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Welcome to Landmark Chambers'

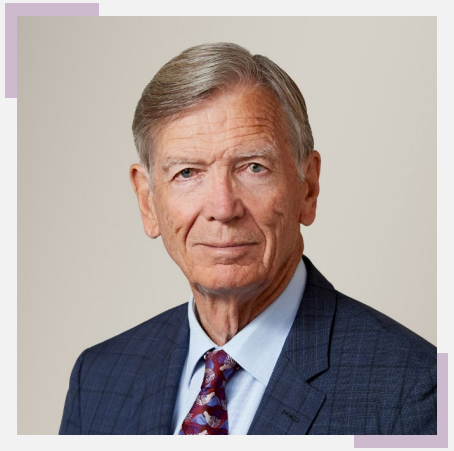
Quarter Day Update seminar – Mediation and Part 36 in Property Law

Thank you for joining us today.
We will begin shortly

Your speakers today…

Myriam Stacey KC (Chair)

Part 36 and Protection of Property Disputes



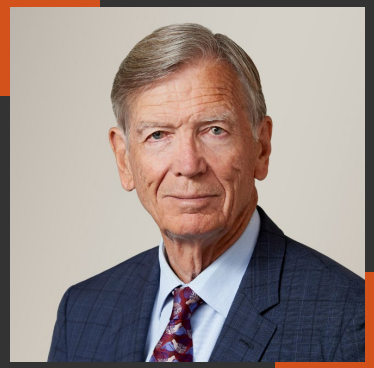
Lord Carnwath CVO

Mediating a high-profile environmental dispute

Rupert Cohen

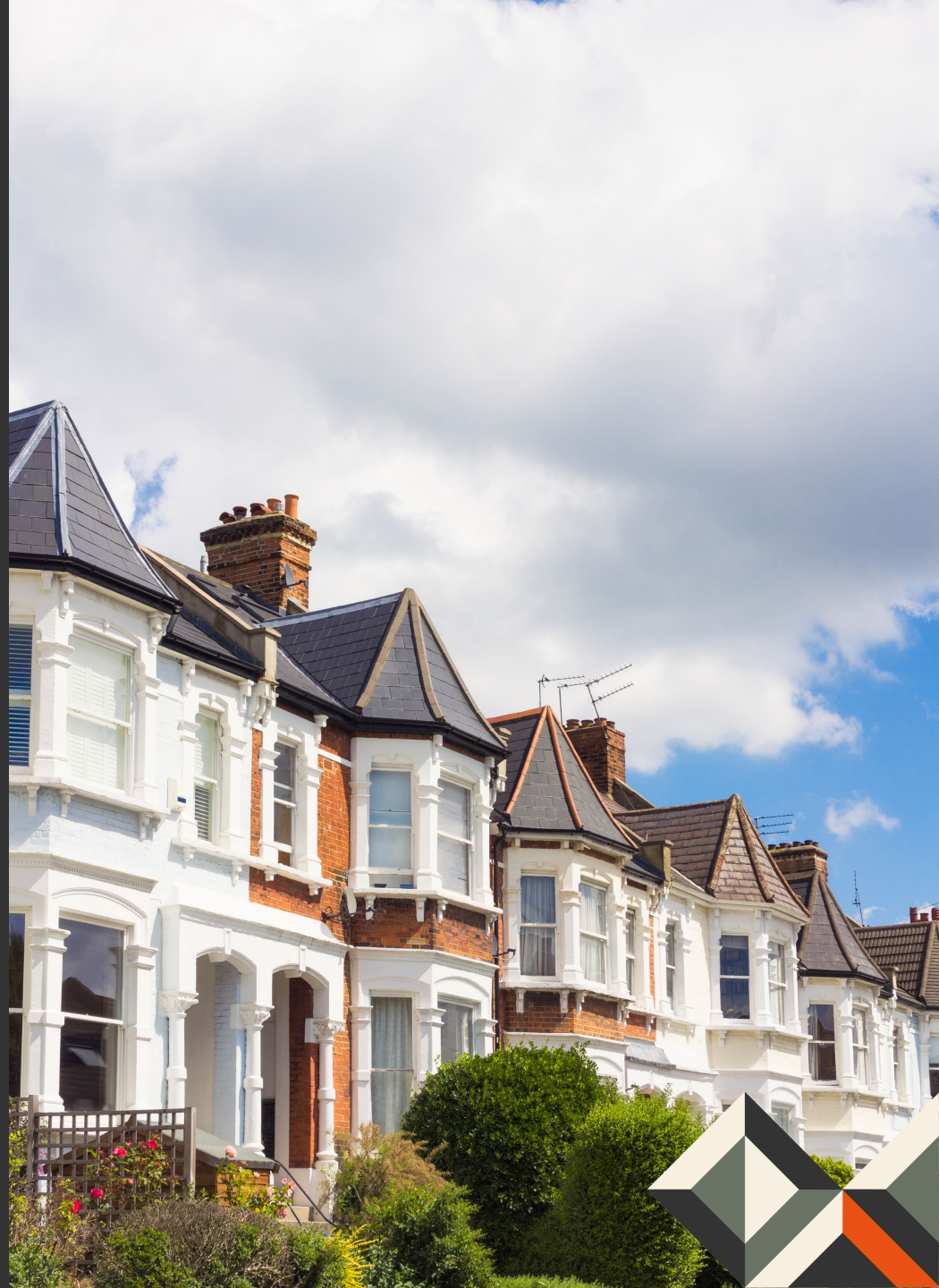
1. How to make mediations work
2. The future for mediations following *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416

