

INTRODUCTION TO MEDIATION

2013

DUNDAS & WILSON

"The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants." Lightman J Hurst v Leeming [2001] EWHC 1051

CONTENTS

What is mediation?	1
Why consider mediation?	2
Am I required by law to mediate?	3
Can I refuse to mediate?	5
Can I 'pretend' to mediate?	7
Can I 'walk away' during the mediation?	8
Can I change my mind after the mediation?	9
Can I recover the costs of an unsuccessful mediation?	10
The Mediation Day	11
How we can help you?	12

WHAT IS MEDIATION?

According to the Centre for Effective Dispute Resolution (CEDR):

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

Others take the view that mediation is merely an assisted without prejudice negotiation. Assistance or third party help differentiate this process from other forms of Alternative Dispute Resolution (ADR), but the parties need to remember mediation is a non-binding process without any usual termination, and they must enter into some sort of settlement or compromise agreement if a resolution of the dispute is reached. If such agreement is breached, then this forms an independent cause of action.

A mediation is conducted in a neutral and non-combative environment with an independent and impartial facilitator - the mediator. What is said is confidential and there is every opportunity for a frank exchange of views, including between principals of the parties, to help understand what each party really wants to achieve from the dispute: making a settlement more likely to be achieved.

The process of mediation is itself relatively simple. It depends on the complexity of the issues in dispute, and the attitude of the parties. In our experience, clients really want to know the following:

- Am I required by law to mediate?
- Can I refuse to mediate?
- Can I 'pretend' to mediate?
- Can I 'walk-away' during the mediation?
- Can I change my mind after the mediation?
- Can I recover my costs after an unsuccessful mediation?

WHY CONSIDER MEDIATION?

Mediation is actively encouraged by the courts in England and is often a recommended step to be taken by parties in a dispute as part of the pre-action protocol process. Failure to comply with the appropriate pre-action protocol can have negative costs consequences. Lord Justice Jackson in his Final Report (2009) on Civil Litigation Costs in England noted that *"mediation has a significantly greater role to play in the civil justice system than is currently recognised".*

This position is mirrored in Lord Gill's Report of the Scottish Civil Courts Review (2009) where it is said that *"Respondents who had experience as litigants or as interest groups had a more positive attitude towards mediation and other forms of ADR than respondents from the legal profession. This may suggest that litigation is not providing all that people seek by way of dispute resolution processes and that there is a desire for the civil justice system to provide a broader range of options."*



AM I REQUIRED BY LAW TO MEDIATE?

England

There is no requirement in English statute that makes mediation compulsory. Mediation is a contractual process and therefore works by agreement. However, English courts can order parties to mediate and can penalise a party with costs sanctions for failure to do so. In particular, the Civil Procedure Rules require parties to treat court proceedings as the last resort when dealing with a dispute. That said, some clients may take the view that potential cost sanctions are commercially acceptable and preferable to mediating in a particular case.

Although *Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576* (discussed below) concluded that courts should not force parties to mediate, and the pre-action protocols have been amended to reflect this, the courts have approved various forms of orders to mediate. In *Shirayama Shokusan v Danovo Ltd [2003] EWHC (Ch)* the Court granted an ADR Order despite resistance from the claimant. The Court considered that the case management powers and Civil Procedure Rules (CPR) 1.4 entitled them to make an order in this form, even against the wishes of a party.

However, the Court of Appeal in *Halsey* concluded that the Court has no jurisdiction to force the parties to mediate, relying on Article 6 of the European Convention on Human Rights Article 6. Dyson LJ stated:

> *"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."*

The Court did however approve the use of a Commercial Court type ADR Order (which orders the parties to take such steps as appropriate to resolve their dispute by mediation) and the form of order made by Master Ungley in clinical negligence cases. This requires parties to consider ADR and if a party objects it must file its reasons with the court no later than 28 days before trial so these can be considered in relation to costs after judgment.

Scotland

The Scottish Courts have a considerably less hands on approach to mediation than their counterparts in England and Wales.

