



The rise of the private FDR

Vanessa Meachin QC

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Context

- Sir James Munby 27 July 2018
- President's Circular: Financial Remedies Court Pilot Phase 2
- Following successful initiation of the Financial Remedies Court project in West Midlands (part) centred at Birmingham, announced further roll-out of the pilot

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"Private" FDRs

7. I hope that the lead and other judges will take the opportunity to develop the use of "private" FDR's locally. A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as a private FDR judge. That person may be a solicitor, barrister or retired judge. No additional qualification is required.

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"The private FDR takes place at a time convenient to the parties, usually in a solicitors' offices or barristers' chambers and a full day is normally set aside to maximise the prospects of settlement. It takes the place of the in-court FDR".

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Para 8

“At present, demand on court resources has led to the over-listing of FDR’s. A high settlement success rate is not likely to be achieved if the district judge’s list for the day has more than 5 FDR’s in it. This has the inevitable knock on of far more cases being listed for a final hearing than should be-a classic example of the law of diminishing returns”

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Para 9

“Although a private FDR does require (often quite modest) investment by the parties, this expense can be greatly outweighed by the advantages gained. The very fact of investment by the parties will signify a voluntary seat at the negotiating table rather than being dragged there. The hearing can take place at a time convenient to the parties, even in the evening or at a week-end, and for as long as they want...”

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“The private FDR judge will by definition, have been given all the time needed to prepare fully for the hearing”

Para 10

“Anecdotal evidence suggest that private FDR’s have a very high settlement rate. Of course, each settlement frees up court resources to deal, sooner and more fully, with those interim and final hearings that demand a judicial determination”

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Para 11

“Usually, where the parties have agreed to a private FDR the order made at the first appointment will record such an agreement in a recital and will provide for a short directions hearing shortly after the date of the private FDR. That directions hearing can be vacated if agreed minutes of order are submitted following a successful FDR”.

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"If it has been unsuccessful then directions for the final hearing can be given. An alternative is for the case to be adjourned generally while the private FDR takes place.."

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- Earl Spencer sued his barristers for £1M
- On the basis that they had failed to alert him to the change in the law, in relation to potential for hearings to be in public
- Claimed that he had expected to pay ex wife between £4M and £4.5M, but once lost application for hearing to be held in private, paid £5.65M to ex-wife in out of court settlement.

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Earl Spencer claimed in his writ that Mostyn had told him that he had named his seven piglets after Mr Justice Munby. Names included: James, Munby, self-regarding, pompous, publicity, seeking and ...



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- Choice of Judge, can often inspire confidence in what the Judge has to say, encourages settlement
- Time: the parties choose the day and time.
- The parties are voluntary participants
- Investment in the process, will have paid so hopefully more invested in resolving matters

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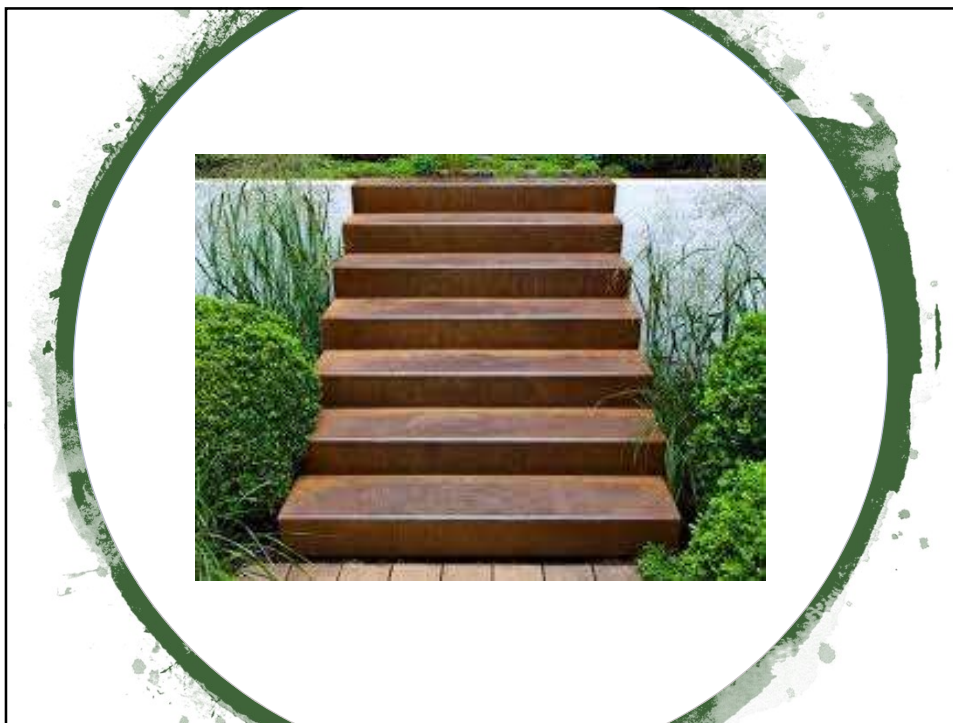
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- Choice of location
- Issue led, perhaps parties have reached agreement on some areas and not others and seek guidance on disputed issues
- Flexibility

