



RICS guidance note, UK

Mediation

1st edition



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Acknowledgments

RICS would like to thank the following for their contributions to this guidance note:

Working group

Chairman: Jacqui Joyce (the Property Mediators)

Martin Burns (RICS)

John Fletcher (RICS)

Alan Langleben (the Property Mediators)

Roger Levitt (Altermans Solicitors)

Robert Martell FRICS (Robert Martell & Partners)

Alex Stefanovic FRICS (Alex Stefanovic and Company)

Kevin Woudman FRICS (AKD Consulting)



Published by the Royal Institution of Chartered Surveyors (RICS)

Surveyor Court, Westwood Business Park, Coventry CV4 8JE, UK

www.ricsbooks.com

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Produced by the Dispute Resolution Service of the Royal Institution of Chartered Surveyors.

ISBN 978 1 78321 072 5

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Typeset in Great Britain by Graham Land Creative Limited.

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RICS guidance notes

International standards

RICS is at the forefront of developing international standards, working in coalitions with organisations around the globe, acting in the public interest to raise standards and increase transparency within markets. International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. This guidance note links directly to and underpins these standards and RICS members are advised to make themselves aware of the international standards (see www.rics.org) and the overarching principles with which this guidance note complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with this guidance.

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

Document status defined

RICS produces a range of professional guidance and standards products. These have been defined in the table below. This document is a guidance note.

Type of document	Definition	Status
Standard		
International standard	An international high level principle based standard developed in collaboration with other relevant bodies	Mandatory
Practice statement		
RICS practice statement	Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members	Mandatory
Guidance		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
RICS guidance note (GN)	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
RICS information paper (IP)	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

1 Introduction

This guidance note is intended for surveyors advising clients in relation to a dispute and gives guidance on when mediation should be considered, how it works, the benefits of mediating over litigating, and the consequences if parties do not mediate. It is aimed at helping surveyors represent their clients at or before mediations (with or without lawyers). It is not aimed at surveyors acting as mediators.

Surveyors often represent their clients in without prejudice negotiations. Mediation is a step on from that where the negotiations are carried out with a third party facilitator present. Mediation is an extremely effective tool, open to parties in a dispute whether proceedings have been issued or not. It can resolve the dispute quickly and cost effectively.

Mediation can be used for all types of property disputes including those relating to commercial or residential property, construction, planning, service charge disputes, dilapidations, rent reviews and all other leasehold property issues, neighbour disputes, and development properties. It can also achieve a settlement whatever the value of the dispute, e.g. from small neighbour claims to large multi-million pound commercial disputes. For a more detailed list of the types of action see Appendix 1.

Mediation is essentially a commercial rather than legal process and as such it can be used to explore the many on-going commercial issues between the parties, which lie beyond the narrow confines of the legal dispute about which evidence can be led in trial or arbitration proceedings.

The courts in England and Wales require all parties who bring a dispute before them to have considered whether the matter could be resolved by an alternative form of dispute resolution (ADR), the most common of which is mediation.

Professionals who advise their clients in relation to disputes have a duty to consider with them whether ADR is appropriate. If parties go to court when they should have mediated then the courts will impose costs sanctions on them. Failure to advise on this issue could well be seen by the courts to be negligent. It is, therefore, important that all advisers are aware of mediation and can advise their clients accordingly. Parties are now commonly required to give a statement to the court with reasons should they refuse to mediate.

2 Forms of ADR

Mediation is one form of ADR and the one with which this guidance is solely concerned. Practitioners should be aware though that other forms of ADR may be appropriate for their dispute, e.g. expert determination by a third party, arbitration, early neutral evaluation. For more information on these other forms, see RICS guidance notes on arbitration and independent expert determination; construction adjudication; construction arbitration; expert witness and conflicts of interest.

3 What is mediation?

3.1 Types of mediation

Mediation is a process whereby a neutral third party helps the parties to a dispute to reach a settlement they can all live with. There are two main types of mediation – evaluative and facilitative.

In evaluative mediation the mediator will tell the parties what they think of the merits of the case and how they think a court will decide it.

Facilitative mediation is where the mediator does not make any evaluation and merely ‘facilitates’ the parties’ discussions. Most mediations are facilitative and most mediators will avoid expressing an opinion. They may, however, carry out some robust questioning of the parties on the merits of their cases, both factually and legally. This is known as ‘reality testing’ and is designed to make the parties think hard about the risks of their case and the chances of success if it goes to trial.

3.2 Timing of mediation

Mediation is encouraged before proceedings are issued. It can take place at any point, before proceedings, during proceedings, and even up to and after a trial. The ideal time is when the detail of the claim, and the response, are known to both sides, but before the costs that have been incurred in reaching that stage are so great that they become a barrier to settlement.

3.3 Mediation principles

Mediation is a voluntary, without prejudice and confidential process.

It is **voluntary** because there is no compulsion (although there is often strong encouragement) upon the parties to participate in the process. (See the section regarding court cases on costs). The parties can leave at any time during the mediation and the mediator can stop it at any point.

It is **without prejudice** because nothing which is said in the mediation process can be used in the formal litigation or referred to in the court proceedings (save in limited circumstances).

It is also **confidential**. This is in the sense of *externally*, i.e. nothing in the mediation can be repeated in the outside world. This confidentiality comes from the terms of the mediation agreement. Some agreements also state that the fact that the mediation has taken place is also confidential.

Mediation is also confidential *internally*. Whatever is said by one side to the mediator is confidential and will not be repeated to the other side without permission from the party giving the information. This is to aid the parties to be as open as possible so that the mediator can better understand and help all participants and see any overlap of positions/aims.

Once an agreement is reached and a document signed, the deal is legally binding on the parties and can be enforced.

Mediators help the parties settle the matter so as best to serve their on-going and future relationships from a pragmatic and commercially viable standpoint – and so the process by nature looks to the future. In litigation and arbitration evidence is led about what happened at a point in the past and a decision is made as to the legal consequences of this event – they are as such retrospective in nature and limited in the extent of the matters which can be considered in evidence. Thus, a judge or arbitrator cannot take into account the future plans of the parties, e.g. to form a joint venture, in deciding where liability lies in respect of an event in the past. A mediator by contrast can build on such an intention to assist the parties reach a pragmatic commercial settlement.

3.4 Mediation process

Mediations usually take place face to face although there are schemes that run telephone and electronic mediations.

This guidance deals only with ‘face to face’ mediations. The format and formality for mediation can vary depending upon the nature of the dispute, the number of parties involved and the requirements of the parties. Nevertheless, there are certain generally accepted principles which exist and which govern most mediations.

The process is simple and informal. The mediation is usually preceded by the parties agreeing and sending to the mediator a bundle of relevant documents, e.g. statements of case, experts’ reports, etc. The parties also usually each prepare a short written statement which is sent to the mediator and usually exchanged with the other side unless it contains confidential information.

Where appropriate, the mediator may carry out a site visit to familiarise themselves with the issues in dispute, e.g. boundary disputes, and will often call the parties before the mediation to discuss issues.

The mediation usually begins with a **joint opening session**, at which the mediator outlines the process and gives each of the parties an opportunity, without interruption, to state its case. There are no formal rules of evidence attached to these statements. There is also no requirement for anyone to say anything at this point if they do not want to. Often it is better for the parties to say that they have come to the mediation with a view to reaching a settlement. This often helps more than restating the legal cases. Sometimes the opening session leads to a dialogue where the parties can answer any questions that the other side may have at that point. It can also be cathartic for a party to explain their position at this point, although most mediators will encourage them to be conciliatory rather than argumentative. An opening session is also a good time for any apologies to be made which can set a positive tone for the rest of the day.