Mediating a high-profile environmental dispute



Lord Carnwath CVO

Former Justice of the UK Supreme Court,
Associate Member at Landmark Chambers



- This mediation arose from a complex and highly contentious dispute about emanations from a landfill site in the Midlands. It had attracted widespread complaints from the public, and representations from MPs and the Press.
- The background was described by the Court of Appeal in a judgment in early 2022 (*R (Richards) v The Environment Agency*[2022] EWCA Civ 26 (17.1.22)):
  - "From a time in late 2020 onwards, complaints were received about foul-smelling odours coming from the landfill site. The principal cause of the odours was hydrogen sulphide gas. The emissions give rise to a strong, foul-smelling odour like the stench of rotten eggs. It can cause irritation to the eyes, sickness, headaches, vomiting and other symptoms… The level of complaints was high. We were told that there had been about 45,000 complaints in a period of some months in 2021, more than the number of complaints made about all other such facilities in the country combined."
- Those proceedings had been brought by Mathew Richards, a five-year-old boy with severe health problems living in the area, alleging breach by the Agency of his rights under articles 2 and 8 of the European Convention of Human Rights. The action failed. Although the court found that Matthew's health had been directly affected, it accepted that at the date of the hearing (August 2021) the Agency was taking reasonable steps to monitor the problem and deal with it.

Legal Background

- The legal framework was complicated by the overlapping jurisdictions of -
  - Staffordshire County Council, as waste planning authority, responsible for enforcement of conditions in the planning permission;
  - Environment Agency, as regulator with responsibility for granting permits and with powers of enforcement under Environment Act 1995, and
  - Borough Council, with duties to take action in respect of “statutory nuisances” under Part III of the Environmental Protection Act 1990.
- The statutes are unhelpfully reticent about how these respective functions are expected to interact. But it was clear that the Borough Council, having identified a statutory nuisance, had an independent duty to act, regardless of any action or lack of action by the Agency.

Statutory nuisance proceedings

- The Council had served an abatement notice on the operator under s.80 of the 1990 Act on 13 August 2021, which was subject to appeal.
- This seems to have provided the stimulus for further action by the operator, including the engagement of new experts. By the summer of 2022, there was a reasonable degree of consensus about the action that needed to be taken to deal with the problem.
- Meanwhile a date had been set for a hearing of the statutory nuisance appeal in Autumn 2022 before a District Judge. Leading and junior counsel had been instructed.
  - "The hearing was listed for a four week trial, with directions providing for disclosure and the exchange of factual and expert evidence. In addition to factual experts, the parties each intended to call expert witnesses on hydrology, odour and landfilling."
  - See https://www.ftbchambers.co.uk/news/news-view/landfill-odour-case-settled

