a claimant would have to start proceedings (or recommence proceedings which have been stayed) in order to bring her/his professional negligence claim against the defendant/respondent. Alternatively the defendant/respondent would have to commence proceedings to seek declaratory relief that it was not liable or that the compensation ordered by the Decision was excessive. The party bringing those proceedings might be at special costs risk if, having taken the matter to court/arbitration, the judge or arbitral tribunal decided against that party.
30. The parties can elect for finality. When they agree to refer a dispute to Adjudication they can decide that they will be bound by the result. This may be an attractive option, particularly for a modest claim where legal costs of continuing the dispute will be disproportionate.

What Costs Orders can be made ?

31. It is very important that before the parties agree to adjudication under the Scheme they consider how they want the issue of legal costs to be dealt with. Paragraphs 14.1 and 14.2 of the Rules provide the parties with a choice: they can either limit the Adjudicator's power to award costs to his power to determine which party is liable for his own fees and disbursements (paragraph 14.1), or the parties can decide to give her/him some other power which could be the power to award the costs of the entire dispute, or could be something else (paragraph 14.2).
32. In the simple case where the Adjudicator only has the power to order the parties to bear her/his fees and expenses in such proportion as she/he sees fit, that power will be exercised in a very similar fashion to the power of a court or an arbitral tribunal to award costs. She/he will have a very broad discretion but the guiding principle will be who has won and who has lost. The Adjudicator will not have the power to award one party any part of her/his/its own costs of

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fighting the Adjudication. Still less will he/she have the power to award one party her/his/its costs of and occasioned by the dispute. If the parties want the Adjudicator to have these limited powers they should select the option of paragraph 14.1. If the parties wish to give the Adjudicator a different power over the award of costs they should select the option of paragraph 14.2. The default position under paragraph 14.2 is that the Adjudicator has the power to award the costs of and occasioned by the dispute. This would include her/his own fees and disbursements, the legal costs of fighting the Adjudication and the other legal costs of the dispute (for example the costs of early investigations by solicitors and legal advice). Here too the Adjudicator would approach entitlement to costs in a very similar fashion to the power of a court or an arbitral tribunal to award costs. She/he will have a very broad discretion but the guiding principle will be who has won and who has lost.

33. But the parties are not limited by the default position. Depending on their particular needs, they may decide, before they agree to Adjudication, that they want the Adjudicator to exercise a different power to award costs. One possibility is that the parties decide that irrespective of the result they do not want any award of costs. They can direct that the Adjudicator's fees and disbursements will be paid by them equally, or in particular proportions irrespective of the result and that she/he shall have no power to award costs. Many mediations proceed on this basis and it should be kept in mind that Adjudication is a form of ADR. Alternatively the parties may decide that the Adjudicator shall have power to award her/his own fees and disbursements and the parties reasonable costs of fighting the Adjudication, but not any wider costs. Still further, they could give the Adjudicator the power to award the costs of the dispute, but only from a certain date.
34. The parties should be aware that, provided she/he is given clear and specific powers, the Adjudicator can approach costs in a much more sophisticated way than would be the case under the general discretion applied by courts and tribunals. Examples of limited costs shifting regimes which the parties could impose upon the Adjudicator include:
 - 34.1. costs awards only if the Adjudicator considers that a party has behaved "unreasonably";
 - 34.2. costs capping – in the event that the Adjudicator awards costs they will be limited or capped to an amount no higher than say £20,000
 - 34.3. costs capped by reference to the award – for example a successful claimant would not recover costs exceeding the value of compensation
 - 34.4. where the claimant is unsuccessful no costs liability beyond available BTE / ATE cover.
35. The intention behind giving the parties the ability to decide their own costs regime is to make it easier for them to agree to use Adjudication under the Scheme as a form of ADR. Parties are encouraged to have regard to finding the costs regime that is most likely to make Adjudication attractive to both of them.
36. Depending upon the powers accorded to the Adjudicator and his or her decision one party may be liable for all or most of the Adjudicator's fees and disbursements. The Adjudicator will invoice the parties accordingly. However, it is important to point out that, notwithstanding that

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decision, as in construction adjudication the parties are ultimately jointly and severally liable for the Adjudicator's fees: if the losing party fails to pay the Adjudicator the winning party will have to do so, although she/he can then recover those costs from the losing party.

