





# Mediation Webinar

David Watkinson, Garden Court Chambers

7 November 2023



GARDEN COURT CHAMBERS



Garden Court Chambers

 @gardencourtlaw

# Practice Direction on Pre-Action Conduct

---

## Settlement and ADR

**8.** Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

**9.** Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.

**10.** Parties may negotiate to settle a dispute or may use a form of ADR including—

- (a) mediation, a third party facilitating a resolution;
- (b) arbitration, a third party deciding the dispute;
- (c) early neutral evaluation, a third party giving an informed opinion on the dispute; and
- (d) Ombudsmen schemes.

(Information on mediation and other forms of ADR is available in the Jackson ADR Handbook (available from Oxford University Press) or at: <https://www.gov.uk/guidance/a-guide-to-civil-mediation>)

**11.** If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.



# Pre-Action Protocol for Judicial Review

---

**10.** It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation which may be appropriate, depending on the circumstances—

- Discussion and negotiation.
- Using relevant public authority complaints or review procedures.
- Ombudsmen – the Parliamentary and Health Service and the Local Government Ombudsmen have discretion to deal with complaints relating to maladministration.
- The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies, and this is available from their website at [www.bioa.org.uk](http://www.bioa.org.uk). Parties may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.
- Mediation – a form of facilitated negotiation assisted by an independent neutral party.



# What is Mediation?

---

- The Mediation is Voluntary
- The Mediator is not a Judge/Arbitrator
- The Mediation is confidential
- The Mediation Procedure: (in brief) -
  - Agreement to Mediate
  - Agree the Mediator
  - Agree Mediator's Fee and shared payment
  - Agree date/location
  - Enter into Mediation Agreement
  - Prepare Mediation Bundle
  - Prepare Position Statement
  - Attend with Authority to Settle
  - Draft Settlement Agreement (with luck)



# When is it Reasonable/Unreasonable to refuse mediation/Costs consequences/Case Law

---

- *PGF II SA v OMFS Co Ltd* [2013] EWCA 1288
  - “the need, ....., for the courts to encourage parties to embark on ADR in appropriate cases and .. silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might, in the circumstances, have been justified.” [para 49].
- *Orientfield Holdings Ltd v Bird & Bird Ltd* 2015 [EWHC] 1963 (HHJ Pelling QC sitting as High Ct Judge)
  - Para 76 “When and on what basis an approach is made by a party to mediate is a judgement call”
  - Para 78 “That a client’s case is considered strong is not a good reason “ (for refusing to mediate)
- *Thakkar v Patel* 2017 [EWCA] Civ 117
  - Jackson LJ said: “The message which this court sent out in [an earlier case] was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, the parties should get on with it.”



# When is it Reasonable/Unreasonable to refuse mediation/Costs consequences/Case Law

---

*DSN V Blackpool Football Club 2020 [EWHC] 670 (QB) Griffiths J*

- “No defence however strong justifies by itself a failure to engage in any kind of alternative dispute resolution” (para 28)
- The directions for trial (Master McCloud) included the following:-
  - *“At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21days of that proposal; such witness statements must not be shown to the trial judge until questions of costs arise”.*

*Richards and anr v Speechly Bircham LLP 2022 [EWHC ] 1512 (Comm) (HH Russen QC sitting as High Ct Judge)*

*21. In my judgment, the Defendants’ failure in this case to engage constructively with the mediation proposals does not justify an order for costs against them on the indemnity basis. To make such an order would involve elevating that factor over others which weigh in their favour. Those others include them successfully resisting a significant part of a claim put at around £4.3m (see the Judgment at [90]-[91]) and doing significantly better than either of the Claimants’ Part 36 offers proposed (thereby avoiding the consequences of CPR 36.17(1)(b)).*

*22. In circumstances where neither side made a cost-effective Part 36 offer, the Defendants’ unreasonable conduct in relation to mediation is in my judgment sufficiently marked by an order that they pay the Claimants’ costs down to and including trial on the standard basis. That is an appropriate “sanction” for them not engaging in a process of ADR which might have curtailed those costs in a significantly lower sum at an earlier stage of the proceedings.*