When the joint session ends the mediator will meet privately with each party and, as the day progresses, shuttle backwards and forwards between the parties. The mediator may also convene other joint sessions during the day depending on how things progress.

In **the private sessions** the mediator will often act as a 'devil's advocate' to get the parties to focus upon the strengths and weaknesses of their case. Part of the intention here is that while the mediator is with one party, the other party is discussing the case in some detail with their advisers, to determine a position or strategy. The aim of the shuttling process is to bring the parties' respective positions closer together so that, in time, a settlement emerges naturally. The mediator will try to get the parties to be frank about what they want to achieve and how they think that might happen.

Private meetings with the parties continue for so long as they are required. Once a solution is reached, arrangements are agreed for the documentation of the settlement in a manner which will bind the parties.

Traditionally, mediators have not been required to have an expert knowledge of the field in which the dispute lies. However, in recent years there would appear to be a growing change in the commercial mediation market, especially in the built environment sector where there is a strong demand for mediators with skills and experience in the field in which the dispute exists. This enables them to assist the parties develop commercially viable options for settlement and to assist them in robust and informed reality testing.

3.5 Flexible process

One key point about mediation is that the process is flexible. Often, as well as the shuttling process described earlier, the mediator may have other separate meetings, e.g. with the parties (without lawyers), with the lawyers alone, with experts or have a full joint meeting at other points in the day. Mediators are experienced at recognising when a process has hit a deadlock and will usually make suggestions to try to get around this.

3.6 The venue

The mediation will normally take place at a neutral venue or often at the offices of one of the parties' representatives. There will be a room set aside for each party and one for the mediator that can also be used for any joint sessions.

Sometimes, e.g. for boundary disputes, it can be useful to hold the mediation on site. This is helpful so that the mediator can fully understand the 'position on the ground' but also as solutions are being discussed, the parties can go and have a look at the area in question and see if they will work from a practical point of view.

3.7 Practicalities

The parties should check that facilities are available for tea, coffee and food. Laptops, printers, copiers and internet and phone access also need to be available.

Mediations often overrun the working day so out of hours facilities should also be available.

4 Success rate/statistics

The Sixth Mediation Audit, carried out jointly by the Centre for Effective Dispute Resolution (CEDR) and the Civil Mediation Council, in May 2014, stated that 'mediators report that just over 75% of their cases settled on the day, with another 11% settling shortly thereafter to give an aggregate settlement rate of around 86%'.

However, it is important to note that just because a mediation does not settle on the day (or soon afterwards), it does not mean that it was not a 'success'. Taking part in a mediation enables the parties to rehearse their arguments and assess the strength of their own and the other side's case. Also, even if only a few points can be agreed, this helps to narrow issues and will reduce the time and money to be spent in the formal legal process both before and at trial.

Of course, parties have always been able to settle matters and most cases do settle. However, it may be better to use the mediation process rather than just normal negotiations as the process has evolved over many years to offer the parties the opportunity, with the benefit of a skilled and experienced mediator, to explore and analyse under conditions of complete confidentiality, all the commercially relevant options for settlement open to them.

5 Advantages of mediation over litigation

There are a number of advantages to settling disputes by mediation rather than going to court.

5.1 Preserving business relationships

Property disputes are well suited to mediation. There is usually an on-going relationship between the parties, e.g. landlord and tenant, neighbours, parties to a construction project. The focus is to achieve a mutually satisfactory settlement. There should be no winners and losers unlike in arbitrations, court proceedings and expert determinations. The speed of a mediation helps and more creative and lateral solutions may be available than are available to a judge, arbitrator or expert.

5.2 Speed

A mediation can be organised within days and usually concludes within one day so a solution can be achieved quickly and with less expense. Half day mediations can also be useful for smaller disputes. Often it can take at least a year for a matter to reach trial and then parties need to wait for a judgment and often appeals.

5.3 Cost

Attending a one day mediation is much cheaper than taking a matter to trial. Mediation will not just reduce the legal costs, but also management time and energy, which can be more profitably used to benefit the business than in litigation. Parties need to bear in mind that the costs of going to trial can often dwarf the amount in dispute. Mediation gives them the opportunity to settle before that becomes the case.

Also, litigation can be very stressful. Achieving resolution by settlement will avoid months of uncertainty and worry.

5.4 Maintaining confidentiality

As mentioned earlier, mediation is confidential – it may not even be known that a mediation took place. This helps in commercial property disputes, e.g. a landlord of a shopping centre may prefer to reach an amicable settlement with one tenant without publicising the dispute to other tenants.

5.5 Avoiding precedent

A mediated settlement does not give rise to a precedent for future, similar disputes. This may also be seen as a disadvantage, however.

5.6 Creative solutions

The mediation process, by its very nature, facilitates more creative solutions, e.g. renegotiations of the terms of sale between vendor and purchaser, variation in lease terms, or the project management of a construction contract, etc. It gives the parties the opportunity of finding a commercial solution, as opposed to a purely legal one.

5.7 Retention of control/client involvement

The parties themselves play a key part and will make the decision whether to settle or not. If they feel the process is not working, they may leave at any time, although the mediator will strenuously try to keep the discussion going if there seems to be any prospect of a deal being done. Most mediation agreements will require the parties to engage in the process in good faith, and this is the expectation of the court.

The client is central to the mediation and is involved throughout. This can be a very different experience to the court process.

The parties can also suggest to the mediator ways that may help to push the mediation along, e.g. joint meetings, etc.

5.8 Resolving multi-party disputes

In some cases, mediation can overcome the difficulties which can be experienced when several parties are involved in a dispute, e.g. where a third party to a claim has subsequently been added as a defendant, for example where there is landlord, tenant and sub-tenant.

5.9 High success

As stated in Section 4, 86% of all mediated cases result in a successful outcome.

5.10 No lose option

Apart from some investment in time and costs, parties have nothing to lose by referring their case to mediation. If it is unsuccessful, they simply carry on with their litigation. Since most cases commenced in the courts settle, there is a strong argument for trying mediation. The timing of the mediation is very important but the longer it is left the more costs that will be incurred, which could be a barrier to a settlement.

5.11 Choice of mediator

Parties are free to choose their mediator.

Parties should choose a mediator who is experienced in the sort of dispute with which they are dealing, and an effective way of finding one is often by personal recommendation. There are also many organisations which provide mediators and all of the recognised bodies ensure that their mediators are fully trained and have sufficient expertise and experience to act as a mediator in a particular case.

RICS does not endorse any one provider, but parties should ensure that any person chosen is duly accredited, insured, and has relevant experience.

5.12 Costs of mediation

A standard mediation is usually for eight hours (e.g. 10am–6pm, 9am to 5pm or some other agreed time frame), for which a mediator will charge a fixed fee per party, agreed and paid in advance.

If mediations overrun then parties normally agree to pay an hourly rate for any extra time.

Mediators vary as to whether they also charge for reading in time and expenses and parties should always check.

Parties should also check whether the mediation agreement provides for them to be jointly and severally liable for the other party's share of the fees and whether the mediation costs are 'costs in the litigation' (see Glossary), or that each party bears their own costs of the mediation despite what happens in the litigation should it go to trial.

5.13 Costs sanctions for failure to mediate

The courts have increasingly imposed costs penalties on parties who unreasonably refuse to mediate. See paragraph 10.