Confidentiality

37. The process of Adjudication is intended to be confidential but, unless the parties have agreed to the contrary, the Decision is not. This may seem irrational, not least because the Decision will necessarily refer to the documents and submissions from which it is drawn, but there is a reason for it. As has been stated, Adjudication is intended to be a form of ADR. Whilst it is envisaged that most cases will be resolved because the losing party will abide by the Decision, experience in construction adjudication has shown that a substantial number of cases are resolved by agreement during the process of Adjudication. Moreover even after an Adjudicator produces her/his Decision, the parties may decide, as part of a resolution of the dispute (or more likely, a larger dispute of which the referred dispute forms part), that they both want the details to remain confidential. Confidentiality can be an important issue to parties who are close to settlement.
38. On the other hand, the reason that the Scheme provides for the option of the Decision becoming "open" is that many claimants (and some defendants/respondents) ascribe value to the notion of public evaluation or declaration. That will not always be the case. The parties can opt for confidentiality from the outset. Thus for example, if the parties have elected arbitration as their primary means of dispute resolution because confidentiality is important to one or both of them, it may deter the parties from employing the Scheme if they cannot ensure that the process including the Decision is confidential.
39. It is important to note that the Adjudicator must keep all the information provided to him by way of evidence and legal submissions confidential. This is provided for in her/his standard terms.

Ben Patten QC - after discussion with PNLA – PNBA – MOJ – ABI – RPC

TRIAL ADJUDICATORS

APPOINTED BY PROFESSIONAL NEGLIGENCE BAR ASSOCIATION

In alphabetical order, as follows; please see their websites for full details of their practices.

Spike Charlwood, Hailsham Chambers. A past winner of Professional Negligence Junior of the Year, he has also co-organised the PNBA's Lawyers' Liability Day for each of the last 4 years, and writes for 'Professional Negligence and Liability' (ed. Simpson).

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Simon Monty QC, 4 New Square. As well as being a practising barrister, Simon is a mediator, deputy High Court Judge, and former PNBA committee member.

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Leigh Ann Mulcahy QC, 4 New Square. First Counsel to the Welsh Government, she is a mediator and is particularly knowledgeable about the interaction between professional liability and personal injury/clinical negligence claims.

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STANDARD TERMS OF INSTRUCTION FOR ADJUDICATOR

ADJUDICATION AGREEMENT

AGREEMENT MADE THIS day of **201-**

BETWEEN:

Party A: [Name]

[Address]

[Telephone]

[Email]

Party B: [Name]

[Address]

[Telephone]

[Email]

(together referred to as “the Parties” and each a “Party”)

AND:

The Adjudicator: [Name] [Address] [Email] [Telephone]

1. The Appointment of the Adjudicator

- 1.1. Pursuant to the Professional Negligence Adjudication Scheme, the Adjudicator has been appointed to adjudicate a dispute in accordance with the Rules of the Scheme (“the Rules”) and the Parties have agreed to be bound by these terms. The dispute is identified in the Notice of Referral as defined in the Rules.
- 1.2. The Adjudicator has disclosed to the Parties to the best of his knowledge any prior dealings he has had with either of them and any interest he has in the dispute. Subject to the terms of any such disclosure, the Adjudicator and the Parties agree that the Adjudicator is neutral and independent from the Parties and the dispute and that the Adjudicator does not give legal advice.
- 1.3. If at any stage the Adjudicator becomes aware of any circumstances which might reasonably be considered to affect the Adjudicator’s capacity to act impartially, the Adjudicator will immediately inform the Parties of those circumstances. The Parties will then confer and if agreed may continue with the Adjudicator. In the event that the Adjudicator resigns or can no longer continue, the Parties may seek the appointment of another Adjudicator by the Appointing Body or dispense with adjudication.

