

Top tips when advising clients and instructing counsel in private client disputes

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12 May 2022



**Tip #1: Get capacities,
responsibilities and rights
clear when advising**

Tip #2: Be clear about costs recovery prospects

**Tip #3: Focus on
proportionality and the
right remedy when
dealing with
administration complaints**

Tip #4: Get language and tone of correspondence right

Tip #5: Consider the right types of ADR

Mediation

1. A without prejudice process whereby a third party – the mediator – facilitates the parties' negotiations
2. Timing is key
3. Select a good mediator – ask counsel for views
4. Prior preparation with the client
5. Practicalities

Early Neutral Evaluation

1. See the Chancery Guide – paras 18.7 to 18.15
2. A process whereby an independent party (a Judge) expresses an opinion about a dispute or an element of it
3. Non-binding and without prejudice (unless otherwise agreed)
4. Useful for disputes turning on a point or points of law

Early Neutral Evaluation

See para 18.15 of the Chancery Guide (specimen draft order for ENE):

Upon the parties requesting at a CMC the Hon Mr(s) Justice/Master/ Insolvency and Companies Court Judge (“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/Master which shall be lodged by 4pm on [date]*
- 3.The parties shall attend before the Judge/Master[in private] at 10.30 on [date].*
- 4.The parties estimate the judicial pre-reading to be [x] hours.*

Early Neutral Evaluation

5.The Judge/Master 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/Master. No non-party shall be entitled to obtain a transcript of the hearing.

8.The Judge/Master 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 Financial Dispute Resolution (“Ch FDR”)

1. See the Chancery Guide – paras 18.16 to 18.19
2. A process whereby an independent party (a Judge) (a) facilitates negotiations and (b) may provide the parties with an opinion about the claim or elements of it
3. Takes place at a Ch FDR “hearing” (effectively a meeting, similar to an initial session at a mediation)
4. Non-binding and without prejudice
5. Similar in some ways to mediation

Chancery FDR

See para 18.18 of the Chancery Guide (specimen draft order for Ch FDR):

Upon the parties requesting that the Master / Insolvency and Companies Court Judge (“the Judge”) should conduct an FDR hearing

IT IS ORDERED THAT:

1.The claim shall be listed before the Master/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 estimated 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.

Chancery FDR

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.

Tip #6: Timings for instructing counsel

Tip #7: Keep the case under review and manage expectations



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