

GARDEN COURT



M E D I A T I O N

Mediation and Housing – *What you need to know*

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GARDEN COURT MEDIATION



21 July 2021



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Introduction

- Welcome to the parties and their representative
- Significance of agreeing to mediate
- How mediation works: process and procedure
- Confidentiality in the course of the mediation and beyond
- Confidentiality in joint and private sessions
- Confidentiality in a settlement agreement



The Mediator is neutral and impartial

- The Mediator is not connected with the outcome of the mediation
- The Mediator facilitates the parties' exploration for a resolution
- The Mediator does not express a view on the merits – or generally
- The Mediator does not give legal advice or make findings
- The Mediator sets the ground rules
- One of the attendees for each party must have authority to settle



Compulsory ADR – the Civil Justice Council’s report

- the cost and time burden on the parties;
- whether the process is particularly suitable in certain specialist areas of civil justice;
- the importance of confidence in the ADR provider (and the role of regulation where the provider is private);



Compulsory ADR – contd

- Whether the parties engaged in the ADR need access to legal advice and whether they have it;
- the stage(s) of proceedings at which ADR may be required; and
- whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.



Contents of the Mediation Bundle

- Opening or position statement
- Pleadings if litigation has begun – the most recent version
- Expert reports
- Selection of documents in support
- History of any offers made/rejected including any Part 36 offers
- Costs budgets for litigation begun after 1st April 2013
- [For Mediator's Eyes Only]



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Part 1: Preparing for a Mediation



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Preparing for a Mediation

1. Make contact with your client

2. Give your client the opportunity to 'get things off their chest'

3. Establish the purpose of the mediation and manage client's expectations

4. Explain your role

5. Prepare the position statement

6. Prepare a bundle

7. What to take to a mediation

8. The mediation and the opening statement

Make contact with your client

- Where possible, arrange a conference with your client before the mediation if possible. Set out what a mediation is and the general process and, most importantly, that it is not a court hearing or a trial. Avoid leaving this to the morning of the mediation if possible.
- Explain your role. You are not there to cross examine or persuade the mediator.
- Disputes and the process of resolving them can be emotional. Allowing clients the opportunity to discuss what is really affecting them and what is really important to them.



Establish the purpose of the mediation and manage client's expectations.

Try to avoid talking about 'red lines' but it is important to understand the main objectives:

- Mediation is often used when attempts to resolve issues informally or negotiations have ground to a halt so parties need to think of creative ways a resolution can be found.
- What do they really want from the other party? Sometimes this does not entirely reflect the pleaded case.
- What do you want to ask the o/p?
- What do you think they will want to ask you?
- What do you need from the o/p?
- What issues might the o/p raise that you might find difficult?
- What are the benefits of reaching an agreement?
- What are the negative outcomes that can be avoided?



Prepare the position statement

Keep it brief, again, you are not there to persuade the mediator but to explain your case. What to include:

- Refer to your client's willingness to engage in mediation.
- Who the parties are and who will attend the mediation
- A brief outline of the facts (chronologies are always very helpful)
- An overview of any legal proceedings
- Issues to be mediated
- Potential outcomes (what the party wishes to achieve from mediation and potential options for resolving the dispute)
- Sometimes parties may wish to provide the mediator with confidential documents separately
- Sometimes a schedule of costs is attached



Prepare a bundle

- Agree, where possible, the key documents that the mediator should see in court time.
- This is not a trial, so the mediator needs to see key documents.
- Given that mediations are now regularly online, the bundle should be electronic.



What to take to a mediation

- