APPENDIX 1

Chapter 18 Case management for settlement

The role of the court

18.1 The settlement of disputes without a trial, by means of Alternative Dispute Resolution ("ADR") can help litigants (a) to save costs, (b) to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation and provide litigants with a wider range of solutions than those offered by the determination of the issues in the claim. Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed about the most cost effective means of resolving the dispute.

Stays for mediation

18.2 Where appropriate the court will, as part of the overriding objective, encourage the parties to use ADR or otherwise help them settle the case or resolve particular issues. There should normally be discussion at the case management conference about what steps have already been taken (if any), and those which ought to considered in future, to try to resolve the claim.

18.3 The court will readily grant a stay at an early stage of the claim to accommodate mediation or any other form of ADR if the parties are agreed that there should be a stay. A consent order may be lodged to stay the claim. The court will not, however, normally grant an open-ended stay for such purposes and if, for any reason, a lengthy stay is granted it will usually be on terms that the parties report to the court on a regular basis about their negotiations.

18.4 Any order for a stay will normally include a provision that the parties may agree to extend the stay for periods not exceeding a total of 3 months from the date of this order without reference to the Court, provided they notify the Court in writing of the expiry date of any such extension. Any request for a further extension after 3 months must be referred to the Court. The order will include permission to apply in relation to the extension. At the end of the stay the parties should be in a position to tell the court what steps have been taken or are proposed to be taken

18.5 Once the claim has reached the stage of trial directions being given, a stay for ADR may not be appropriate if a stay will interfere with the timetable of directions or there is no agreement about the optimum time for the stay to take place. The parties may need to be flexible about finding the best time for settlement discussions or mediation and to do so without a stay of the claim.

18.6 The court will not make an order directing the parties to undertake a form of ADR. However, if the court considers that one or both parties are unreasonably refusing to attempt ADR, the court may order a stay with a direction for the parties to take reasonable steps to consider ADR.

Early Neutral Evaluation and Financial Dispute Resolution

Early neutral evaluation

18.7 In appropriate cases and with the agreement of all parties the court will provide a non-binding, early neutral evaluation (ENE) of a dispute or of particular issues (see CPR rule 3.1(2)(m)). ENE is a simple concept which involves an independent party, with relevant expertise, expressing an opinion about a dispute or an element of it. It is unlike mediation because a mediator acts primarily as a facilitator. Although the mediator may undertake some 'reality testing', there is no requirement to do so. The person undertaking ENE provides an opinion based on the information provided by the parties and may do so without receiving oral submissions if that is what they wish.

18.8 An essential feature of ENE, apart from being consensual, is that unless the parties agree otherwise, the opinion is non-binding and the process is without prejudice (it being treated as part of a negotiation between the parties).

18.9 ENE is offered in the Chancery Division by all judges. The judge providing the ENE may be a full time Chancery judge, a section 9 judge, Chancery Master or Registrar. The ENE may be conducted by a judge of the same level as would be allocated to hear the trial, but need not be if the parties agree otherwise.

18.10 There is no one case type which is suitable for ENE. In many cases mediation will remain the preferred form of ADR. Although ENE may be unsuitable for multi-faceted complex claims, if a particular issue lies at the heart of the claim an opinion could help unlock the dispute in a way which a mediator cannot. It is particularly suitable where the claim turns on an issue of construction, an issue of law where there are conflicting authorities or where the case involves the court forming an impression about infringement of intellectual property ("IP") rights.

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

18.12 Two important points which need to be addressed are as follows:

(a) The norm is that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice. However the parties can agree that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.

(b) The norm is that the judge's evaluation after the ENE process will not be binding on the parties. However the parties can agree that it will be binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement.

18.13 Assuming the ENE is without prejudice and not binding, the court will not retain on the court file any of the papers lodged for the ENE or a record of the judge's opinion.

18.14 In any event the judge will have no further involvement with the claim, either for the purpose of the hearing of applications or as the judge at trial, unless both parties agree otherwise.