Mediation

- It was at this point (in July 2022) that I was approached to act as mediator, with a view to arriving at an agreed resolution of all the outstanding issues.
- As I understood it, there were three main factors which led the parties to agree to mediation, in preference to the court procedure:
  - The unattractive prospect of a long and expensive hearing with highly technical evidence before a non-specialist judge;
  - In court the issues would be confined by the statutory framework - whether there was a statutory nuisance at the time of the notice (August 2021), and what was needed to “abate” it; rather than looking broadly for practical solutions to the outstanding problems at the time of the hearing, and providing an effective and transparent regime for the future;
  - The major and complex issue of costs could be left unresolved.

The outcome*

- The mediation was conducted over two days in the offices of the solicitors (Browne Jacobson) in Nottingham
- The result was an agreement whereby the operator agreed to withdraw its appeal against the statutory nuisance abatement notice, subject to an agreed programme of remedial measures and monitoring procedures. This was subject to approval by the District Judge which was duly given.
- The agreement also provided for payment by the operator of a substantial contribution towards the Council's costs already incurred and the costs of future monitoring, and arrangements for improved information to the local community.

- * Reported in Local Government Lawyer 24.10.22; see also https://www.ftbchambers.co.uk/news/news-view/landfill-odour-case-settled

- The agreement provided for a formal statement by me confirming the agreement, and stating:
- “Walleys Quarry Limited acknowledge that the site has been the source of community complaint, and the council acknowledge that Walleys Quarry Limited have improved their operational practices such that odour emissions have recently reduced significantly and best practicable means are currently in place.
- The terms of the agreement reached by the parties ensure that an abatement notice will remain in place and require best practical means to prevent any repetition so far as is reasonably possible of any statutory nuisance and provide for ongoing reporting to give continuing assurance to the community.”