In general there is no mechanism for the Court to order parties to engage in mediation. There are however several qualifications to this rule which generally appear in the commercial setting, and which are limited to family disputes. A referral to mediation can be made:

- where an order in relation to parental responsibilities or parental rights are at issue;
- pilot schemes which have been carried out in some Sheriff Courts;
- general case management opportunities in Court of Session Commercial Actions; and
- when the parties have provided for mediation in their own contract.

ADR pilot schemes were run in Aberdeen and Glasgow Sheriff Courts from 2006 to July 2008 and dealt with small claims, summary causes and ordinary causes on a sliding scale of costs. The report analysing the success of these schemes was generally positive, but expressly moved away from the idea of making the scheme compulsory.

In Commercial Actions, the Rules of Court (Rule 47.11) provide that the judge can make any order which he sees fit for the speedy determination of the action. This could include referring the case to ADR. This position is further enforced by the Court of Session Practice Note 6 of 2005, which provides that it is important before a commercial action is commenced that the matters in dispute are discussed and focussed in pre-litigation communications between the prospective parties' legal advisers. In particular, it states that both parties 'may wish to consider' to what extent any of the issues in question could be dealt with in some form of ADR.

Further, in terms of the Commercial Action Provisions in the Sheriff Court (40.12(3)(m) OCR) a Sheriff is allowed to order ADR. However, at the 2010 International Mediation and Construction Conference Lord Glennie said that he did not think there was a record of anyone having done that.

Whilst both the Court of Session Rules Council and Sheriff Court Rules Council have considered whether the current rules relating to ADR should be extended to allow for compulsory mediation, Lord Gill has confirmed that in his view *"We do not consider that the Court should have the power to compel parties to enter into ADR. That is entirely contrary, in our view, to the constitutional right of the citizen to take a dispute to the Courts of law"*.

Parties will be forced to mediate if there is a provision in their contract which requires they attend mediation before resorting to litigation. This is in contrast with the approach the courts have taken to clauses which require parties to negotiate in the first instance.

CAN I REFUSE TO MEDIATE?

Yes you can, but you are very likely to face costs sanctions.

England

The Court of Appeal in *Halsey v Milton Keynes NHS Trust* provided a list of non-exhaustive considerations to take into account when assessing whether a party acted unreasonably in refusing to partake in alternative dispute resolution.

These included:

- The nature of the dispute. Was it the type of dispute (for example where there are complex issues of law) that made the successful party reasonably believe it was unsuitable for mediation?
- The merits of the case. Was it reasonable for the successful party to believe it had a 'watertight' case?
- Whether other settlement methods had been attempted.
- Whether the costs of the mediation would have been disproportionately high.
- The timing of the mediation. If it was proposed late in the day, whether accepting the offer to mediate would delay the trial of the action.
- Whether the mediation had a 'reasonable prospect of success,' of resolving the dispute.

If at trial the Court considers, taking into account these factors, that it was unreasonable for a party to refuse to mediate, even if that party is successful, it will be penalised for its conduct by the Court imposing cost sanctions. Given the high costs often involved in litigation, even a 20% reduction in cost recovery could be significant.

Scotland

As detailed above, the Courts in Scotland do not have the power to compel parties to enter into ADR. Unlike in England, there are currently no sanctions for a party's refusal to mediate.

Lord Gill states within his Review

"We do not consider it necessary to make any specific provision in court rules for sanctions in expenses where a party has refused to engage in alternative dispute resolution. Nor do we consider that the parties should have to justify to the court why they did not engage in ADR or, if they did, why it did not result in settlement. These, in our view, are not proper matters for the Court to raise. There is case law in England and Wales where the conduct of the parties in relation to mediation has been found relevant to the awarding of costs. We would regret if such an approach were to become a feature of litigation in Scotland. There may, however, be exceptional cases where it may be clear to the court that a party's refusal to consider alternative dispute resolution has been wholly unreasonable. In such exceptional situations we consider that the court's general discretion at common law in the awarding of expenses is a sufficient safeguard. As a general rule, however, we consider that parties should bear their own expenses in relation to mediation, unless they agree otherwise, and that such expenses should not normally be part of an award of expenses by the Court".