6 Preparing for mediation

6.1 Documentation

The mediator needs to see the key documents along with a summary of the background to the dispute and the points in issue, both factually and legally.

It is also very helpful for the mediator to be given any previous correspondence detailing attempts to settle.

Parties usually prepare a position statement setting out their view of the case for exchange with the other side and to go to the mediator a few days before the mediation. A draft position statement is included at Appendix 3.

Parties can also send the mediator a confidential statement before the mediation containing details of the points covered in Section 8.1. This would not be revealed to the other side, but will give the mediator an indication of the issues that are really important to the party that they do not want the other side to know, and will save time on the day.

The parties will also need to agree the terms of the mediation agreement under which the mediation is to take place. Most mediators have their own standard form but will usually accept amendments that the parties agree. A draft mediation agreement is included at Appendix 4. In considering the terms of an agreement, the parties and the mediator should specifically consider the liability for costs between the parties and also the confidentiality provisions.

6.2 Authority/who should attend

It is imperative that the people who can authorise the terms of a settlement are there on the day or available by telephone and/or email – even late into the evening, e.g. clients, board members, trustees, insurers. Advisers should expect the unexpected and be prepared to react and be flexible.

Also ensure that people supplying advice, such as accountants and lawyers, are available. It is not necessary for lawyers to attend mediations (this will depend on the individual circumstances of each case), although they usually do.

6.3 What do parties need/want to achieve?

It is important that parties examine the strengths and weaknesses of their case, legally and evidentially. Parties should think very carefully about what it is that they want to achieve. Not what they are entitled to, but what they *need* to happen; what is the real *value* to them? They need to know their 'bottom line' but be prepared to be lateral and flexible. Think about the worst and best case scenarios and what it is that they really need to avoid/achieve. For example, a party may accept that it has to vacate a retail property but it would really help its cash flow if it could trade over Christmas. At a mediation, it can negotiate a longer vacation date in return for, perhaps, payment of a slightly higher sum.

Parties with a monetary claim should attend the mediation with up to date figures including any interest calculations.

6.4 Costs

Parties should keep track of how much they have spent and have a realistic estimate of what they will spend if the matter goes to trial. It is always more than anticipated, even allowing for the unexpected. Parties need to think about how they will pay their costs and the other side's costs if they lose. Can they really afford to take that risk?

Even if they win, parties need to work out their net gain. After they have paid their unrecoverable costs and factored in their time – is it really worth continuing with the dispute/litigation? Where is the break-even point?

It is important to think very carefully about the consequences of any Part 36 offers that have been made or any Calderbank/without prejudice offers (see Glossary). The figures should be worked out carefully – failing to beat the amount of an offer by a very small amount can have catastrophic costs consequences.

6.5 Know the other party and empathise

Each party should try to walk in the other's shoes and think about what might be really important to them. What is it they need to achieve and what is driving them? How can their needs be accommodated? Discussions should be open and honest with both parties acknowledging the effects of their respective actions.

6.6 Think about the process

It is the parties' day and, therefore, they need to think about how they want it to run. Are there any personalities involved that need to be 'handled'? Would it be helpful for the parties to meet with the mediator without lawyers? Would it be better for the lawyers to talk to each other?

Do they feel that the other side simply do not understand their case – would it be helpful if they could explain things to the other side directly, without having the message diluted by advisers?

6.7 Let go

Mediations can be emotional arenas, particularly when they involve small businesses and individuals. Parties have the chance to 'get it off their chests' but then they should let it go in order for the process to be cathartic.

There is also a need to let go of the litigation. Parties have to accept they will not get to know the 'answer'. There will be no 'winner'. No vindication, just an acceptable solution.

6.8 Attitude

The attitude of the parties and their advisers is key. Blame, aggression, and long speeches are unhelpful. The respective cases should be made in a positive manner and above all, parties should not bury their heads in the sand. This could be their opportunity to get out of a difficult situation before costs rise inexorably.

6.9 Settlement structure

Consider in advance how any settlement will be documented. Is a court order needed? Is it just payment of money, or is it more complicated involving the transfer of land or granting of rights, etc.?

Consider issues such as confidentiality clauses and if possible, do any drafting in advance.

If proceedings are already on foot then these are usually compromised by a Tomlin Order. A sample Tomlin Order is included at Appendix 5.

6.10 Make the most of the mediator

Often parties treat the mediator as an extension of the other side. They try to convince the mediator of the strength of their case and expect the mediator to be their mouth piece in convincing the other side of this. This is not part of the mediator's job.

A better use of the mediator would be to trust them – be honest. Remember that whatever the parties say to the mediator is confidential unless they say it can be revealed to the other side. Even if a party admits it has a weak case then it can focus, with the mediator, on what it is it really needs to achieve from the day.

6.11 Other issues

Think in advance about issues that may come up on the day. Is there a taxation or VAT issue that a party will need to take into account? If so, get the advice beforehand.

Does the practical answer to the dispute depend on a third party? If so, make sure that they have been spoken to beforehand or that they are available to speak to on the day.

Does a party need any other evidence/documents to help its case or provide a solution? If so, find them in advance and bring them to the mediation.

6.12 If no settlement on the day

If settlement is not reached on the day it is important that all parties leave with the same understanding. Document what has and has not been agreed and agree how to take the matter forward? Who will do what next?

Mediators are often able to help (by telephone) after the mediation and achieve a settlement that was not achieved on the day.

7 History of ADR/court rules

The Civil Procedure Rules (which cover the conduct of legal proceedings in England and Wales) set out how parties should behave in a dispute and steps that should be taken by them both before and after proceedings are issued.

The Practice Direction – Pre-Action Conduct ('PD-PAC') sets out the rules relating to ADR, basically instructing the parties to consider whether any form of ADR is appropriate for their dispute.

PD-PAC also sets out sanctions that the court can apply if the parties unreasonably refuse to use ADR. These include staying the proceedings, costs and interest sanctions.

For more detail on the court rules see Appendix 6.

8 Sanctions for failure to mediate

There have been many cases where the courts have considered whether a party has unreasonably refused an offer to mediate and, if so, what sanctions it should impose and to date, the cases mostly penalise in costs those parties who have refused.

The table provides a summary of the results from some of those cases. More details can be found in Appendix 7.

Unreasonable reasons to refuse to mediate

- wanting your 'day in court'
- having to 'accept guilt'
- failure of previous mediation on another dispute
- wanting disclosure first
- wanting expert evidence exchanged first
- considerable dislike and mistrust between the parties
- belief in a 'watertight' case
- wide gulf on amount; and
- ignoring an offer to mediate which is of itself an unreasonable refusal

The courts have accepted that there can be valid reasons for not mediating. However, while a party may consider they have a valid reason that follows a similar decided case, it will not prevent their opponent taking the point that they unreasonably refused to mediate and in such instance there is always the risk that the court will decide against them.

At the present time, mediation is not compulsory following the judgment in *Halsey v Milton Keynes General NHS Trust*. However, there seems to be a growing desire among the judiciary to ensure that parties do mediate and Sir Alan Ward, one of the judges in *Halsey*, has intimated that he now believes mediation should be compulsory. No doubt further case law will develop on this point.

Appendix 1 – Suitable disputes for mediation

This is a non-exhaustive list of the types of dispute within the property arena that are suitable for mediation:

- service charges
- dilapidations
- break notices
- rent reviews
- lease renewals
- rent arrears
- possession actions
- professional negligence
- unpaid fees
- boundary disputes
- rights of way
- rights of light
- planning disputes
- construction disputes
- development contracts
- trespass
- share of ownerships of property
- building disputes
- leasehold enfranchisement
- adverse possession
- restrictive covenants; and
- insurance disputes and claims.