## Mandatory Mediation - where are we?

---

- *Halsey v Milton Keynes General NHS Trust* 2004 1 WLR 3002
- *Civil Justice Council Report on Compulsory ADR* (12/7/21)
- *Rental Mediation Service Pilot- Post Implementation Review* 22/2/2023 MoJ / DLUHC
- *Increasing the Use of Mediation in the Civil Justice System: Government Response to Consultation*. 25/7/2023 Corrected 1/9/2023. MoJ
- *Churchill v Merthyr Tydfil CBC* Ct App hearing 8/11/23 CA 2022-001778





# Thank you

020 7993 7600

| [info@gclaw.co.uk](mailto:info@gclaw.co.uk)

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



GARDEN COURT CHAMBERS

---

GARDEN COURT



---

M E D I A T I O N



# Mediation: When and how to get ready for it

Helen Curtis  
Garden Court Chambers  
7 November 2023



GARDEN COURT CHAMBERS



 @gardencourtlaw

# Introduction

---

- Invitations to mediate
  - when to suggest mediation
  - when to formally invite
  - who to make the invitation
- Responses to invitations to mediate
  - how to respond
  - what needs to exist before you say yes
  - what may make you refuse
- How to get ready for a mediation



## Considerations on timing

---

- *Employment* – can be initiated where tribunal claim is being considered or has been submitted or can take place within the proceedings with an Employment Judge acting as the mediator for judicial mediation
- *SEND* – Local Authorities obliged to provide mediation in accordance with the Children and Families Act 2014 within 30 days of being informed of parent/guardian’s decision to mediate
- *Stay proceedings pending mediation* - CPR Rule 3.1(f)
- *Online Civil Money Claims*– Pilot extended until 30 November 2023. Parties required to opt out of mediation



# Invitations to mediate

---

- When to suggest mediation
  - what stage are proceedings at:  
Issued? Court date? Evidence? In principle willingness?
- When to formally invite
  - crucially, when ready to be receptive to offers  
Satisfied evidence reflects strengths/weaknesses? Other sides' case understood? Advice from independent lawyers or experts available?
- Who to make the invitation
  - which party to generate the invitation  
Personal invitation between the parties? Provider administrator?



# Responses to invitations to mediate

---

- How to respond to an invitation to mediate
  - a response whether negative, positive, equivocal is essential
- What needs to exist before you say yes
  - what are your clients' priorities?
- What may make you refuse or refuse on behalf of your client
  - what value does your client place on settlement?



## How to get ready

---

- Agree on a mediator, a date and whether remote or not and if not, a venue. Ensure time commitments (half a day/a day/sessions) are well understood
- Agree how the fee is to be split – are there genuinely more than two parties?
- Prepare
  - Identify documents to be referred to – remember this is not a trial
  - Draft Position Statement
  - Discuss all aspects of own case and the other parties' case including costs to date and costs to trial
  - remember mediation is without prejudice and confidential
  - Consider outcomes which are realistic





# Confidentiality

---

- *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No. 2)* [2009] EWHC 1102 (TCC)
- Claimants sought to set aside settlement agreement concluded at mediation – parties waived confidentiality – mediator sought to uphold confidentiality clause in Agreement to Mediate and applied to set aside witness summons requiring mediator attendance to give evidence of mediation. Application to set aside witness summons refused
- *“Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice' rule set out above”.*



# Costs

---

- Mediation reaches settlement, what happens about the accumulated costs?
- Legally aided party may seek to recover their costs from the other party at the mediation rather than risk their associated costs not being covered by the LAA
- If asked, do supply – in advance of the mediation – a costs budget or costs incurred to date with a projection of costs if the matter is contested in court
- Be aware of the potential sanction of costs not being awarded to the successful party if it unreasonably refused an invitation to mediate.



## Money and the Legal Aid Agency (LAA)

---

- If parties are privately paying, each pays the fee for the mediator, usually in advance and split equally
- If there is a civil legal aid certificate in place for the claim, then the mediator's fee can be claimed as a disbursement under that certificate at the rate of £100.80 per hour
- Civil mediation is not established within LAA compared to family mediation
- Mediator would then charge an hourly rate instead of the day rate
- Prior authority is not needed to claim the mediator's fee as a disbursement



## Money and the Legal Aid Agency (2)

---

- If mediation takes place pre-permission and settles, then the cost of the work done is potentially payable at the LAA's discretion. Anecdotally, this has rarely been claimed although there are no formal stats available.
- The attendance of solicitor and/or counsel at a mediation can be claimed and could be covered under the applicable rate for 'attendance and preparation' rather than 'advocacy'. The LAA has said this would be an issue of reasonableness in terms of the cost assessment around whether it was reasonable to attend the mediation.
- This suggests there needs to be an assessment as to the prospects of settlement prior to the mediation which could be relied on to justify the cost associated with the mediation.



