

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 (PBNA), the Association of British Insurers (ABI) and the Professional Negligence Lawyers 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;
- Most insurers who responded to the ABI were unsure why there was such a focus on this particular scheme when mediation works so well

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 appear 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 be to 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 1 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 consider 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 (**agreed by the Working Party**);
- Continue to collate data on the number of proposals made and by whom (**agreed by the Working Party**);
- 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 (**agreed by the Working Party**);
- 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 by the Working Party and currently being considered and will be implemented**);
- Amend the Guidance Notes to draw attention to the parties' ADR obligations (**agreed by the Working Party and currently being considered**);
- Working party to consider the issue of QOCS (**this is a matter for the Ministry of Justice**).

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