Submission to the Review of the Administration of Civil Justice.

I am delighted that the committee are undertaking a review of the civil justice system. The growth in civil litigation has put an enormous additional burden on the courts. Accordingly anything that can ease that burden and in particular increase use of Alternative Dispute Resolution (ADR) is to be welcomed. In my experience there is a reluctance on the part of litigants and their lawyers to engage positively in ADR and in particular mediation. I think a lot of the reservations about mediation from lawyers arise from ignorance of the process and a belief that the process is either anti-lawyer or can be undertaken without the need for lawyers. It is my firm belief that if lawyers can be encouraged to buy into mediation, then it will become "the norm" as opposed to the exception for dispute resolution. In this respect the courts have a considerable role to play in fostering and encouraging the rollout of mediation. The Mediation Act empowers courts to impose cost sanctions against parties who have not positively engaged in mediation, when this has been directed by the court. It is arguable that this power has the effect of making mediation mandatory in civil matters where directed by the court as the failure by a party to accept the court direction could result in a costs sanction. Many have argued that the costs sanction flies in the face of mediation which is a voluntary process. I am firmly of the view that for mediation to become more widespread, thereby relieving pressure on the courts, the following actions should be considered:

1.All parties should prior to the institution of proceedings be obligated to attend a mandatory session on mediation. This session could be provided by a trained mediator or by a member of court staff who is trained in mediation. The session would involve the furnishing of information about mediation and the showing of a video which shows the process in action. This template has proved very successful in other jurisdictions, particularly in Canada.

2.Lawyers need to be made aware that mediation is to be embraced and not feared. In my view this can be achieved by judicial encouragement of mediation together with the parties being advised that when engaging in mediation they should have the benefit of legal advice throughout the entirety of the mediation process. In order to achieve equality of bargaining power in a mediation, it is in my view essential that both parties have the benefit of independent legal advice. The best mediated agreements and the ones that are most successful are those that have been negotiated with each party having the benefit of independent legal advice.

3. The introduction of robust case management rules, similar to those that have been adopted in the UK under the civil procedure rules, will allow judges during preliminary hearings, to encourage the parties to consider mediation and enable them to advise them on the benefits of mediation. In the circuit court case management is primarily undertaken by county registrars. In my view it might be worth piloting case management with the judge who is dealing with the civil list on a particular circuit. The benefit of this change is that the parties will hear at a far earlier stage the views of the judge in relation to encouraging mediation and this may have the knock-on effect

of encouraging the parties to engage in mediation at the earliest possible stage of the litigation.

There is a grave danger, that despite the incentives contained in the Mediation Act, parties will not embrace mediation to the greatest possible extent, if the first judicial intervention suggesting mediation takes place after pleadings have closed and the case is set down for trial. After a case has been set down for trial, there is a risk that the parties will have closed their minds to the possibility of mediation on the basis that a large proportion of legal costs will have been expended up to the completion of pleadings, thereby reducing the attractiveness of mediation as a method of containing or reducing legal costs. Furthermore the stark nature of pleadings can in many instances inflame the dispute rather than reduce the issues that need resolution and cause parties to become more entrenched in their respective positions. This again can negatively impact on the attractiveness of mediation. The early intervention of a judge suggesting and encouraging mediation prior to the closure of pleadings and indeed possibly prior to the institution of proceedings, will be far more effective in channelling the parties towards mediation, because at that stage they will not have incurred significant legal costs and their positions may not have become entrenched.

Dated the 8th day of February 2018

Submitted by Keenan Johnson

Judge of the Circuit Court.

Assigned to the Midland Circuit.