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- 1.4. The Adjudicator shall not be liable to any of the Parties for any act or omission or default of the Adjudicator in connection with the adjudication other than as a result of his own wilful misconduct or bad faith. Nothing in this provision shall prevent a Party from making a complaint to an appropriate Regulator concerning matters of service or misconduct.
- 1.5. The Parties agree that they will not seek to call the Adjudicator to give evidence in any judicial or arbitral proceedings arising out of or in any way in connection with the subject matter of the dispute. Any notes of the Adjudicator are confidential to the Adjudicator and shall not be available to the Parties at any time, nor subject to subpoena for production as evidence in any court, tribunal or other judicial hearing or proceeding.
- 1.6. Any Party who seeks (whether successfully or not) to require the Adjudicator to give evidence and/or provide documents concerning the adjudication in any arbitral or judicial proceedings arising out of or in any way in connection with the subject matter of the dispute hereby agrees absent wilful misconduct to indemnify the Adjudicator against any costs, expenses or disbursements including legal expenses incurred in responding to any such attempt by that Party.

2. The Adjudication

- 2.1. The Adjudicator will decide the dispute according to the Rules.
- 2.2. The Adjudicator may communicate with a Party or the Parties orally or in writing, but will endeavour to communicate with them jointly.
- 2.3. The Adjudicator will decide issues of costs according to the Rules.
- 2.4. The Adjudicator will treat all documents produced for the purposes of the adjudication and all statements made during the conduct of the adjudication as private and confidential as if the same were documents produced for, or statements made in, the course of a mediation.
- 2.5. All documents and copies of documents produced by either of the Parties to the Adjudicator will be securely destroyed by the Adjudicator at the end of the adjudication process.
- 2.6. The Adjudicator will treat the Decision as private and confidential as if the same were a document produced for or in the course of a mediation if the Parties have elected to treat the Decision as confidential pursuant to the Rules.
- 2.7. The Adjudicator will not accept appointment as an arbitrator in or act as an advocate in or provide advice to a Party to an arbitral or judicial proceeding relating to the dispute.

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3. The Adjudicator's Fees

- 3.1. The Adjudicator will charge a fee commensurate with the time expended in producing the Decision.
- 3.2. The Adjudicator will provide the parties with his hourly rates on appointment.
- 3.3. As soon as practicable after appointment, which may be after receipt of evidence and submissions, the Adjudicator will provide an estimate of his fees.
- 3.4. In the event that the Adjudicator incurs expenses in conducting the Adjudication these shall be recoverable in the same way as fees.
- 3.5. After provision of the Decision the Adjudicator will address a VAT invoice to either or both of the Parties, depending upon his Decision, or their solicitors as their agents, and the fees and any expenses will be paid within 28 days of the date of the invoice. In his absolute discretion, the Adjudicator shall be entitled to require the payment of the Adjudicator's fees and any expenses before the Decision is released to the Parties, in which event the 56-day period in the Rules shall be automatically extended until those fees and any expenses have been paid.
- 3.6. In the event of the parties resolving the dispute before the Adjudicator produces the Decision, or otherwise deciding not to continue with the Adjudication, the Adjudicator will be remunerated for the time actually spent working on the Adjudication together with any incurred and non-refundable expenses.

4. Legal Status

- 4.1. These Terms shall be subject to the Law of England and Wales and the Courts of England and Wales shall have exclusive jurisdiction to hear and determine all disputes that may arise out of any agreement between either party and the Adjudicator pursuant to these terms and the Rules.

The Parties and the Adjudicator have executed this as an Agreement on the date set out above.

Party A.....