Appendix 2 – Glossary

- **Calderbank offer:** A Calderbank offer is an offer to settle that is ‘without prejudice save as to costs’. Its effect is that the court is unable to refer to the offer except when dealing with the question of costs at the end of the proceedings. The court has complete discretion to decide what weight should be given to the offer when considering costs.
- **Costs in the litigation/costs in case:** This means that the costs will be dealt with at the end of the trial depending on who wins and the impact of any offers to settle. The normal starting point is that the loser will pay the winner’s costs but this can be changed by the consequences of Part 36 or the exercise of the judge’s discretion.
- **Part 36 offer:** This is a formal offer under Part 36 of the Civil Procedure Rules. It is without prejudice and, like a Calderbank cannot be referred to the court until the question of costs falls to be decided. Unlike a Calderbank, Part 36 offers must be made in a formal way and contain certain prescriptive information. There are also automatic costs consequences depending on whether or not the offer is accepted and whether it is beaten at trial.
- **Tomlin Order:** A consent order in court proceedings where the proceedings are effectively stayed on the terms set out in the agreement attached to the order as a schedule. If one side does not perform their obligations the other party can go back to court in the same proceedings to enforce the terms of the agreement.

Appendix 3 – Draft position statement

For the purposes of a mediation to take place on 1 January 2015

Position statement of the claimant in the matter of a dispute:

Between

A Landlord PLC [AL]

and

The Tenant [TT]

Background

1. This is a dilapidation claim. The lease expired on 30 September 2014 and TT vacated on that date.
2. The schedule was served on TT on 15 October 2014.
3. The response is dated 15 November 2014.

Issues

4. AL claims £1m, TT says only £200k is payable.
5. There are two main areas of dispute, namely
 - a) the roof
 - b) windows
6. If these issues can be resolved, AL is sure that the remaining issues can easily be dealt with.
7. **The roof:**
AL's expert advises that the roof is beyond repair and therefore needs to be replaced. The cost of a new roof is between £450k [AL] and £350k [TT]. TT's expert considers that patch repairs can be done, at a cost of £100k.
8. **The windows:**
AL's expert advises these too are beyond repair, and his estimate of cost of new windows is £350k. TT's expert would put that cost at £250k, but feels that repairs will suffice, at a cost of £50k.

9. S.18/betterment

There are no issues between the parties, TT accepts that AL will repair the building and re-let as per current use.

Approach to mediation:

10. AL accepts there is room for genuine disagreement about the roof and windows. However, he is certain that a new roof is essential to the integrity of the building and will not accept any other solution, even if he has to pay something towards it. Indeed a contract to replace the roof has been signed at a cost of £450k. As for the windows, no contract has yet been entered into. AL's attitude will depend on the outcome of this dispute. AL would like to proceed and sort out the building as soon as possible, and this mediation will, it is hoped, achieve that end.

Costs

11. Current legal costs to include the mediation are £25k [VAT is irrecoverable]. To trial costs are estimated at £75k. AL does not know TT's costs, but he has used very expensive city solicitors; that is TT's privilege, but AL is not paying.

Previous attempts to settle

12. The following offers to settle have been made:
.....

Finally

13. AL enters this mediation in good faith and believes that with common sense and help from the mediator, a solution will be found.

Appendix 4 – Draft mediation agreement

[Most providers and mediators have their own version of a standard mediation agreement and will accept reasonable amendments by the parties. This draft agreement is provided to show the types of clauses that are generally proposed]

RICS Model Agreement to Mediate

This Agreement is made the day of 20....

Parties:

Party A

.....

Party B

.....

Party C, etc.

.....

(Together referred to as **'the Parties'**)

The Mediator/s

.....

(A term which includes any Assistant or Pupil Mediator)

And

RICS Dispute Resolution Services of Surveyor Court, Westwood Way, Coventry, CV4 8JE (**'DRS'**)

In relation to a mediation to be held

On.....

At.....

('The Mediation')

Concerning a dispute between the Parties in respect of¹

.....

.....

.....

.....

.....

('The Dispute')

¹ Provide sufficient detail to identify the complaint/s of the Party seeking a remedy

IT IS AGREED by those signing this Agreement that:

1. The Parties will (unless and until one of the Parties withdraws from the Mediation, or it is otherwise determined) attempt in good faith to resolve the Dispute by mediation and will take all such steps as may be necessary to participate fully in the mediation process, including the taking of all preparatory steps for the mediation appointment.
2. The Parties warrant that the signatory to this Agreement has the authority to bind the respective Party and all others present at the mediation appointment on that Party's behalf to bind that Party to observe the terms of this Agreement and also have authority to bind that Party to the terms of any settlement agreement.
3. The Mediator may in his or her absolute discretion give such directions for the conduct of the Mediation as he or she thinks fit. Such directions shall be communicated in writing to the Parties' Representatives for the time being as soon as reasonably practicable.
4. The mediation appointment shall take place as set out above. If the Dispute has not been resolved at the end of the time allotted then, with the agreement of all the Parties and the Mediator, the appointment may be continued or may be resumed at such time and place as the Parties, the Mediator and DRS may agree.
5. The procedure at the Hearing shall be determined by the Mediator in consultation with the Representatives. In the event of any disagreement the decision of the Mediator shall be final.
 - 5.1 Unless otherwise agreed by the Parties the language in which the Mediation shall be conducted shall be English and this Agreement and any settlement agreement shall be governed by the law of England and Wales and the Parties agree to submit to the exclusive jurisdiction of the Courts of England and Wales as regards any claim or matter arising under or in relation thereto.
 - 5.2 In the event that no settlement is reached by the Parties all the Parties' rights shall be reserved and shall remain in all respects unaffected by the Mediation save to the extent provided in this Agreement.
6. The Parties, their Representatives, their advisers and the Mediator and Assistant Mediator (if any) shall keep confidential and shall not reveal save as required by law and insofar as may be necessary to bring into effect or enforce the settlement agreement:
 - 6.1.1 any written summaries of the Parties' cases;
 - 6.1.2 any statements whether oral or written made in the course of the Hearing;
 - 6.1.3 any concessions or admissions of law or fact;
- 6.1.4 that any settlement has been reached.
- 6.2 The Mediation shall be confidential and shall be treated as though the same was a negotiation conducted upon a 'without prejudice' basis with a view to settling proceedings and shall be privileged according to law.
 - 6.2.1 No recording or other verbatim record shall be made or kept of the Mediation.
- 6.3 All documents, written case summaries, written submissions, written concessions or admissions of law or fact or written statements (whether prepared specifically for the purposes of the Mediation or not) used or disclosed for the purposes of the Mediation and in the possession of the Mediator may at the sole discretion of the Mediator be destroyed after the conclusion of termination of the Mediation or retained by the mediator as he/she deems fit.
7. The Parties shall not be permitted to rely upon any expression of opinion, advice or comment made by the Mediator in the course of the Mediation in or for the purposes of any legal or similar proceedings or any form of alternative dispute resolution in relation to the Dispute or any matter related to or concerning the subject matter of the Mediation.
 - 7.1 The Parties will not call the Mediator or any employee or consultant of DRS as a witness nor require them to produce in evidence any records or notes relating to the Mediation in any litigation, arbitration or any other formal process arising from or in connection with the Dispute, the Mediation or any other issue in any way flowing from or connected to them, nor will the Mediator nor any DRS employee or consultant act or agree to act as a witness, expert, arbitrator or consultant in any such process.
8. The Parties shall be responsible for the Mediator's fees and the fees of DRS in accordance with the DRS Terms & Conditions.
 - 8.1 Unless otherwise agreed in writing all the costs of the Mediation, the fees and expenses of the Mediator (which expression shall include the Assistant Mediator where one is appointed), the costs of the appointment and the administrative charges and costs of DRS including all Value Added Tax shall be borne by the Parties in equal shares and that they shall be jointly and severally liable for the total of such amount. However each Party further agrees that any court or tribunal may treat any such fees and costs and each Party's legal costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in the settlement of the Dispute.