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Financial Remedies Courts
Good Practice Protocol (18 pages
including four schedules) November
2019
Link as set out in later slide
Required reading for finance
practitioners

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Para 8 of the Good Practice Protocol

“If the parties wish to agree the directions to be made at the First Appointment they may do so using the ‘Accelerated First Appointment Procedure’ originally piloted at the CFC and referred to as Fourth schedule and the FRC3”

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- Accelerated first appointment procedure in FRC
- Approved by Mostyn and Moor JJ on behalf of the High Court Judiciary
- Does not derogate from the underlying philosophy of FPR 2010 part 9 and the key principle of judicial case management from an early stage in FRP
- Position for large majority of cases will be personal attendance where parties can hear for themselves what arguments are being advanced on their behalf , hear the Judge's

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Reaction to them and hear what has been spent on costs so far and what is likely to be spent if the dispute continues.

Procedure intended to be a method of avoiding the personal attendance of parties and legal representatives at the CFC in a limited number of cases where the parties have been able to agree directions in advance, where personal attendance little benefit, likely to be outweighed by costs of attendance

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Example given where it is obvious that a particular asset needs to be valued before meaningful negotiations can take place but where the facts are otherwise broadly agreed.

Procedure only available where draft standard direction set out in the annex attached, signed by both and required documents filed with the court 14 days before the FDA

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Good Practice Protocol

Para 9 “FRC Judges will be ever mindful of opportunities for the parties to engage in attempts to reach settlement of some of all of the issues by whatever means are suited to the case: Arbitration, Mediation, The Divorce Surgery and Private FDRs where available. Parties will be referred to websites for Family Mediation Council, The Institute of Family Law Arbitrators and to

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the Private FDR Guide 2018”

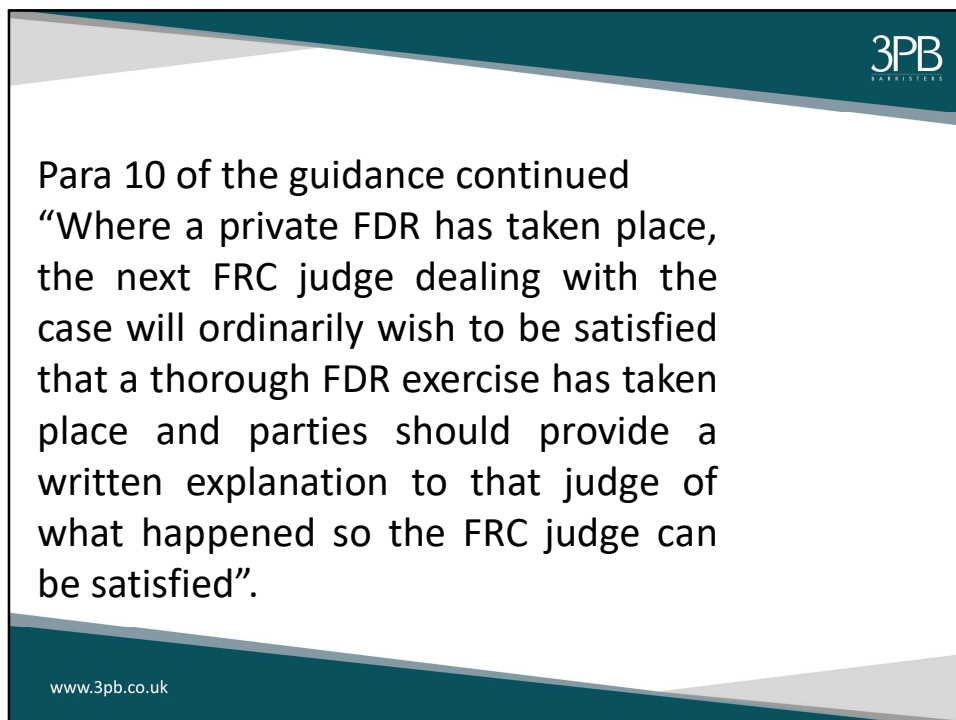
Para 10 “where a case has been referred to be dealt with by an out of court settlement mechanism, it shall not ordinarily be given further court time save for a short directions appointment which may be vacated by consent in the event that an agreement has been reached and a consent order filed”

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Absent specific enquiry by the FRC Judge, this explanation should not include reference to any without prejudice positions, but should describe the date of the private FDR, the tribunal, the time spent and an assurance that offers were made on each side and an indication given.