18.15 A specimen draft order is set out below. The order is on the basis that the opinion is agreed to be not binding and the ENE is to be conducted without prejudice.

Specimen draft order directing an ENE

Upon the parties requesting at a CMC the Hon Mr(s) Justice /Master/ Registrar ("the Judge") to provide an opinion about the likely outcome of the claim [or the issue defined in the appendix]

IT IS ORDERED THAT:

1. The Claimant and Defendant shall exchange position papers by 4pm on [date].
2. The parties shall agree a core bundle of documents for the Judge which shall be lodged by 4pm on [date]
3. The parties shall attend before the Judge [in private] at 10.30 on [date].
4. The parties estimate the judicial pre-reading to be [x] hours.
5. The Judge shall consider the submissions made by the parties and provide an informal non-binding opinion about the likely outcome of the claim [or the issue].
6. The opinion shall be without prejudice to the claim and the opinion shall remain confidential to the parties.
7. The court shall not retain any papers filed for the ENE hearing or any record of the opinion provided by the Judge. No non-party shall be entitled to obtain a transcript of the hearing.
8. The Judge shall have no further involvement with this claim or any associated claim.
9. The costs incurred by the ENE shall be costs in the case.

Chancery FDR ("Ch FDR")

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

18.17 Broadly the key elements of Ch FDR are:

- It is consensual. The court will not direct Ch FDR unless all the parties agree to it.
- There will be a Ch FDR 'hearing', although it is quite unlike any other type of hearing. It is better described as a meeting in which the judge plays the role of both facilitator and evaluator.
- Ch FDR is non-binding and without-prejudice. The court will try to lead the parties to agree terms but cannot make a determination.
- It is essential for the parties, or senior representatives in the case of corporate parties, to be present.
- The court will carefully set up the Ch FDR meeting by giving directions which will help it be a success. This may include directing the parties to exchange and file without prejudice position papers (and direct what is to be addressed) and to lodge a bundle. If there is an issue which can only be resolved with expert evidence a way may be found to obtain that evidence without commissioning CPR compliant reports.
- When the meeting takes place the parties are directed to attend before the meeting starts so they may hold initial discussions. The parties are then called in before the judge. The Ch FDR meeting is a dynamic process which has some similarities with an initial mediation meeting. If the parties request it the judge may express an opinion about the issue or the claim as a whole.
- The court will not retain any papers produced for the meeting or any notes of it.
- The judge who conducts the Ch FDR meeting has no further involvement with the case if an agreement is not reached.

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

Specimen draft order directing Ch FDR

Upon the parties requesting that The Hon Mr(s) Justice /Master / Registrar ("the Judge") should conduct an FDR hearing

IT IS ORDERED THAT:

1. The claim shall be listed before the Judge for a without prejudice financial dispute resolution ('FDR') appointment in private on [date] [or a date to be fixed in consultation with counsel's clerks] with a time estimate of [x] hours commencing at 11.00. Judicial pre-reading is estimate to take [x] hours.
2. The parties and their representatives shall attend one hour beforehand for the purpose of seeking to narrow issues and negotiation.
3. The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation. Parties attending the FDR appointment must use their best endeavours to reach agreement on all matters in issue between them.
4. The parties must personally attend the FDR appointment unless the court directs otherwise.
5. Not less than 7 days before the FDR appointment, the claimant must file with the court a bundle for the FDR appointment. Copies of all offers and proposals, and responses to them whether made wholly or partly without prejudice should be included in the bundle. The disclosure of offers to the court does not amount to a waiver of privilege.
6. At the conclusion of the FDR appointment, the court may make an appropriate consent order.
7. At the conclusion of the FDR appointment, any documents filed under paragraph (3), and any filed documents referring to them, must be returned to that party and not retained on the court file and the court will not retain a record of the hearing. No non-party will be entitled to obtain a transcript of the hearing.
8. The judge hearing the FDR appointment must have no further involvement with the claim, other than to conduct any further FDR appointment or to make a consent order or a further directions order.
9. The costs of and associated with the FDR hearing shall be costs in case.