8.2 In the event that the Parties settle the Dispute before the mediation appointment or for any other reason the appointment does not take place or is adjourned, but after fees payable in advance have become due (whether paid or not) DRS and or the Mediator shall be entitled to retain or receive payment (as the case may be) of any irrecoverable expenses incurred together with the following additional charges:

- a) Cancellation 15 working days or more before the date fixed for the commencement of the Hearing – No additional charges.
- b) Cancellation 10 working days or more before the date fixed for the commencement of the Hearing – 25% of the daily rate plus the fees for any preparation time actually spent by the Mediator.
- c) Cancellation 5 working days or more before the date fixed for the commencement of the Hearing – 50% of the daily rate plus the fees for any preparation time actually spent by the Mediator.
- d) Cancellation less than 3 working days before the date fixed for the commencement of the Hearing – 75% of the daily rate plus the fees for any preparation time actually spent by the Mediator.
- e) The Parties shall be responsible for all such fees, expenses and additional charges in equal shares and jointly and severally and DRS shall not be concerned or affected by any dispute or disagreement between the Parties or any of them as to who is responsible for the cancellation or adjournment of the Hearing.
- f) For the avoidance of doubt DRS will act as the agent of the Parties in respect of any booking of accommodation, equipment hire or the like which the Parties may require for the purposes of the Mediation and the Parties shall be liable to indemnify DRS in respect of any such booking fees, equipment hire or the like which are incurred by DRS on their behalf.

Exclusions of Liability

9. Neither DRS nor any of its employees, servants or agents nor the Mediator nor any Assistant Mediator shall be liable to the Parties in contract, tort (including negligence and breach of statutory duty) or otherwise howsoever except in the case of fraudulent misrepresentation or dishonesty for (i) any increased costs or expenses (ii) for any economic loss, loss of profit, business, contracts, revenues or anticipated savings or (iii) for any other loss or damage (including but not limited to special, indirect or consequential loss or damage) of whatever nature in respect of any act or omission in connection with the services provided by them.

9.1 No responsibility is assumed by DRS nor by any of its members, servants or agents nor by the Mediator nor by any Assistant Mediator for the accuracy or completeness of any advice or opinion proffered (whether intentionally or not) in the course of the Mediation or for any assistance given in or about the content or drafting of any settlement agreement and the Parties acknowledge that they are not entitled to rely upon any such advice, opinion or assistance and must seek their own legal or other professional advice.

9.2 The Mediator and the Assistant Mediator where appointed act as independent service providers in the performance of their functions in connection with the Mediation and are not the servants or agents of DRS nor its representative(s) and the Parties hereby expressly acknowledge that the Mediator and the Assistant Mediator where appointed so act.

Signed:.....
On behalf of Party A

Signed:.....
On behalf of Party B

[Signed:.....
On behalf of Party C, etc.]

Signed:.....
Mediator

Signed:.....
On behalf of DRS

Appendix 5 – Model settlement agreement

RICS Model Settlement Agreement

Date

.....

Parties

.....

('Party A')

.....

('Party B')

[.....]

('Party C') and add more as necessary
(jointly 'the Parties')

The Parties having agreed to settle 'the Dispute' which:

- is being litigated/arbitrated [court/arbitration reference] ('the Action')²
- has been the subject of an RICS mediation procedure today ('the Mediation') upon the following terms and conditions:

Terms

It is agreed as follows:

1. [.....] will deliver..... to at by not later than 4 o'clock on [.....]³
2. [.....] will pay £..... to by not later than 4 o'clock on (by direct bank transfer to bank sort code account number [.....])⁴

OR

[.....] will pay £ to per week/calendar month/ in (.....) tranches by cheque/cash/bank transfer commencing on or beforeand thereafter until finishing on or before [.....]

3. [In default of such payment (all outstanding sums shall fall due and payable forthwith/or)shall pay interest on the balance outstanding at the rate of % above base rate for the time being to payment]⁵
4. [.....]⁶
5. The Action will be stayed and the parties will consent to an order in the terms of the attached Tomlin Order precedent [see attachment].

OR

The Action will be dismissed with no order as to costs.

6. This Agreement is in full and final settlement of any causes of action whatsoever which the Parties [and any subsidiaries of the Parties] have against each other.

2 Omit this wording and paragraph 5 if there are no court proceedings
 3 Omit as necessary but otherwise be as specific as possible in respect of any act positively required to be performed, for example, how, by when, etc. or alternatively to be refrained from.
 4 Or any other tranche of payments or currency agreed
 5 Optional. Many mediators dislike putting in any default provision.
 6 Any additional positive or negative performance obligations

7. This Agreement is the entire agreement between the Parties and supersedes all previous agreements between the parties [in respect of matters the subject of the Mediation].⁷
8. If any dispute arises out of this Agreement, the Parties will attempt to settle it by mediation⁸ before resorting to any other means of dispute resolution. To institute any such mediation a party must give notice to the mediator of the Mediation. Insofar as possible the terms of the Mediation Agreement will apply to any such further mediation. If no legally binding settlement of this dispute is reached within [28] days from the date of the notice to the Mediator, either party may [institute court proceedings/refer the dispute to arbitration under the rules of ...⁹].
9. The Parties will keep confidential to themselves, their legal advisers [and by agreement] and not use for any collateral or ulterior purpose the terms of this Agreement [except insofar as is necessary to implement and enforce any of its terms].
10. This Agreement shall be governed by, construed and take effect in accordance with [English] law. The courts of [England and Wales] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with this agreement.¹⁰

Signed

.....
 [for and on behalf of¹¹]

.....
 [for and on behalf of¹².....]

Note: This Model Agreement and attached precedent of a Tomlin (stay) order is for guidance only. Any agreement based on it will need to be adapted to the particular circumstances and legal requirements of the settlement to which it relates. Wherever possible, any such agreement should be drafted/approved by each party's lawyer. Although the RICS Mediator is likely to be involved in helping the parties to draft acceptable terms, they are not responsible for the drafting of the agreement and do not need to be a party to it.

**Attachment to Model Settlement Agreement
 Tomlin (stay) Order Precedent**

[Action heading]

UPON hearing from the solicitors to the parties in correspondence.....

And by consent

IT IS ORDERED that all further proceedings in this case be stayed upon the terms set out in the Settlement Agreement between Parties dated, an original of which is held by each of the Parties' solicitors except for the purpose of enforcing the terms of that Agreement as set out below.

AND IT IS FURTHER ORDERED that either Party/any of the Parties may apply to the Court to enforce the terms of the said Agreement [or to claim for breach of it] without the need to commence new proceedings.

[AND IT IS FURTHER ORDERED that [each Party bear its own costs].]