Points to consider

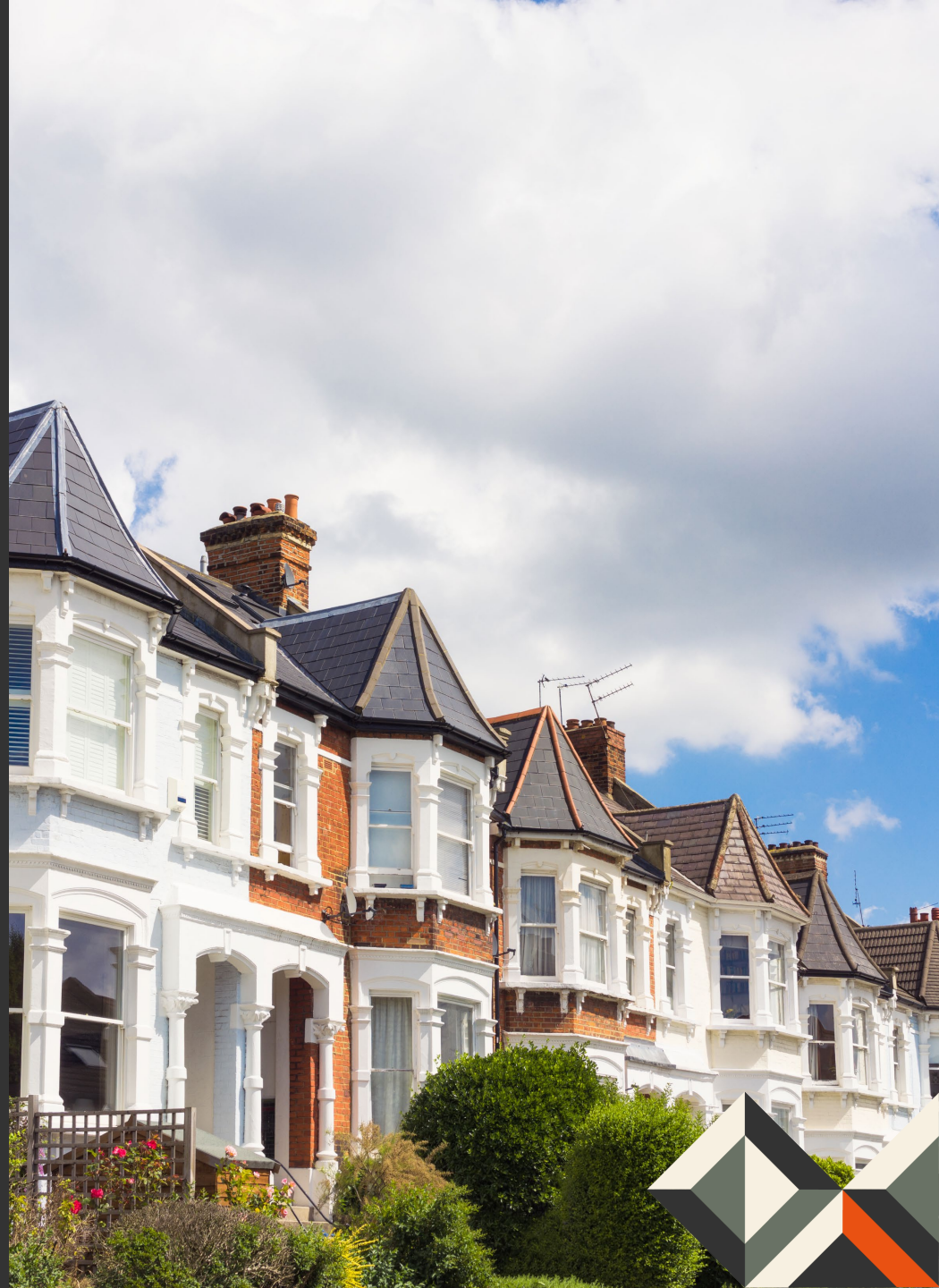
- Mediation versus the relief which can be claimed in court proceedings. Mediation offered a potentially much cheaper alternative, and the opportunity to cut through the legal and factual complexities, to a more flexible and practical approach.
- Choice of mediator – horses for courses. In this case, I believe, the parties saw me as a senior legal figure with direct experience over many years of dealing with environmental cases, as practitioner and judge; while it may have been thought that the involvement of a former Supreme Court justice would help to promote public acceptance of any resulting agreement.
- Good working relationship between mediator and lawyers. In this case the process was much assisted by two preliminary zoom sessions with counsel on both sides.
- Detailed preparation. It is essential that the mediator is fully briefed on the legal, factual and technical background of the case, so that he/she can command confidence of the parties in the discussions

- A good working environment – adequate rooms for the parties and their advisers to meet separately, and for joint sessions, with a separate room for the mediator. I was very grateful to the solicitors (Browne Jacobson, Nottingham) for organising this in advance without any need for input from me.
- A firm but realistic timetable. In this case, the parties had allowed four days for the process, but I decided at an early stage to set a much tighter timetable of two days, which was achieved.
- All key parties present – including not only the lawyers and the main experts, but crucially the decision-makers (with the necessary authority to conclude the agreement).
- Costs can be a major stumbling-block. It is essential that they are on the table from the start.

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

Rupert Cohen

Barrister at Landmark Chambers,
Mediator at The Property Mediators



How to make mediations work

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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

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<u>During</u>

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

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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 / cagoling parties to think about every point above both before and during a mediation.

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

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- 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