# Thank you

020 7993 7600

| [info@gclaw.co.uk](mailto:info@gclaw.co.uk)

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



GARDEN COURT CHAMBERS

---

GARDEN COURT



---

M E D I A T I O N



Mediation: advocating for mediation and being the mediation advocate

# Abigail Holt, Garden Court Chambers

## 07 November 2023



GARDEN COURT CHAMBERS



TOP TIER SET  
2023



Garden Court Chambers

 @gardencourtlaw

# Nuts and bolts!

---





# Reluctance & Resistance – 2 stubborn asses!

---

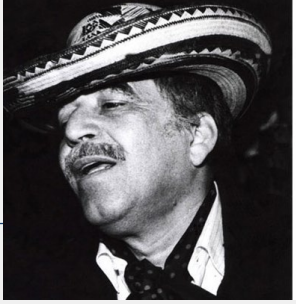
Parties very often do not want to mediate – for a variety of reasons including:

- Unfamiliarity with the process.
- Fear of losing control.
- Costs building.
- Bad experience.



# Magical (Lack of) Realism

---



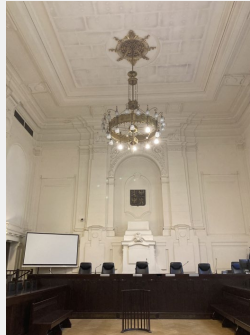
Parties indulge in magical thinking about the courts and the court system and do not appreciate:

- Adversarial process.
- They feel an overwhelming need to be acknowledged and listened to (far better facilitated in the mediation system).
- The lottery of the court system.
- *“I’m not interested in the money, it’s a point of principle!”*
- *“Each party fervently believes their position to be the only objective and universal truth. They are driven in the belief that they are being true to themselves, and that a judge, arbitrator, mediator or other conflict resolver will eventually agree with their objective truth”* Paul Randolph [“The Psychology of Conflict – Mediating in a Diverse World” Bloomsbury]



# Touching faith in the court system!

---



# Choosing the mediator

---

- Mediator with specialist knowledge?
- Mediator's professional background?
- The client will research the mediator.
- You need to be confident that the mediator is genuinely able to see both sides.



# Be prepared!

---

## **Position statement**

- It is not a skeleton argument!
- Is it for the mediator and/or the other side (consider doing 2!)
- Get instructions to do early.
- Use as a way of summarising the case, the issues, the strengths, wishes and possible remedies.

## **Authority to settle?**

- Insurance reserves?
- Property owners?
- Charges over property?

## **Costs**

- Costs budgets/statement of costs.
- Be ready to deal with costs/inclusive settlements.



# The role of the advocate

---

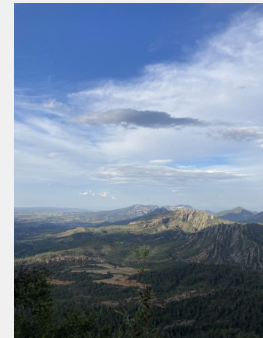
The role of the advocate - assisting the mediator whilst protecting the party's interests:

- *“The mediator this seeks gently to nudge the parties to move to a different perception – of themselves, of each other and of the dispute”* [Paul Randolph ibid]
- The process is not facilitated (just) through reason - “soft” psychological skills are required.



# Tunnel vision v blue sky thinking

---





# There is a time and a place

---

## Time

- Ideally early on.
- If “*last minute*” and to avoid a trial, as a process mediation is particularly well-suited for cases involving:
  - Complete intransigence.
  - Parties/lawyers with personality “issues”.
  - Multi-party disputes.

## Confidentiality







# Thank you

020 7993 7600

| [info@gclaw.co.uk](mailto:info@gclaw.co.uk)

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



GARDEN COURT CHAMBERS

---