WE CONSENT to an order in these terms

.....[]
 Claimant's Solicitors

.....[]
 Defendant's Solicitors

7 Only necessary if there have been previous agreements
 8 Alternatively, negotiation at Chief Executive level, followed by mediation if negotiations do not result in settlement within a specified time
 9 Reference to the appropriate arbitration body
 10 Usually not necessary where parties are located in same country and subject matter of agreement relates to one country. If the Parties elect for their agreement to be governed by the laws of another jurisdiction they should take legal advice on the implications for enforcement.
 11 Not necessary where the party signing is an individual
 12 Not necessary where the party signing is an individual

Appendix 6 – History of ADR/court rules

Woolf reforms

Alternative Dispute Resolution (ADR) first gained prominence in the UK with the introduction of the Civil Procedure Rules in 1998. It had always been part of Lord Woolf's vision as evidenced by his report on the reform to the civil justice system:

'...where a party has unreasonably refused a proposal by the court that ADR should be attempted, or has acted uncooperatively in the course of ADR, the court should be able to take that into account in deciding what order to make as to costs.'

(Lord Woolf, Access to Justice, Section II, Chapter 5, July 1996)

Practice Direction – Pre-Action Conduct (PD-PAC)

Woolf's ethos was carried into the Civil Procedure Rules and has been set out in the Practice Direction – Pre-Action Conduct (PD-PAC). The part relating to ADR states:

'8. Alternative Dispute Resolution

8.1: Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR (see paragraph 4.4(3)).

8.4: The parties should continue to consider the possibility of reaching a settlement at all times. This still applies after proceedings have been started, up to and during any trial or final hearing.'

Para 4.4(3) provides that the Court may decide there has been a failure of compliance with the Protocols if a party has unreasonably refused to consider ADR.

Allocation Questionnaire/Rule 26.4

Once a claim has been issued at court and a defence filed the parties have to fill out an Allocation Questionnaire. In this the legal representatives need to sign to say:

'I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to settle.'

At that point a party can ask the court for a stay to try to reach a settlement, or the court can order one of its own accord. This is provided for in Rule 26.4:

'26.4

(1) A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

(2) If all parties request a stay the proceedings will be stayed for one month and the court will notify the parties accordingly.

(2A) If the court otherwise considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate.'

Appendix 7 – Court sanctions for failure to mediate

Ever since the introduction of Pre-action Protocols in 1999 the courts have been urging parties to settle their disputes and avoid the costs of going to trial.

Practice Direction–Pre-Action Conduct – Sanctions

Paragraph 4.6 of the PD-PAC sets out the sanctions a court can impose on parties for failure to comply with the Protocol and consider ADR. It states:

'If, in the opinion of the court, there has been non-compliance, the sanctions which the court may impose include –

(1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken;

(2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties

(3) an order that the party at fault pays those costs on an indemnity basis (rule 44.4(3) sets out the definition of the assessment of costs on an indemnity basis);

(4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded;

(5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded.'

Case law

There have been a number of cases where the courts have considered this issue but the main recent cases are set out below.

The main principles

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

This was the first case 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. In summary, the principles laid down were:

1. The court should not compel parties to mediate even were it within its power to do so. This would risk contravening article 6 of the Human Rights Convention, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness.
2. Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.
3. The court's powers to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs, includes power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR.
4. For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR.

Decisions on validity of reasons given for not mediating

Rolf v De Geurin [2011] EWCA Civ 78

Facts

This was a dispute about a contract to build a garage and a loft between the home owner, Mrs Rolf, and the builder Mr De Geurin, which the Court of Appeal described as 'A sad case about the lost opportunity to mediate'.

The judge found that Mrs Rolf's husband interfered so much in the process that the contract was effectively repudiated (although this point was not put in evidence by the builder). The owner was claiming £70,000 in damages.

The owner made several offers early in the proceedings to enter into round table negotiations and to mediate. She also made a Part 36 offer. These were spurned by the builder.

At trial the owner was awarded £2,500 and ordered to pay the builder's costs from the date she made her Part 36 offer which was to accept £14,000 plus costs. This was because the judge fundamentally misunderstood the costs consequences of a Part 36. Mrs Rolf appealed and the Court of Appeal exercised its discretion anew as to costs, awarding no order as to costs. There were several factors which it took into account, one of which was the owner's 'willingness to settle' and Mr De Geurin's corresponding lack of willingness to mediate.

Reasons given for refusal to mediate

The builder argued that if he had mediated, he would have to accept 'his guilt'. Also, he would have been unable to persuade a mediator about the conduct of the claimant's husband, which he claimed had partly induced the repudiation of the contract, without the husband appearing to give evidence. Also, he stated that, in any event, *'I wanted my day in court, and I was proved correct.'*

Judgment and reasons

The Court of Appeal held that the builder's reasons for declining mediation or settlement discussions *'do not seem to hold water'*. It was true he emerged with a judgment of only £2,500 against him but he incurred costs down to the time of trial and *'... he could be said to be fortunate to win the issue of repudiation on an unpleaded point.'*

The court pointed out that the builder had also lost on issues and said that his wanting the judge to see the husband could not have been his reasoning at the time as he would have pleaded and given evidence about him. The court said the builder could not have known what the owner's bottom line was *'...until he entered into the spirit of a settlement or mediation'*.

Rix LJ said *'As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this regard should be taken into account in awarding costs.'*

He endorsed the view of Ward LJ in *Burchell v Bullard* [2005] EWCA Civ 358, that *'...a small building dispute is par excellence the kind of dispute which...lends itself to ADR'* and found that *'...the facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly in this class of case.'*

PGF II SA v OMFS Company & Anr [2012] EWHC 83 (TCC) First instance

Facts

At first instance in this case the court stated that *'Any obstacles to a successful mediation should normally be capable of being resolved'*

PGF was the landlord in a dilapidations claim for £1.9m. The tenant, OMFS, denied liability entirely relying on s.18 (1) of LTA 1927. On 11 April 2011 there was an exchange of Part 36 offers. The landlord offered to accept £1.25m and the tenant offered to pay £700,000, effectively narrowing the gap to £550,000.

On the same day, the landlord's solicitors wrote seeking the tenant's agreement to mediate and an explanation for any refusal. They sought confirmation as to documents and information which the tenant might wish to see before mediation, an exchange of dates and the tenant's list of proposed mediators. This invitation received no response. On 19 July the landlord's solicitors sent a further invitation to mediate which again received no response. On 20 December the landlord decreased its Part 36 offer to £1.05m, narrowing the gap to £350,000.

Trial was fixed for 11 January 2012. In its skeleton argument on 10 January the tenant took, for the first time, the point that an air conditioning system (for which damages were claimed of about £250,000) was outside of the demise. The landlord then accepted the Part 36 offer of £700,000.

The normal consequences of Part 36 would have meant the landlord should have paid the tenant's costs from 21 days after the offer was made. The landlord argued that the tenant should pay the landlord's costs as the tenant had unreasonably refused to mediate.

Reasons given for refusal to mediate

The tenant said it was not unreasonable to refuse to mediate because:

- a previous mediation between the parties on a service charge dispute had failed
- it needed disclosure first
- it needed expert evidence exchanged first; and
- there was no chance of success as the parties were so far apart on amount.