Party B

Adjudicator

PRELIMINARY REVIEW OF THE PROFESSIONAL NEGLIGENCE ADJUDICATION PILOT SCHEME

1. Background

- 1.1. The initial pilot scheme for adjudication in professional negligence disputes ('the Pilot Scheme') was launched under the supervision of Mr Justice Ramsey in February 2015. The Pilot Scheme was re-launched on 25th May 2016 under the supervision of Mrs Justice Carr and Mr Justice Fraser in a much expanded version.
- 1.2. The re-launched Pilot Scheme is now available to claims against a wider range of professional; it removes the limit on the value of the dispute (which had been fixed at £100,000); and it introduces "banding" in terms of the cap on the fee payable to the adjudicator. The Rules which accompany the Pilot Scheme were also refined and are now accompanied by detailed guidance notes. The Pilot Scheme is fully voluntary and both parties to a dispute must agree to adopt it.
- 1.3. A working party was set up at the direction of the Master of the Rolls and included representatives from the Ministry of Justice, the Professional Negligence Bar Association (PNBA), the Association of British Insurers (ABI) and the Professional Negligence Law Association (PNLA). The PNBA was named as the appointing body, with a panel of five adjudicators drawn from its members.

2. Promotion of the re-launched Pilot Scheme

- 2.1. Members of the working party have been proactive in marketing and promoting the Pilot Scheme to their respective members as well as more generally to the wider legal and insurance community. This has been done by advertising the pilot via organisational websites; presentations at conferences such as the Professional Indemnity Forum and the PNLA Annual Conferences in 2016 and 2017; presentations at the Lloyd's Market Association; and promotion at training sessions held at law firms across the major cities. Last year I was invited to attend the annual conference of the Adjudication Society in Birmingham where I discussed the Pilot Scheme with delegates.

3. Collating feedback

- 3.1. As well as obtaining feedback in respect of the cases which went through the Pilot Scheme, I have also obtained information on the number of proposals made (but rejected) to the Pilot Scheme and included the general views and observations on the perceived strengths and weaknesses of the Pilot Scheme. I have obtained feedback (written feedback via email and telephone conversations) from the claimant and defendant solicitors, insurers, and adjudicators appointed to decide disputes under the Pilot Scheme.

4. Proposals to the Pilot Scheme

4.1. Total of 45 proposals have been made of which:

- defendant proposals: 33
- claimant proposals: 12

4.2. The PNLA has confirmed that it has definitely been notified of 12 claimant proposals. The ABI has also received details of 4 claimant proposals. The latter 4 could also have been notified to the PNLA as it has not been possible to check for duplication.

- Total number of accepted proposals: 6
- Total completed adjudications: 5

5. Rejected proposals to the Pilot Scheme

5.1. It is clear from the data that I have thus far that the Pilot Scheme is being proposed by both sides. However, there has been some concern expressed by insurers and defendant solicitors that, despite making a large number of proposals, the majority of proposals have been rejected. The data I have considered, including the data from the ABI, does show that the defendant/insurers have made the majority of proposals to the Pilot Scheme. I consider this further in section 9 below.

5.2. Data from the ABI and my discussions with some claimant and defendant solicitors indicates that proposals have either been rejected without reasons being given or, more commonly, proposals have been rejected (without a reason) and a counter proposal has been made in favour of mediation. This appears to show that making proposals to the Pilot Scheme has the positive effect of focusing the parties on ADR/settlement. I discuss this further in section 9.

5.3. As indicated above, the information regarding the total number of proposals is subject to change as more data is gathered. I am also aware that some claimant and defendant solicitors intend to make further proposals on a number of cases and therefore it will be important to continue to monitor the position in the event that the Pilot Scheme is extended.

5.4. The following are examples of cases in which adjudication has been proposed but rejected:

Case 1 proposed by claimant

This concerned a solicitor's negligence case in respect of immigration advice. Although liability was accepted early in the litigation process, quantum remained an issue and could not be assessed until the claimant's future employment status became clarified. Adjudication was suggested by the claimant to assess the amount of interim payment rather than making an application to the court which would have been both time consuming and expensive. The invitation to adjudicate was ignored.

