



Well, how are we going to resolve this? Mediation – why and how?

What are we going to talk about?

- To remind ourselves of the current requirements to consider/use ADR
- To think about how they apply to us
- For today, to focus on mediation and think about:
 - When it might be proposed
 - What, if anything, needs to be in place
 - How to maximise the chances of resolution
- **NB** A few busy slides. Don't fret – it's because they're also your handout notes, and will be sent to you



Current requirements to consider/use ADR – your pre-action protocols

- The CPR apply to your court-based civil claims
- The PD – Pre-action Conduct (para 8): litigation should be a last resort, the parties should consider whether negotiation or some other form of ADR might enable them to settle without commencing proceedings AND (paras 13-16) court intervention/sanctions if non-compliance
- PAP for Housing Conditions Claims (para 4): [as above, plus] L&T may be required by the court to provide evidence that alternative means of resolving their dispute were considered
- PAP for Possession Claims by Social Landlords (para 2.10): [ditto, plus] claims should not be issued prematurely when settlement is still being actively explored
- PAP for Debt Claims (para 6): more of the same, with some suggestions about options
- So, you have to consider ADR – and be seen to



Current requirements to consider/use ADR – *Churchill* [2023] EWCA Civ 1416

- You should all be aware of *Churchill*
- Nub of it is at para 74:
 - Court can stay proceedings to enable (or order) the parties to engage in non-court based dispute resolution process
 - Provided that the order does not impair the very essence of C's right to proceed to a judicial hearing
 - And is a proportionate and legitimate aim of settling the dispute fairly, quickly and at reasonable cost
 - Vos MR did not lay down fixed principles as to what will be relevant to determining the questions of a stay



Current requirements to consider/use ADR – CPR

- CPR 1.1(2)(f): Overriding objective - promoting or using ADR
- CPR 1.4(2)(e): Duty to actively manage cases – ordering or encouraging, facilitating use of ADR
- CPR 3.1(2)(o) & (p): More of the same
- CPR 3.1(3): Case management – can specify the consequence of a failure to comply with the order or a condition
- And so on...

And

- CPR 44.2(5)(e): Costs – the conduct of the parties – whether failed to comply with an order for ADR or unreasonably failed to engage in ADR



Current requirements to consider/use ADR – what's happening?

- The courts are already applying this stuff
- Several cases – not going to deal with them today at all



How do the requirements apply to us – what sort of ADR

Consider:

The dispute/the issues

- The parties
- The representation
- The value
- The relief
- The timelines
- The costs
- Funding (will a privately funded party cover the costs/fees of the other party?)

The court will consider these things



How do the requirements apply to us – what options

- Complaints procedure?
- Ombuds service ?
- Without prejudice meetings?
- Expert determination?
- Mediation?
- Early neutral evaluation?
- Conciliation?

[If you ask ChatGPT, you'll get a whole load more]



How do the requirements apply to us – when is the right time?

- Applying the PD and the PAPs, before a claim is started
- But... information gaps?
- If so, how deal (and the costs/funding for that)
- Costs/benefit
- ...etc etc.
- You've got the gist and know what to do



Given the other options in your sector, why mediate?

- Gives your client an opportunity to have their day in court – to actually be heard
- Gives the other side the opportunity to do the same – and perhaps apologise (it often makes a huge difference)
- Allows for possible settlements beyond what other formal processes might be able to “order”
- Could allow for a complete settlement, i.e. to cater for things not strictly within the formal dispute
- Freedom to choose someone you both agree to assist in the settlement of your dispute
 - please don't get hung up on who suggested who etc; you just want someone who will gain trust, has some mediation experience and will likely work hard for you all
- Certainty of outcome – if can settle



What does a typical mediation look like - logistically?

- Agreement on date and choice of mediator
- Agreement to mediate, inc re mediator's fees, online or in-person and how costs/fees to be dealt with between the parties
- Ensuring those attending will have authority to settle
- Pre-mediation call with mediator
- Position statements (?) and bundle preparation
- On mediation day, introductory meetings with mediator
- Joint session
- Separate to own rooms, and mediator works between them
- Settlement – with full agreement, or heads of terms with agreement to be drafted and agreed later



What needs to be in place to be able to mediate productively?

- Schedule of losses?
- Factual support?
- Schedule of works?
- Expert input?
- Agreement with client about costs outcomes?
- Funding?
- What else...?



What does a typical mediation look like - practically?

- Depends on how long it is scheduled to last – fixed number of hours, half day, whole day?
- Whole day often (but not always) runs into overtime
- If agreed fixed duration, will that in fact happen?
- Opening session – who is going to speak?
- If seems right, might be extended into a sensible discussion – in part to enable the direct communication of points/questions, reducing the scope for loss in translation by mediator (I always encourage this, if the situation supports it – not likely in a vitriolic neighbour dispute)
- When in separate rooms, timings and making good use of the time
 - Anticipate what going to be raised with you and prepare to deal with it
 - Anticipate and prepare to make your proposals/offers
- Possible breakout meetings, e.g. lawyers, surveyors, principals



What can you do to maximise the chances of success?

- Prepare, prepare, prepare
- Prepare your client properly and effectively – as to how a mediation works, what to expect, what settlement proposals could be made, and how
- Understand what the red lines are/bottom line is
- Crunch the numbers beforehand
- If there are any barriers to settlement, work out with your client beforehand how they could be overcome
- If there are to be position statements, ensure it is neutral and will help settlement, not drive the parties further apart
- If there are position statements, consider suggesting a way forward, even an offer



What can you do to maximise the chances of success? [Cont'd]

- The mediator will have some ideas about process, but it is ok for you to suggest things too
- Help the mediator help your client understand the problems with their own case, and the strengths too of course
- Persuasion rarely happens at mediation. Your excellent court advocacy will not usually make much difference. Your ability to articulate can – so plan to do that.
- Don't showboat – you're here in service of your client (the mediator is neutral, but you want them psychologically on your side – they're only human too) and you don't want to drive a wedge between your client and the other side
- You don't need to win; you just need to address risk(s) for both sides
- Acknowledge the other side's points/point of view



What can you do to maximise the chances of success? [Cont'd]

- Allow/encourage your client to speak – if they're not given the chance to be heard, any settlement will later feel worse to them than the compromise it is likely to be
- So, let them be emotional, if that is how they are in relation to what has happened
- Don't be afraid of silence – especially if the mediator is "working" with your client



What can you do to maximise the chances of success? [Cont'd]

- Rarely any magic in who offers first
- Not a weakness thing – you're all there to try to settle, you can set the tone, you can move things forward

- Ideally have a draft "master" settlement agreement prepared with the essential info already included
- Manage client expectations about the process and how settlement might be documented
 - it can be that as much time is done on that as on the heads of settlement, and which happens after the mediation day



Funding

- The mediator's fee(s)
- Venue costs?
- Preparation costs
- Client and expert engagement
- What could settlement look like and costs/fees for preparing for that
- The mediation itself
- Overrun costs/fees
- Documenting/agreeing the settlement terms



Any more questions?



JASON HUNTER

✉ Email: jason@jasonhunterconsultancy.co.uk

☎ Mobile: 07362 438936

🌐 Website: <https://www.jasonhunterconsultancy.co.uk/>

A dark blue rectangular box containing a portrait of Jason Hunter on the left and his contact information on the right. The portrait shows a man with a beard and balding head, wearing a blue suit jacket, with his arms crossed. The contact information includes his name, email address, mobile phone number, and website URL, each preceded by a small icon.