ResolveUK

Mediation & Arbitration
Dispute Resolution

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Mediation Guide: Russell Evans

Mediation

Mediation is a private and confidential process focused on dispute resolution. It involves the appointment of an experienced Mediator, often likened to a diplomatic intermediary, to assist parties in conflict to resolve their dispute. Mediation is highly effective in resolving disputes and is encouraged by the Courts, Judiciary & Government. It often saves significant cost, stress and time.

Mediation Process – Meeting, ONLINE or Tel

The mediation process is flexible. It can be designed to fit the circumstances of the dispute and party needs. During the Coronavirus epidemic most mediation has transitioned to ONLINE platforms such as ZOOM. Whether by way of traditional meetings or Online, Mediation will usually involve private meetings between a party and Mediator to discuss and consider issues and explore settlement options. It may also involve joint meetings where these are approved by the parties. Comments made by any party in this process are confidential and can not be repeated in court. The process is designed to enable parties to TALK, THINK & EXPLORE SOLUTIONS in a safe environment. Settlement is concluded by a Settlement Agreement set out in writing which is duly signed by the Parties.

Pre Action Protocols – Practice Direction

Pre Action Protocols & Practice Directions are in place requiring parties to consider Mediation prior to going to court. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct

Para 1. Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings.
Para 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.

Ministry of Justice Approved Mediators

Finding Solutions For You

ADR

ADR means Alternative Dispute Resolution. It is an alternative to determination by the court. Mediation is the most effective and most common form of ADR process used.

Court Rules

The Civil Procedure Rules apply to all cases where court proceedings have been issued. Parties are obliged once again to consider mediation.
https://www.justice.gov.uk/courts/procedure-rules/civil/rules

1.1
(1) These Rules are a new procedural code with the **overriding objective** of enabling the court to deal with cases justly and at proportionate cost.
(2) **Dealing with a case justly and at proportionate cost includes**, so far as is practicable –
(b) **saving expense**;
(c) **dealing with the case in ways which are proportionate** –
(d) ensuring that it is dealt with expeditiously and fairly;
(f) **enforcing compliance with rules, practice directions** and orders.

1.2
The court must seek to give effect to the overriding objective when it –
(a) **exercises any power given to it by the Rules**

1.3
The **parties are required to help the court to further the overriding objective**.

1.4
(1) **The court must further the overriding objective by** actively managing cases.
(2) Active case management includes –
(e) **encouraging** the parties to use an **alternative dispute resolution** procedure

Sanctions for Failing to Mediate

The Court has power to and frequently does impose cost sanctions against parties who refuse or fail to mediate civil or commercial cases.

PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288

Lord Justice Briggs:

1. **An unreasonable refusal to participate in ADR has, since 2004, been identified by this court as a form of unreasonable conduct of litigation to which the court may properly respond by imposing costs sanctions**: see Halsey v Milton Keynes General NHS Trust [2004] 1WLR 3002.

22. The Halsey case was the first in which the Court of Appeal addressed, as a matter of principle, the extent to which it was appropriate for the court to use its powers to encourage parties to civil litigation to settle their disputes otherwise than by trial.
24. In the nine and a half years which have elapsed since the decision in the Halsey case, much has occurred to underline and confirm the wisdom of that conclusion.
34. In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that **silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable**.
56. Finally, as is recognised by the weight placed on the judge's decision in the passage in the ADR Handbook to which I have referred, **this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR** ……. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that **it is appropriate to emphasise that message by a sanction** which, even if a little more vigorous than I would have preferred, nonetheless operates **pour encourager les autres**.

Thakkar & Anr v Patel & Anr [2017] EWCA Civ 117

Lord Justice Jackson:

31. The message which this court sent out in PGF II 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, it behoves both parties to get on with it. **If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction**. In the present case, the costs sanction was severe, but not so severe that this court should intervene.

Attempts to Avoid Mediation

The court is very weary of attempts to avoid mediation and these are usually given a short shrift response. Indeed Mr Justice Turner in Laporte characterised refusing to mediate as a 'high risk' strategy.

Burchell v Bullard (2005) EWCA 358

Lord Justice Ward

41. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense.

Lord Justice Rix

50. I agree that mediation here would have had a reasonable prospect of success and that a party cannot rely on its own obstinacy to assert that it would not.

Laporte & Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)

Mr Justice Turner quoting Mr Justice Lightman - Hurst v Leeming [2003] 1 Lloyd's Rep 379

53. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution.

N J Rickard Limited v Holloway & Anor [2015] EWCA Civ (3 Nov 2015 unreported)

34. No dispute is too intractable to be mediated.

OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195

Sir Geoffrey Vos C

39. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The **parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process**.

DSN v Blackpool FC [2020] EWHC 670 (QB)

Mr Justice Griffiths

28. **No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution**.

Other Judicial Dicta

Burchell v Bullard (2005) EWCA 358

Lord Justice Ward

43. Halsey has made plain not only the **high rate of a successful outcome being achieved by mediation** but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. **The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.** The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued.

Lord Justice Rix

50. **The court is entitled to take an unreasonable refusal into account, even when it occurs before the start of formal proceedings**.

Oliver and another -v- Symons and Another [2012] EWCA Civ 267

Lord Justice Ward

53. It depresses me that solicitors cannot at the very first interview persuade their clients to **put their faith in the hands of an experienced mediator**, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come.

Consequences of Failing to Mediate

PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288
Sanction Applied - Party penalised £250,000 Costs

Laporte & Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)
Sanction Applied - Party penalised One Third of Costs

Rolf v De Guerin [2011] EWCA Civ 78
Sanction Applied - Party penalised All of its Costs

Thakkar & Anr v Patel & Anr [2017] EWCA Civ 117
Sanction Applied – 75% cost award against party rather than No Order as to Costs

DSN v Blackpool FC [2020] EWHC 670 (QB)
Sanction Applied – Indemnity Cost Award

By contrast in **Beattie Passive Norse Ltd v Canham Consulting Ltd [2021] EWHC 1414 (TCC)**, **a failure to mediate until shortly before trial** did not attract a cost sanction in circumstances where "the claimants were advancing, and continued to advance, a factually untruthful case." Parties should however beware of any false sense of safety as **Mr Justice Fraser** described it as a highly unusual case which "plainly sits outside the norm" where the claimants were conducting the litigation "on a wholly false factual basis."

Cabinet Office Guidance – issued 7 May 2020

The Guidance is directed at both public authorities, businesses and all individual within the wake of the Covid 19, Cororonavirus epidemic and applies to contracts and contractual disputes. It requires parties to engage in 'responsible contractual behaviour.'

Para 1 parties to contracts should act responsibly and fairly

Responsible and fair behaviour includes:

Para 15n requesting, and responding to, requests for mediation or other alternative or fast-track dispute resolution.

Para 17 The Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes.

Para 25 This guidance applies with immediate effect.

Russell Evans is a Director & Past President of the Hampshire Law Society. He is a full time Mediator and has judged the Finals of both the UK & International Mediation Competitions. He has conducted mediations for ftse companies, government agencies, local authorities, premiership football clubs, world champions, national charities, home owners, directors, partners, Estates & beneficiaries.

At ReSolve UK we have experts in: Business Disputes/ Insurance Claims/ Property Disputes/ Employment/ Construction/ Professional Negligence/ Personal Injury/ Sport/ Music & Entertainment/ Shipping & Maritime/ International Trade & Energy/ Director & Shareholder/ Partnership / Inheritance Claims & Probate/ Trusts & Estates/ Charities/ Care/

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