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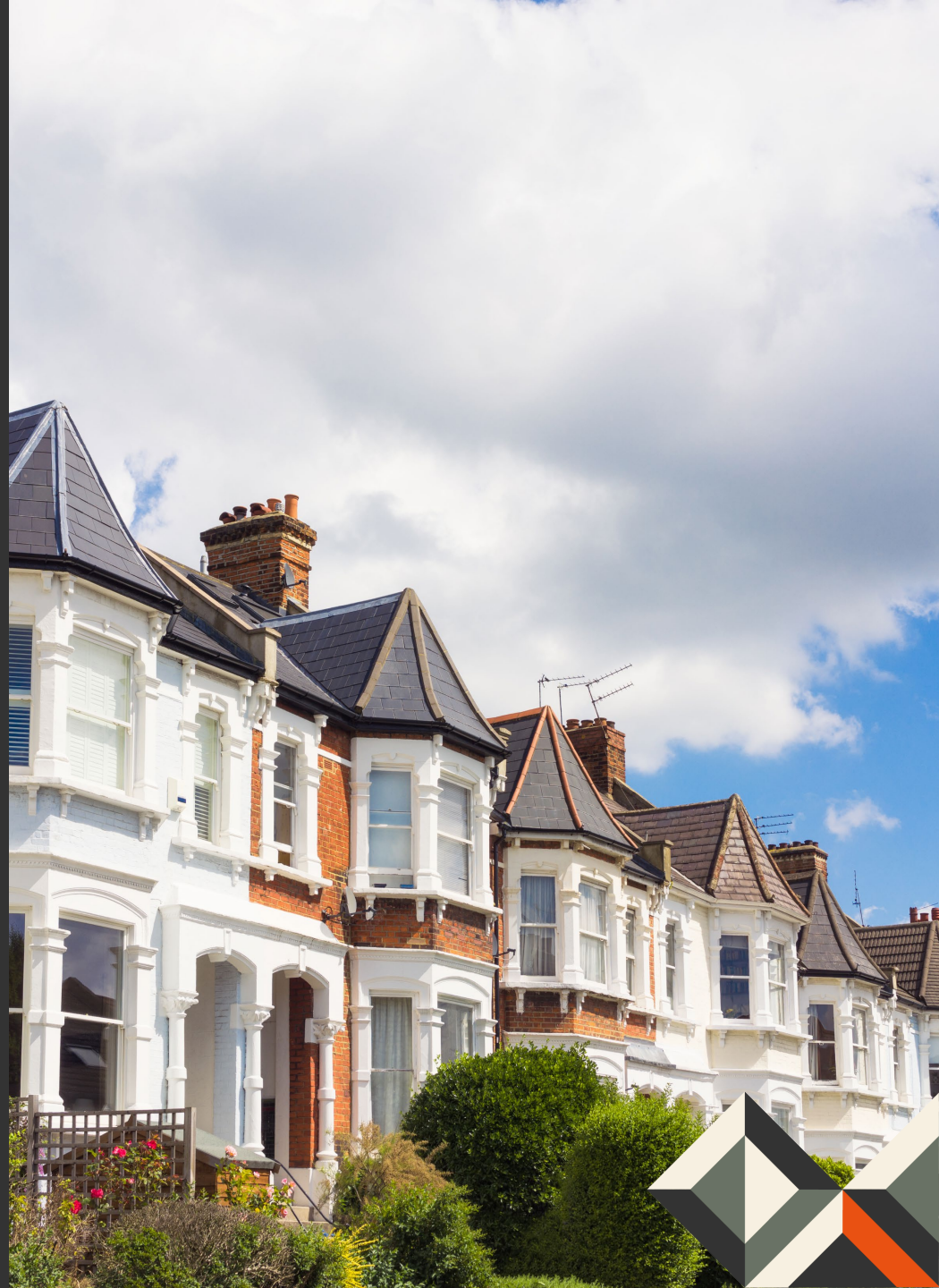
- You will need to take a position on mandatory mediation prior to every CCMC
- I suspect DQs will change to expressly incorporate a question about whether a party wants the Court to order a mediation / form of ADR
- If budgeted & both sides represented and in funds (reduces the prospect of article 6 being engaged) then why not?
- Expect it to be 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?