Judgment and reasons

The court held that the tenant was unreasonable to refuse:

- if the tenant had an issue with previous conduct it should have raised it and not just ignored the request to mediate
- the fact there was no valuation evidence was not a reason to refuse
- even if there are real obstacles to mediating these should be raised at the time as the likelihood is they can be overcome
- there was a reasonable chance the mediation would have succeeded despite the wide gulf
- the purpose of mediation is to allow the parties to re-evaluate their cases and the gulf should not be an automatic bar to mediating; and
- in property disputes, where parties have professional advisers, any obstacles to a successful mediation should normally be capable of being resolved.

On that basis the court said the tenant would be deprived of the costs it would otherwise have been awarded and there was no order as to costs from the expiry of the Part 36 offer in May 2011.

PGF II SA v OMFS Company 1 Limited [2013] EWCA Civ 1288, Court of Appeal

Both the landlord and the tenant appealed the costs decision in PGF. This appeal raised for the first time the question of what should be the response of the court to a party which, when invited by its opponent to take part in ADR, simply declined to respond to the invitation in any way. The appeal focused more on the interaction between this and Part 36 and the court described its judgment as *'a sanction that operates "pour encourager les autres"'*.

Part 36

The automatic cost consequences of the landlord accepting the Part 36 offer were that it should pay the tenant's costs from 21 days after the offer was made until the date it was accepted. However, the court retains discretion *'to order otherwise where it considers it unjust to make an order as prescribed by the rules'*.

ADR

The court reiterated the principles set out in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, as to whether a court could encourage parties to mediate and its power to deprive a successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR. It also stated that, even though statistics need to be treated with caution, the research by CEDR of success rates in mediation (70% on the day with 20% more shortly thereafter) *'...are powerful testimony supportive of the value of the process, in the cases where it has been undertaken'*.

Reference was also made to the 'clear endorsement' of ADR by Jackson LJ as a means of achieving proportionality and of saving court time and costs and the Court Guides, which require legal representatives to consider with their clients and the other side, the possibilities of attempting to resolve the dispute, or particular issues, by ADR.

The court looked at the advice set out in the *ADR Handbook* (2013) to a party faced with a request to engage in ADR, which it believes it has reasonable grounds for refusing to participate in at that stage and what it should consider in order to avoid a costs sanction. This is summarised as *'calling for constructive engagement in ADR rather than flat rejection, or silence'*.

Judgment

Briggs LJ stated that *'in my judgment, the time has now come for this court to firmly endorse the advice given in the ADR Handbook, that **silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable**, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by identification of reasonable grounds.'*

This was for reasons of both practicality (How do you investigate reasons that are only put forward months after the event and not at the time?) and policy (a failure to provide reasons is a failure to engage with the ADR process.) The court's view was that there may well be reasons why ADR is not appropriate at a specific point, but that the parties should discuss any difficulties. Also, even if ADR only works in part, it will still narrow issues and save the parties' and the court's time and resources.

While the above was sufficient to conclude that the tenant had acted unreasonably, the court then went on to examine the judge's findings that there had been a refusal and it had been unreasonable.

The tenant argued that the fact that it had made its Part 36 offer, not withdrawn it, and that it had eventually been accepted showed that it cannot have been other than reasonable. Also that because of the monetary difference between the parties' Part 36 offers, which were characterised as their bottom lines, the mediation stood no reasonable prospect of success.

Briggs LJ rejected both these points stating that it was wrong to regard a Part 36 offer as a living demonstration of a party's belief in the strength of its case, and that Part 36 offers do not necessarily, or even usually, represent the parties' respective bottom lines. There was no unbridgeable gulf between these parties' respective Part 36 offers which could not have been overcome in mediation, particularly as the gap was broadly equivalent to the amount of further costs that would have been spent to go to trial.

Indeed, he considered the dispute *'eminently suited to mediation'*. The dispute gave rise to complicated matters of detail likely to cost a disproportionate amount to litigate. The tenant argued that the matter settled when the claimant recognised the defect in its case regarding the air-conditioning. Briggs LJ commented that *'...that is precisely the sort of insight which a trained and skilled mediator, experienced in the relevant field, can bring to an apparently entrenched dispute.'*

The court upheld the judge's order that the tenant should not get the costs it otherwise would have done under Part 36. It also left open the door for a court to impose the more draconian sanction of ordering the tenant to pay the landlord's costs where the court had encouraged the parties to engage in ADR and that encouragement had been ignored.

Briggs LJ regarded this case as sending out an important message to litigants that they need to engage with ADR and that 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 that *'operates "pour encourager les autres"'*.

A case where a refusal was held not to be unreasonable

Swain Mason & Ors v Mills & Reeve [2012] EWCA Civ 498

Facts

In April 2012, the Court of Appeal reached a different decision. This was a case of professional negligence against the defendant. The defendant maintained that the claimants' case was weak on liability. The claim was dismissed but the judge found the defendant's refusal to mediate was unreasonable and held that the claimants only had to pay 50% of the defendant's costs.

On appeal the decision that the defendant was not negligent was upheld. The Court of Appeal then looked at the costs order and at the impact of the refusal to mediate.

Reasons given for refusal to mediate

At various stages the claimants had proposed mediation or any other appropriate form of ADR. At two of the hearings before him, Peter Smith J had encouraged the parties to consider mediation. At all stages, however, the defendant declined to participate, taking the stance that the claim was entirely without merit. The defendant had in fact offered a 'walk away' shortly prior to proceedings and had also responded to a Part 36 offer made shortly before the first trial by offering only to negotiate over its own costs if the proceedings were withdrawn. The defendant had been prepared to move, and had moved, no further.

Judgment and reasons

The court referred to the decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, and, in particular, that the Court of Appeal had been concerned to make it clear that parties are not compelled to mediate. It was emphasised that where a party reasonably believes that they have a watertight case, that may well be a sufficient justification for a refusal to mediate, otherwise there is scope for a claimant to use the threat of costs sanctions to extract a settlement even where the claim is without merit.

In *Swain Mason* Davis LJ stated: **'The fundamental question remains as to whether it had been shown by the unsuccessful party that the successful party had acted unreasonably in refusing to agree to a mediation. In my view, that could not be shown here...'**

One factor relied on by the first instance judge was that he said one of the advantages of mediation would be that, if successful, there was avoided the risk to the defendant of being exposed to 'collateral reputational damage'. The Court of Appeal took a different view. Davis LJ said *'A settled professional negligence claim is capable, in some instances, of leaving behind reputational damage. Some professional defendants may, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. It is a matter for them. It would be unfortunate – speaking generally – if claimants in cases of this kind could be encouraged to think that such a consideration as identified by the judge could enhance their bargaining position.'*

The Court of Appeal also said that in this case it did not think *'it right to style critically the defendant's refusal to agree to a mediation as "intransigent". Nothing changed in this particular case (unlike many cases) to necessitate a re-evaluation on the question of liability. A reasonable refusal to mediate does not become unreasonable simply by being steadfastly, and for cause, maintained'*

Indemnity costs awarded for refusal to mediate

Phillip Garritt-Critchley & Ors v Andrew Ronnan and Solar Power PV Limited [2014] EWHC 1774 (Ch)

This case involved the breakdown of a business relationship and the claimant sought the sum of £208,000. In its letter of claim the claimant indicated it was willing to mediate. The defendants did not engage with this and in their Allocation Questionnaire made it clear they did not want to negotiate or mediate as *'the parties are too far apart at this stage'*.