CAN I 'PRETEND' TO MEDIATE?

England

You are strongly encouraged to enter into mediation. But what if, because you believe your case is so strong, you fail to take an active part in trying to reach a commercial settlement? The case of James *Carleton Seventh Earl of Malmesbury and others v Strutt and Parker [2008] EWHC 424 (QB)* considered this question and made it clear that, a party who adopts an unreasonable stance in a mediation (i.e. 'pretends' to mediate) is in the same position as a party who unreasonably refuses to mediate and therefore should be subject to an adverse costs order.

In *Earl of Malmesbury,* the claimants commenced proceedings against the defendant for alleged negligence in representing and advising them in respect of three leases. During a mediation which took place following judgment on liability, but prior to quantum being decided, the claimants offered to accept £9 million plus 80% of its costs in settlement of the matter. That offer was rejected by the defendant and the Court awarded the claimants the significantly lesser sum of £915,139.00. Although the claimants had won the litigation per se, the defendant requested that the Court use its discretion when deciding costs to take into account that the claimants had exaggerated their claim, making the mediation impossible.

The Court held that the claimants' position in the mediation was 'plainly unrealistic' and 'unreasonable'. Had the claimants taken a more reasonable stance on the valuation of the claim, the mediation might have succeeded. It should be noted that as most mediations take place on a without prejudice basis the Court is not usually aware of parties' conduct during the mediation. However in this case the 'without prejudice' privilege was waived so the Court could consider the claimants' conduct and equated its unreasonable stance with a party refusing to partake at all. Therefore the Court reduced the claimants' costs by 30% and 20% in respect of liability and quantum respectively to reflect its unreasonable conduct.

Scotland

Engaging in the mediation process is entirely voluntary in Scotland therefore the Court does not have the ability to make an adverse cost order against the party who 'pretends' to engage in the mediation. There is however little benefit to be gained from adopting such a stance.

CAN I 'WALK AWAY' DURING THE MEDIATION?

England

This depends on the facts. The fundamental issue is that if you 'walk away' at the beginning of the mediation then you may be found to be unreasonable and treated as if you had refused to participate. On the other hand, if you abandon discussions after long, considered negotiations then arguably you have not blithely 'walked away'. It is important to note that the process of mediation is not a formal process with an immovable start and finish - the parties are free to leave the mediation at any stage.

Scotland

As the process is entirely voluntary either party has the right to 'walk away' during the mediation without any adverse cost consequences.



CAN I CHANGE MY MIND AFTER THE MEDIATION?

Yes - provided there is no binding settlement agreement.

England

Imagine that you have entered into mediation and after a few long days of strongly fought negotiations you have managed to reach a settlement. However, as the process is non-binding, how can you be sure that the other side will not have a change of heart which will unravel the settlement reached?

In order to avoid such a situation, the parties should take the following steps:

- Establish at the outset of the mediation that that there is a representative for each party present, or available remotely, who has authority to settle.
- Once the parties are satisfied that due authorisation has been obtained, all terms and conditions of the settlement must be summarised in the presence of all participants. The terms should then be encapsulated in writing at the mediation and signed by all parties. Even if all parties are tired and want to go home, no parties should leave the mediation without the terms of settlement being agreed and signed. Even if the lawyers have to stay to tweak and legalise the document after the parties have left, all the essential terms must be agreed at the mediation.
- Ensure that the terms signed by the parties do not amount simply to an agreement to agree, rendering the agreement legally unenforceable.
- If after creating a binding mediation agreement a party fails to adhere to its terms, it is then open to the aggrieved party to issue court proceedings for breach of contract.

Scotland

As in England, parties are only bound by a settlement if a binding agreement is entered into by authorised representatives of the parties to the mediation.

The without prejudice nature of the mediation means that, in general, discussions which take place during the mediation cannot be founded upon in later proceedings unless, and until, a legally enforceable agreement has been entered into.

CAN I RECOVER THE COSTS OF AN UNSUCCESSFUL MEDIATION?