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- Mr Justice Mostyn
- 17 March 2020, only few months later
- National lead judge of the Financial Remedies Courts
- Proposed a series of measures

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1. First appointments should be done where possible using the “accelerated”, paper only procedure in the fourth schedule to the FRC protocol (<https://www.judiciary.uk/wp-content/uploads/2019/11/FRC-Good-Practice-Protocol-November-2019.pdf>)

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- The terms of the fourth schedule do not need to be followed strictly.
- Judicial latitude is encouraged.
- Judges should accept consent orders dealing with first appointments routinely.

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2. Parties should be encouraged to have their FDRs done privately. Such private FDRs should routinely be done remotely. Most barristers' chambers and solicitors' offices have facilities to enable FDR's to be done remotely.

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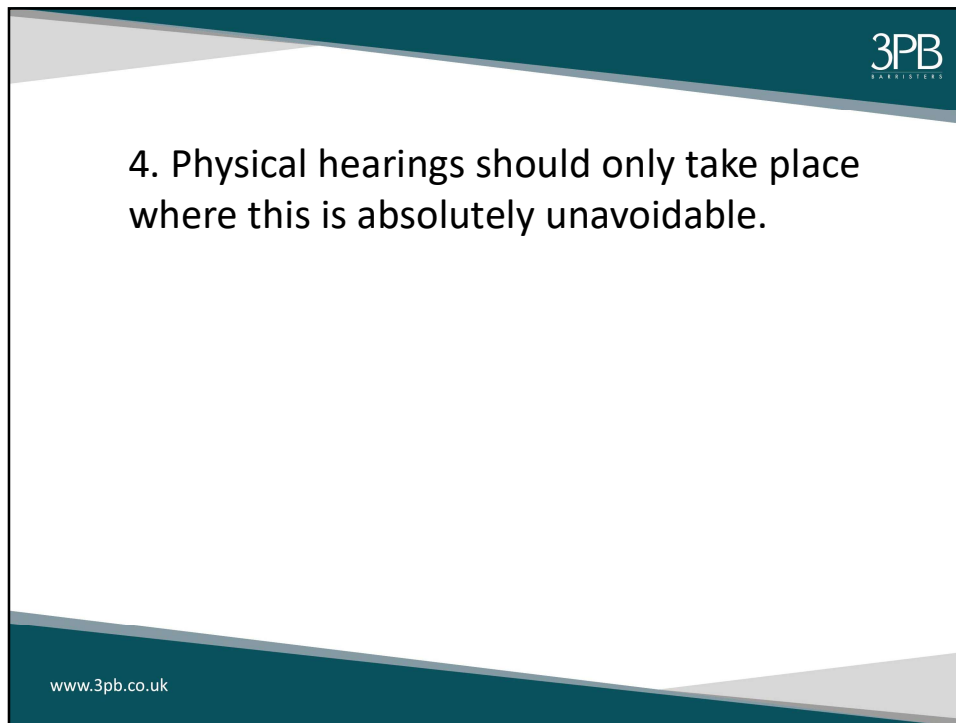
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3. The default position for other hearings is that they should be done either by Skype (skype for business available on all judicial laptops) or by telephone. The extension of the existing virtual courts project is being actively investigated.