Case 2 proposed by claimant

This case concerns a claim by a retired solicitor against the former practice accountants. Part of the claim is being pursued by the claimant for uninsured losses. The pre-action correspondence between the defendants and claimant insurers (who are dealing with it by way of subrogation) have not been copied to the claimant. The claimant's proposal to refer the matter to adjudication has been rejected. The some of the reasons given by the defendant for rejecting adjudication includes the complex nature of the case and the high value of the claim.

Case 3 proposed by defendant

The defendant solicitor proposed the adjudication in respect of a solicitor's negligence claim. The proposal was made on the basis that the issues could be dealt with easily by the adjudicator within a relatively short timeframe thereby saving the delay and cost of litigation. The proposal was rejected by the claimant's solicitor without providing a reason.

Case 4 proposed by defendant

The defendant's solicitor proposed adjudicating which was refused by the claimant in favour of mediation. The claimant did not provide any explanation as to why they did not think adjudication would be appropriate. It was a relatively low value claim and the defendant's solicitor's insurer client suggested adjudication in an attempt to avoid incurring disproportionate costs. The lay client felt strongly about the claim and did not want to make any offer and so adjudication appealed to them for that reason.

6. Adjudicated cases

- 6.1.** Of the five cases which have gone through the Pilot Scheme, I have received feedback on two. At the time of writing this report I am waiting to receive details in respect of the remaining three cases.

Case 1

This case involved a solicitor's negligence claim with a claim value of approximately £100,000 plus interest. The issue of liability caused a deadlock to settlement pre-action. The adjudication took place post issue when it was successfully resolved.

The claimant's solicitors have indicated that, although the Pilot Scheme worked well in resolving the dispute, it could be improved in a number of ways. First, the adjudication agreement could include the Notice of Referral and the agreement itself could be simplified. Secondly, the neutrality of the adjudicator may be an issue which requires attention. I deal with these issues in more detail in the section 6 below.

The defendant solicitors spoke positively about their experience with the Pilot Scheme. Because trial was the only other alternative which would have cost far more in legal fees, the defendant solicitors felt the Pilot Scheme provided the parties with a quick and cost effective means of resolving their differences. It also helped the parties to avoid having to incur substantial costs in carrying-out extensive disclosure and preparing witness statements. The defendant solicitors stated that the Pilot Scheme provided the parties with the flexibility to agree to limit the issues to be decided by the adjudicator. Overall, the defendant solicitors found the Pilot Scheme (including all the Pilot Scheme documents) to be well structured, clear and effective in resolving disputes.

Case 2

I have only received feedback from the defendant solicitors on this matter.

This case was not a solicitor's negligence matter. It concerned the provision of internet services to a hotel. The defendant's solicitor's proposal to refer the matter to the Pilot Scheme was accepted and the matter was successfully resolved.

The defendant solicitors have indicated that the adjudication went well and was "relatively straightforward". The key issues and documents for the adjudication were identified and agreed between the parties. The Pilot Scheme was flexible and allowed for discreet issues to be referred to the adjudicator for determination. The flexibility of the Pilot Scheme was a major advantage of the Pilot Scheme.

7. General feedback from adjudicators

7.1. One of the five PNBA adjudicators has provided the following general feedback which was obtained from the parties on cases which have been through the Pilot Scheme (two of which are discussed above):

- The Pilot Scheme proved successful in providing the parties with a clear answer to the dispute presented to the adjudicator;
- The adjudications have all run reasonably smoothly (there was an issue in one case concerning the payment of the adjudicator's fees which was later resolved);
- The parties opted for a binding decision rather than a temporarily binding decision;
- Directions were tailored to suit the dispute in each case.