England

Pre-action

Pre-action costs can only be recovered where:

- The costs fall within the principles stated in *Re Gibson's Settlement Trusts [1981] Ch 179* (those which are incidental to the litigation e.g. incurred in proving a relevant issue or creating documents used during the litigation); or
- The steps taken to comply with the appropriate pre-action protocol can properly be attributable to the conduct of the action.

Recoverability of pre-action mediation costs was considered in *Lobster Group Limited v Heidelberg Graphic Equipment Limited (1) and Close Asset Finance Limited (2) [2008] EWHC 413*. The Judge refused the second defendant's application for pre-action mediation costs on the basis that:

- Unlike costs incurred in a pre-action protocol, the costs of a separate pre-action mediation are not *"costs of and incidental to the proceedings"*. *Lobster Group Limited v Heidelberg Graphic Equipment Limited.*
- The mediation in this case took place two and half years before the proceedings started.
- At the mediation, the parties agreed to bear their own costs. It would be a breach of that agreement to allow costs to be recovered at a much later stage.

During the action

As the cases of *Chantrey Vellacott v The Convergence Group [2007] EWHC 1744 (Ch)* and *Nat West Bank v Feeney [2006] EWHC 90066* (Costs) demonstrate, it is easier for parties to recover costs of an unsuccessful mediation which took place after the proceedings had commenced because it is easier to prove that the costs of such mediation are incidental to the litigation and were incurred *"in connection with a view to settlement"* (Costs Practice Direction 4.6 (8)).

It is best practice to confirm in writing whether the parties are to bear their own costs of the mediation. If the mediation is unsuccessful and the case proceeds to trial, mediation costs will not be recoverable if it was agreed at the time the parties would bear their own costs.

Scotland

As a general rule in Scotland, parties are required to bear their own expenses in relation to mediation, unless they agree otherwise and such expenses should not normally be part of an award of expenses by the Court.

THE MEDIATION DAY

What happens at a mediation? Our flow chart sets out a typical day.



HOW WE CAN HELP YOU?

Our team has the skills and experience to guide you through the mediation process - from advising you on the best time to mediate, to choosing a mediator and conducting the mediation. We also have a number of accredited mediators who can provide valuable input when preparing for a mediation. We have successfully used mediation for clients across the firm in areas including:

- commercial disputes;
- construction and engineering;
- employment;
- insurance and professional negligence;
- planning; and
- real estate disputes.

If you would like any further information on this Guide please contact:

Lorna Sibbald
Partner, Dispute Resolution
+44 (0)131 200 7515
lorna.sibbald@dundas-wilson.com

Lindy Patterson QC
Partner, Construction & Engineering
+44 (0)141 304 6100
lindy.patterson@dundas-wilson.com

Trudi Craggs
Partner, Planning
+44 (0)131 200 7473
trudi.craggs@dundas-wilson.com

Andrew Walker
Partner, Dispute Resolution
+44 (0)20 7759 3620
andrew.walker@dundas-wilson.com

Colin Hutton
Partner, Dispute Resolution
+44 (0)131 200 7517
colin.hutton@dundas-wilson.com

Eilidh Wiseman
Partner, Employment & Pensions
+44 (0)131 200 7485
eilidh.wiseman@dundas-wilson.com

Gemma Lampert
Partner, Dispute Resolution
+44 (0)20 7759 3657
gemma.lampert@dundas-wilson.com

DUNDAS & WILSON

Northwest Wing
Bush House, Aldwych
London WC2B 4EZ
Tel: +44 (0)20 7240 2401
Fax: +44 (0)20 7240 2448

Saltire Court
20 Castle Terrace
Edinburgh EH1 2EN
Tel: +44 (0)131 228 8000
Fax: +44 (0)131 228 8888

191 West George Street
Glasgow
G2 2LD
Tel: +44 (0)141 222 2200
Fax: +44 (0)141 222 2201

11 Queen's Gardens
Aberdeen
AB15 4YD
Tel: +44 (0)1224 444 100
Fax: +44 (0)1224 444 101

www.dundas-wilson.com

DTP05516