

1. How to make mediations work
2. The future for mediations following *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416



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How to make mediations work

Beforehand

1. Work out top and bottom lines with your client [*saves time in the mediation*]
2. Identify what matters (die in the ditch points) and what does not [*identifies what matters*]
3. Formalities – Tomlin order? Simple compromise? Heads of Terms? [*offers start in final form*]
4. What additional information do you require from the other side? [*will be available on the day*]
5. Ask (ie demand) to speak to the mediator beforehand [*builds rapport / mediator should be doing*]
6. Where – on site? (yes for boundary / neighbour-disputes / easements) solicitor's-offices? Chambers? Holiday Inn? Remote? [*often overlooked*]
7. Is there a deadline before which it has to be finished? Everyone must know in advance [*deadlines are often a benefit*]
8. Single-joint meeting? Would it be productive for everyone to be in the same room early on? [*often insisted on but how useful in reality?*]
9. Choose your mediator carefully [*some proactive / some passive / experience is sometimes critical / positive energy is important*]
10. Decision maker in the room / on the phone [*obvious*]



How to make mediations work

During

1. Be open with the mediator [*WP and confidential – may as well make best use of the mediator*]
2. Offers – run multiple different packages / forms – first offer should be identified prior to the mediation itself [*enables creativity without wasting time*]
3. Costs – negotiate on the basis of no order as to costs? [*just mentally add the figure you want for costs to the principal sum – demanding costs may attribute a sense of blame*]
4. Always start drafting when shape of the settlement becomes clear [*lawyers: get on with it*]
5. Standard property mediation – 3-4 offers each side [*first offer by 11am please*]
6. Avoid: (i) introducing moving parts late on; (ii) rowing back on an offer; (iii) threatening to walk out [*annoys other side*]
7. Stay positive [*amazing what can happen at the 11th hour*]
8. Costs and interest are easier to be flexible on [*everyone knows this so don't think it is necessarily a gift*]



How to make mediations work

What happens if the parties get stuck?

1. Take a break [*30 minute walk round the block = perspective*]
2. Lawyers-only get together? [*client is obstructive*]
3. Client-only get together? [*lawyer is obstructive*]
4. Sealed bids? [*both sides too nervous of giving away too much*]
5. Organise day 2 and agree mediation privilege continues? [*need time to consider*]
6. Repeat best offer in a Part 36 offer the following day? [*leveraging the progress made*]

Ultimately – a good mediator should be demanding / encouraging / cajoling parties to think about every point above both before and during a mediation.



Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

- Dyson LJ's statement in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, [2004] 5 WLUK 215 that to oblige unwilling parties to refer their disputes to mediation would unacceptably obstruct their right of access to the court was obiter.
- A power exists to order parties to engage in a non-court-based dispute resolution process and/or stay a claim until they do.
- Whether the court should order or facilitate any particular method of dispute resolution was a matter for its discretion.
- Relevant factors will include: (i) the form of ADR being considered; (ii) whether the parties were legally advised or represented; (iii) whether ADR was likely to be effective or appropriate without such advice or representation; (iv) whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence; (v) the urgency of the case and the reasonableness of the delay caused by ADR; (vi) whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue; (vii) the costs of ADR, both in absolute terms and relative to the parties' resources and the value of the claim; (viii) whether there was any realistic prospect of the claim being resolved through ADR; (ix) whether there was a significant imbalance in the parties' levels of resource, bargaining power or sophistication; (x) the reasons given by a party for not wishing to mediate; and (xi) the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of a court order.



The future for property litigation post-Churchill





- You will need to take a position on mandatory mediation prior to every CCMC
- I suspect DQs will change to expressly incorporate a question about whether a party wants the Court to order a mediation / form of ADR
- If budgeted & both sides represented and in funds (reduces the prospect of article 6 being engaged) then why not?
- Expect it to become the norm (but will take time to bed in)
- The real question for litigators - when to mediate – what stage?
- Will mandatory mediation work? Unwilling parties? Will success rates for voluntary mediations (currently around 70% depending on the data source) be matched?
- Simply going to create new arguments? Identity of mediator? Expense?
- What about smaller claims? Small claims track mediation service is free
- For fast / intermediate track (fixed costs) – parties just absorb cost?
- Are there enough accredited mediators? established mediators? Good mediators?



Thank you

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