8. General comments on the Pilot Scheme

8.1. The following comments and observations were made by claimant and defendant solicitors who have either had direct experience of using the Pilot Scheme or have proposed it but have not had experience of using it:

- It provides a cost and time effective mechanism to resolve disputes at an early stage of the dispute.

- It is well structured and the Pilot Scheme documents are clear;
- It was particularly useful where there was a deadlock between the parties on key issues such as liability – it provided an effective means of breaking the deadlock and moving matters towards a settlement.
- It had a valuable role to play alongside other methods of dispute resolution – as one respondent put, having it “as part of the litigator’s toolkit is of huge assistance.”
- Some felt that a refusal to adjudicate can be taken as a sign of a lack of confidence in the refusing party’s case and as such it puts additional pressure on that party (whether claimant or defendant) to lower its expectations. As one respondent explained: “proposing adjudication gives a tactical advantage to the more confident party. The scheme is clearly useful, therefore, even if we do not actually get an adjudication!”
- Some respondents felt that adjudication was only proposed in circumstances where either one or both parties felt that it had a strong case.
- Most insurers preferred “some form of mediated settlement than litigation”.
- The insurer market indicated that there were some who were unsure why there was such a focus on this particular scheme when mediation works so well.

8.2. The feedback from the insurer market is more mixed:

- The vast majority of cases are settled by some form of ADR (usually mediation);
- When the Pilot Scheme was discussed in cases the claimant representatives often stated that they could not see the benefit of it over mediation and preferred mediation (see comments in section 5 above);
- Most insurers would prefer some kind of mediated settlement to litigation in most cases;
- Insurers responding to the ABI felt that mediation worked well for many professional negligence cases, but considered that the adjudication scheme was a useful alternative to mediation in certain cases.

9. Summary and observations

- ### **9.1.**
- The feedback thus far indicates that the Pilot Scheme is, on the whole, perceived as a valuable ADR mechanism which can provide an effective and efficient means of resolving a range of disputes.

9.2. The feedback from the two adjudicated cases has been positive. Particular strengths highlighted by respondents included: (i) the clarity of the Pilot Scheme documents (ii) the appointment procedure, conduct of adjudication, costs of the adjudicator etc. allowed the adjudication to run smoothly; (iii) the flexible nature of the Pilot Scheme in resolving discreet issues.

9.3. Positive lessons can also be taken from the number of rejected proposals to adjudicate. This data shows: (i) the claimant and defendant solicitors and insurers are making proposals to the Pilot Scheme; (ii) although the majority of proposals have been rejected, they appears to trigger the rejecting party to make a counter ADR proposal to mediate the dispute; this appears to have the effect of concentrating the minds of the parties to engage with ADR/settlement.

9.4. The following specific issues raised during the feedback process will require attention:

- *Rejection of adjudication in favour of mediation* – As noted at paragraph 9.3 above, positive lessons can be drawn from the rejected proposals to the Pilot Scheme. However, the apparent reluctance from some claimants and insurers towards the Pilot Scheme and the preference to opt for mediation needs further consideration.

The preference of some claimants and insurers to opt for mediation over adjudication may be due to: (i) a lack of understanding of a novel ADR procedure which has been adapted from a procedure used primarily in the construction industry (ii) a lack of understanding on how the Pilot Scheme actually operates and why it may be appropriate to professional negligence disputes as compared with mediation (iii) mediation being the most common and most entrenched ADR procedure within the civil justice system.

The rejection of the majority of defendant solicitor proposals may also be due to the fact that professional negligence work may only form a small percentage of a claimant solicitor's work as compared to the larger defendant firms which specialise in this type of work.

It may be a case of continuing to promote and market the Pilot Scheme to the larger claimant and insurer community at conferences and through newsletter etc. Another way in which the profile of the Pilot Scheme can be raised among the claimant solicitor community is by publishing articles on the Pilot Scheme (e.g. the results of the pilots or aspects of this report) with the *Law Society Gazette* and other professional and academic journals which would impact a much wider claimant solicitor audience. I am a panel author for the LSG and frequently publish with other professional and academic journals and I am happy to assist in either writing a sole or joint article with members of the working group with a view to having it published. A similar step should be taken with the insurer community to raise the profile of the Pilot Scheme.