When questioned as to why they would not mediate in correspondence the defendant stated *'Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable.'*

The claimant continued to push for mediation but to no avail. Shortly before trial the claimant offered to accept £10,000 plus costs to date. The defendants counteroffered that the claimants should drop their claim and only pay three-quarters of the defendants' costs. The matter proceeded to a four day trial but before the judge gave judgment the defendant agreed to pay the £10,000 plus costs. The claimant applied for those costs to be on an indemnity basis. His Honour Judge Waksman QC awarded costs on an indemnity basis.

Reasons given for refusal to mediate and judgment

The defendant argued that this was not a claim which provided any natural middle ground with the parties being directly opposed on the issue of whether there was a binding agreement to issue shares and was therefore not suitable for ADR. The judge stated *'To consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived.'*

He referred to *Halsey* and stated that this indicated that the sort of case where exceptionally its nature might rule out mediation will be where a party wishes to resolve a point of law, considers a binding precedent would be useful, or in cases where injunctive or other relief is essential to protect the parties. In *Halsey* the court concluded that *'In our view most cases are not by their very nature unsuitable for ADR'*. He held that the current case was *'by its very nature eminently suitable for ADR'*.

The defendant also relied on its view that it was ‘*confident that no agreement will ever be reached*’. To this the judge said that ‘*it does not seem to me to be realistic for someone in the position of [the defendant] to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement*’. He stated that ‘*extreme confidence*’ was not a reasonable position to take and quoted Mr Justice Lightman in the case of *Hurst v Leeming* who said ‘*The fact that a party believes he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants.*’

The defendant also argued that it was highly relevant to its decision not to mediate that there was a considerable dislike and mistrust between the parties. The judge held this reason did not have any real foundation as ‘*...it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most useful.*’

The defendant further argued that the costs of mediation would have been as much as the value of the latest offer, and that they considered the costs of mediation to be disproportionate to the sums involved. The judge pointed out that ‘*The point is that you compare the costs of a mediation with the costs of the costs of a trial*’, and that on any view the costs of the mediation would be less.

Compulsory mediation

Wright v Wright [2013] EWCA Civ 234

This case concerned an appeal to the Court of Appeal as to whether the judge had wrongly conducted the trial on written information without allowing the defendants to call live evidence. Sir Alan Ward had enormous sympathy for the judge who had had to deal with two litigants in person and commented that this is a difficulty that is increasingly encountered by the judiciary at all levels who have ‘*...to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences.*’

The judge had repeatedly tried to get the parties to mediate. In the Court of Appeal Sir Alan also raised a concern that ‘*...it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation*’, both tracks being intended to meet the modern day demands of civil justice. He commented that the reason (or excuse) for the Ministry of Justice removing legal aid from swathes of litigation was that mediation is a proper alternative that should be tried and exhausted before finally resorting to a trial of the issue, but that ‘*the rationale remains a pious hope when parties are unwilling even to try mediation*’.

He referred back to *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, where he sat in the Court of Appeal with Lord Justices Laws and Dyson, and addressed the issue of compulsory mediation. In *Halsey* it was decided 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 and would be a violation of Article 6. In *Halsey*, Dyson LJ commented that even if the court does have jurisdiction to order unwilling parties to refer their disputes to mediation ‘*...we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.*’

In *Wright*, Sir Alan intimated very strongly that he had changed his mind, stating that ‘*perhaps it is time to review the rule in Halsey...*’ He questioned whether a stay of proceedings to try mediation is really an unacceptable obstruction to the parties’ right of access to the court if they had to wait a while before being allowed across the court’s threshold. He even went so far as to invite ‘*some bold judge*’ to rule on these questions so that ‘*...the court can have another look at Halsey in the light of the past 10 years of developments in this field.*’

Bradley v Heslin [2014] EWHC 3267 (Ch)

In this case, which was an argument about a pair of gates in Formby, Mr Justice Norris suggested a form of wording for directions in boundary and rights of way disputes, which in effect, would make it compulsory to attempt mediation in such cases. He said:

‘I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.’

Appendix 8 – Mediation solutions a court cannot provide

1. Parties cannot agree as to claims of **adverse possession** of different parts of land. In court, a judge rules on fact and law as to who gets what, but in a mediation, they can agree which parts are most important and a cash balancing payment can be made to resolve the entire matter.
2. If there is a dispute about the meaning and validity of a **restrictive covenant**, possibly preventing an enormous commercial development, the parties in court will have a ruling as to the meaning and enforceability, but in a mediation can agree a variation to the wording, additional safeguards, and a cash settlement.
3. In a claim for **forfeiture** of a lease the court can either order relief on terms or that the lease has ended. In a mediation the parties can agree those terms and even vary the lease.
4. In a **boundary dispute** the court will fix where the boundary is. In a mediation the parties can agree between them where the boundary is – this could also involve a swap of other bits of land and agreement regarding works to be done to boundary fences, etc.
5. Resolving a **construction defects dispute** where several parties are alleged to have been responsible for the defects including, for example, the architect, the builder, the engineer, and the sub-contractor in circumstances where the building owner is also alleged to have contributed to the problem by poor maintenance of the building. A mediation could enable the issues of liability and amount to be debated and for a settlement 'pot' to be put together involving differing levels of contributions from each defendant with, perhaps, a discount to reflect the claimant's poor maintenance. A multi-party resolution of this nature would be very difficult to achieve via normal Without Prejudice negotiations and without the assistance of a mediator shuttling between all parties.



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United Kingdom RICS HQ

Parliament Square, London
SW1P 3AD United Kingdom

t +44 (0)24 7686 8555

f +44 (0)20 7334 3811

contactrics@rics.org

Media enquiries

pressoffice@rics.org

Ireland

38 Merrion Square, Dublin 2,
Ireland

t +353 1 644 5500

f +353 1 661 1797

ricsireland@rics.org

Europe

[excluding UK and Ireland]

Rue Ducale 67,
1000 Brussels,
Belgium

t +32 2 733 10 19

f +32 2 742 97 48

ricseurope@rics.org

Middle East

Office G14, Block 3,
Knowledge Village,
Dubai, United Arab Emirates

t +971 4 446 2808

f +971 4 427 2498

ricsmenea@rics.org

Africa

PO Box 3400,
Witkoppen 2068,
South Africa

t +27 11 467 2857

f +27 86 514 0655

ricsafrica@rics.org

Americas

One Grand Central Place,
60 East 42nd Street, Suite 2810,
New York 10165 – 2811, USA

t +1 212 847 7400

f +1 212 847 7401

ricsamericas@rics.org

South America

Rua Maranhão, 584 – cj 104,
São Paulo – SP, Brasil

t +55 11 2925 0068

ricsbrasil@rics.org

Oceania

Suite 1, Level 9,
1 Castlereagh Street,
Sydney NSW 2000, Australia

t +61 2 9216 2333

f +61 2 9232 5591

info@rics.org

North Asia

3707 Hopewell Centre,
183 Queen's Road East
Wanchai, Hong Kong

t +852 2537 7117

f +852 2537 2756

ricsasia@rics.org

ASEAN

Suite 10, 25th Floor,
Samsung Hub, 3 Church Street,
Singapore 049483

t +65 6692 9169

f +65 6692 9293

ricssingapore@rics.org

Japan

Level 14 Hibiya Central Building,
1-2-9 Nishi Shimbashi Minato-Ku,
Tokyo 105-0003, Japan

t +81 3 5532 8813

f +81 3 5532 8814

ricsjapan@rics.org

South Asia

48 & 49 Centrum Plaza,
Sector Road, Sector 53,
Gurgaon – 122002, India

t +91 124 459 5400

f +91 124 459 5402

ricsindia@rics.org