Part 36 and Protection of Property Disputes

Myriam Stacey KC



REFRESHER – THE TECHNICALITIES

Requirements (1/2)

- CPR r. 36.5(1):

  1. In writing
  2. Make clear pursuant to Part 36
  3. Specify a period of no fewer than 21 days within which D will be liable for C's costs if accepted (the "Relevant Period") – save for where fewer than 21 days before trial
  4. Make clear whether covers whole or part of the claim and/or counterclaim

- Cannot be withdrawn or changed (to be less advantageous) until after expiry of the Relevant Period (CPR r. 36.9(4))

- The Part 36 offer may be time-limited (i.e., it is automatically withdrawn on a certain date)

Requirements (2/2)

- Form N242A – Pepperall J in *Essex CC v UBB Waste (Essex) Ltd (No. 3)* [2020] EWHC 2387 (TCC):

  > "*…much of the difficulty would be avoided if parties would only use form N242A to make their [Part 36] offers.*"

- General discretion to disapply the Part 36 regime where "*unjust*".
- CPR r. 36.13(6) and 36.17(5) require that the Court take into account "*all of the circumstances of the case*" when considering whether or not it would be unjust to apply/disapply any of the Part 36 costs consequences.

Costs consequences – if accepted

Accepted within the Relevant Period	Accepted outside the Relevant Period
C is entitled to costs up to acceptance (CPR r. 36.13(1))	**C is entitled to costs up to expiry of the Relevant Period** **The offeree pays offeror's costs from expiry of the Relevant Period up to acceptance** (CPR r. 36.13(4)(b) and (5))

Costs consequences – if rejected

C makes Part 36 offer. D does not accept.	D makes Part 36 offer. C does not accept.
C fails to obtain more advantageous terms **Usual costs rules apply**	C fails to obtain more advantageous terms **C liable to pay D's costs from expiry of the Relevant Period, plus interest** (CPR r. 36.17(3))
C wins and obtains at least as advantageous terms 1. **Interest on damages up to 10% (from expiry of the Relevant Period)** 2. **Additional amount of up to 10% of damages (max. £75k)** 3. **Costs on indemnity basis (from expiry of the Relevant Period)** 4. **Interest on costs up to 10%** (CPR r. 36.17(4))	C wins and obtains more advantageous terms **Usual costs rules apply**

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PRACTICAL POINTERS

A law unto itself…

- The Part 36 machinery is a self-contained regime. It therefore escapes some of the ordinary rules applicable to contracts.

- Two of the most important aspects:

  1. The level of certainty required to constitute a valid Part 36 offer is not the same as that under the law of contract.

  2. The requirements of s. 2 of the Law of Contract (Miscellaneous Provisions) Act 1989 do not apply.

Certainty of terms (1/2)

- *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188
- C made short Part 36 offer to settle the claim on terms that D:

  (a) pay £63,124 to the Claimant;

  (b) take ownership of certain storage pods in issue; and

  (c) pay the Claimant's reasonable costs, to be assessed if not agreed.
- PoC stated full particulars of C's loss would be given in a Schedule of Loss – had yet to be provided.
- D claimed it could not properly consider the Part 36 offer and C could not rely on the costs consequences in Part 36.

Certainty of terms (2/2)

- Court confirmed C had beaten the Part 36 offer, as the Court awarded damages of £92,375.22.
- Newey LJ on extent of certainty required:

"… a Part 36 offer can potentially leave more to be resolved than a contractual offer could. While contractual principles can be relevant to the interpretation of a Part 36 offer … CPR 36.1 explains that Part 36 contains a "self-contained code" and Part 36 nowhere stipulates that a Part 36 offer must have the certainty that a contractual offer requires.

Further, the facility which CPR 36.8 provides for asking for clarification of an offer tends to confirm that something can be a Part 36 offer while yet needing to be clarified. I do not doubt that an "offer" can be so lacking in certainty as not to represent a Part 36 offer, but, on the other hand, a valid Part 36 offer can still, as I see it, leave some matters (especially of mechanics) to be further defined."

Application to property interests (1/3)

- *Orton v Collins* [2007] 1 WLR 2953 - partnership dispute in respects of a law firm.
- C served a notice of dissolution and commenced proceedings.
- C made a Part 36 offer, which included an obligation on Ds to pay C to dispose of his interests in a law firm and its premises.
- Offer was accepted.
- C later sought to argue that there was no settlement agreement, as the Part 36 offer and its acceptance concerned the disposition of an interest in land, but failed to comply with s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Application to property interests (2/3)

- The issue:

> "… what I have to decide is whether a Part 36 acceptance that, for some reason, creates no contract can nevertheless be enforced by application to the court.