- *Agreement and Notice* - It was stated that the draft adjudication agreement could include the Notice of Referral. Rule 4 requires the parties to first agree in writing to be bound by the provisions of the Pilot Scheme “which agreement involves identification of the dispute to be referred”. A referral is then made by serving the Notice of Referral. There are obvious benefits in terms of time and cost of including the Notice within the adjudication agreement.
- *Neutrality of Adjudicators*– There was concerns regarding the potential for conflicts between adjudicators and their ‘day job’ in accepting instructions from panel firms specialising in defendant professional negligence work. There certainly is a potential for a conflicts issues to arise and this is not unusual in ADR e.g. arbitrators are subject to conflicts disclosure. There are two possible solutions here for the working party to consider. The first is to amend the Pilot documents to include a provision requiring the appointed adjudicator to make necessary conflicts disclosure, similar to the IBA Guidelines on Conflicts in arbitration. The second may to be increase the pool of adjudicators to include retired judges. This will be an issue for the working party to consider further.
- *ADR Compulsion* – There was some discussion of the need for some compulsion for the parties to engage with the Pilot Scheme. There was, as discussed above, evidence of some parties simply ignoring an invitation to engage with the Pilot Scheme. Clearly, ignoring an invitation to ADR will be regarded as unreasonable conduct which may attract cost sanctions (*PGF II SA V OMFS Company I Limited* [2013] EWCA Civ 1288). This principle was recently reinforced by Jackson LJ in *Thakkar - v- Patel* [2017] EWCA Civ 117 when he warned:

“The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene.”

Litigating parties in England and Wales cannot, however, be compelled to engage with ADR (*Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576) and this has been reinforced by successive civil justice reforms from the Woolf Reforms to the recent Civil Courts Structure Review (see also Jackson LJ’s comments in his Review of Civil Litigation Costs (2010) Chapter 36). The courts are, as part of their case management powers and the overriding objective, required to encourage the parties to engage with ADR. But there cannot be compulsion.

The Pilot documents can benefit from being amended so that they make clear that (i) there is a judicial expectation that the parties will constructively considered ADR; and

(ii) parties cannot simply ignore a proposal to refer the matter to adjudication, this will be considered as unreasonable conduct by the courts (iii) the court may penalise parties for unreasonably refusing ADR. This can be easily incorporated into the Guidance Notes at para 2 (Introduction).

- *Qualified one-way costs shifting* - Some claimant solicitors raised this as a way to deal with the costs of adjudication. I leave this for the working party to consider further.

9.5. There also appears to be agreement between claimant and defendant solicitors that the Pilot Scheme should continue and be given more time to take root. Respondents have stated that the fact that a small number of cases have gone through the Pilot Scheme should not be seen as a failure; the Pilot Scheme should be given more time for it to be better understood and utilised more by the parties. As one respondent explained:

“I think it is far too early to judge whether or not it is working as it has not reached anything like its full potential. As it gets better known, it will be used more and people will learn how and when it is useful to propose and use it.”

10. Recommendations

10.1. Having carried out this preliminary review of the Pilot Scheme, I would recommend the following:

- Extend the Pilot Scheme and continue to monitor cases referred to it;
- Continue to collate data on the number of proposals being made;
- Continue to promote and advertise the Pilot Scheme to the claimant and insurer market - sole or joint authorship of articles to be published in the *Law Society Gazette* and other professional and academic journals;
- Working party to consider incorporating the Notice of Referral into the adjudication agreement;
- Working party to consider the issue of neutrality and the need for provisions to be incorporated into the Pilot documents regarding adjudicator conflicts;
- Amend the Guidance Notes to draw attention to the parties' ADR obligations;
- Working party to consider the issue of QOCS.

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