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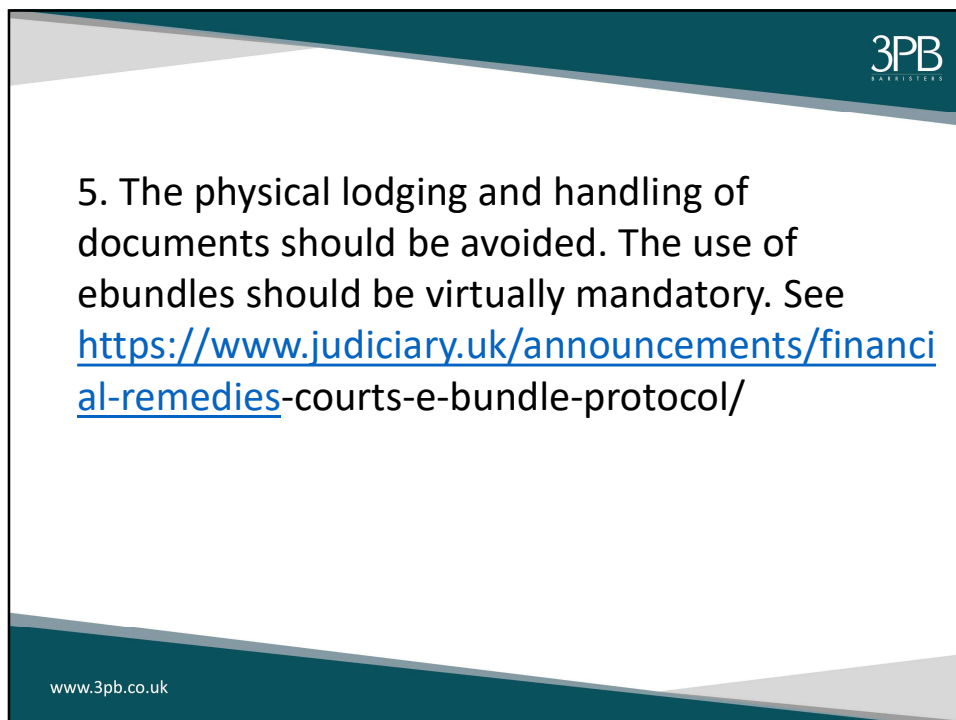


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4. Physical hearings should only take place where this is absolutely unavoidable.

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5. The physical lodging and handling of documents should be avoided. The use of ebundles should be virtually mandatory. See <https://www.judiciary.uk/announcements/financial-remedies-courts-e-bundle-protocol/>

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6. FRC judges should endeavor to do as much work as they possibly can from home.

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- Would have suggested may need to be tempered in light of President's views expressed in version 3 reminding us of fairness and followed up recently by what is being described as a letter from the President , not "guidance".
- However letter from Mostyn J and HHJ Hess, expressly approved by President namely:

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- Points made on page 3 of the letter at (e) to (h) do not apply for FR cases. They apply to private law and public law cases.
- General points at (a) to (d) have to be applied in the context of FR cases.
- FR cases below High Court level are generally relatively short and straightforward.
- The majority will be needs cases which will not depend on a credibility assessment.

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- Even in cases that do require a credibility assessment, for example where non-disclosure is alleged, the case is likely to be relatively short and the relevant issues are likely to be able to be exposed and assessed by remote testimony.
- Generally the court should start from the position that a remote hearing is likely to be consistent with the interests of justice.

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- This is especially so if the hearing will not involve live testimony, however even in the latter case the court can safely assume in many cases that a remote hearing will be consistent with the interests of justice.
- The court should be alive to the possibility that opposition to a remote hearing is motivated by a desire to delay the resolution of the case.

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- We re-iterate the President's words in his email of 14 April 2020 "the letter was intended to do little more than remind judges that the decision about listing is theirs, without directing them".

15 April 2020

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Individual FRC have followed with their own guidance

- Birmingham FRC 25 March 2020
- With associated templates for FDA, FDR and FH directions
- Specifically practitioners are reminded of the 17 March 2020 Mostyn J guidance

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“Parties should adopt the accelerated procedure where practicable or they may request a paper hearing in First appointments and extensions of time may be sought for such purpose”

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“Parties should consider making use of private FDRs, arbitration and other non-court based methods for dispute resolution in so far as practicable. Pursuant to FPR 2010 r3.3 (1) the court must consider in all proceedings whether non-court dispute resolution is appropriate and may exercise its powers pursuant to FPRr3.4 (1) namely:

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(i) To adjourn proceedings
(ii) To enable the parties to obtain information and advice about, and consider using, non-court dispute resolution or
(iii) where the parties agree, to enable non-court dispute resolution to take place”

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Will it be permissible to simply say
like Dawn Penn “No, no, no”?



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- Seems unlikely, need to at least be prepared to consider alternatives even if not ultimately tried
- Likely to be even greater pressure on court system post this present phase
- Seems likely that greater use of other means of resolving disputes will be here to stay
- Initiative from 3PB in relation to our remote private FDR's

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Top Tip in dealing with private FDR's
remotely or otherwise

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