- Determination:

> "61. In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences."

Application to property interests (3/3)

"62. … I therefore hold that it need not be a contract that is being enforced and that the regime of Part 36, while it may well give rise to a contract under the general law touching offer and acceptance, does not depend upon contract law, …. Infringement of human rights there is none. Nobody is forcing a party to make or accept a Part 36 offer. The obligation that arises is not primarily contractual. It is sui generis. It is part of the court's inherent jurisdiction, now regulated and clarified in CPR Part 36, "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". The administration of justice includes addressing the settlement of disputes.

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OTHER PRACTICAL POINTS

Service of Part 36 offer by email (1/4)

- CPR r. 36.7(2) confirms that a Part 36 offer is made when it is served.
- Part 6 permits service by way of personal service, first class post, leaving it at a particular place, and fax or or other means of electronic communication (in accordance with PD 6A).
- Practice Direction 6A, para. 4.1 provides that a party must have indicated in writing that they are willing to be served by email and identify the email addresses to which it must be sent.
- NB: para. 4.2 requires the serving party to ask the receiving party whether there are any limitations to their agreement to accept service by email (e.g., format or file size).

Service of Part 36 offer by email (2/4)

- So, what happens if a party fails to comply with PD6A but purports to serve by email anyway?

- *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] 4 WLR 143.
- C purported to serve Part 36 offer by email, without complying with PD6A. Ds argued that it was not validly made and therefore of no effect.
- C relied upon CPR r. 3.10 - where there has been an error of procedure, it will not invalidate any steps taken in proceedings unless the court so orders.

Service of Part 36 offer by email (3/4)

Robin Vos (sitting as a Deputy Judge of the High Court) said an order invalidating the offer would be "*a triumph of form over substance*" :

> "it is clear that the defendants' solicitors received the Part 36 offer on 15 December 2020. … No complaint was made about the method of service of the Part 36 offer until shortly before the hearing on 3 November. No suggestion has been made that there is any prejudice to the third defendant in the Part 36 offer having been sent by email rather than having been served in some other way, for example by post. In these circumstances, it would in my view be *a triumph of form over substance* if the court were to make an order invalidating the Part 36 offer."

Service of Part 36 offer by email (4/4)

- *London Trocadero* followed in *Coldunell Ltd v Hotel Management International Ltd [2023] TCLR 1.*
- *Any* consequences flowing from the defective service? Maybe …
- In *London Trocadero*, At [45], Vos held:

> "45. In my view, a further relevant factor to take into account is the defective service of the Part 36 offer. Although I have concluded that it is not in accordance with the overriding objective to invoke CPR Rule 3.10(a) and make an order that the Part 36 offer has not been validly made, this is in my view a reason why it would be unjust to award the claimant the maximum available under CPR Rule 36.17."

- But approach was <u>not followed</u> in *Coldunell* - judge refused to disapply any of the costs consequences due to defective service, noting that Dknew about the offer, suffered no detriment and should have challenged validity at the time.

Pleaded issues (1/2)

- CPR r. 36.2(3)(a) - a Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in a claim, counterclaim or other additional claim.
- *Hertel v Saunders* [2018] EWCA Civ 1831:

> "… I construe [that] as referring to pleaded claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded. Once proceedings have started, the certainty required for Part 36 to operate properly can only be achieved by this interpretation. A new claim which has been intimated, but which is not part of the pleadings, is not therefore caught by r.36.2(2)(d) (current r.36.5(2)(d))."

Pleaded issues (2/2)

- *However*, see *AF v AB* [2010] 2 Costs LR 164 - the fact of a counterclaim not being "*formulated or pleaded does not of itself matter*".
- See also *Calonne Construction Ltd v Dawnus Southern Ltd* [2019] 1 WLR 4793 - early offer to settle proposed claim which had yet to be pleaded:

> *"in the light of the fact that a party is entitled to make a Part 36 offer at any time, including before commencement of proceedings (r 36.7), it cannot be correct that a Part 36 offer cannot be made in relation to a counterclaim before that claim has been pleaded."*

Thank you

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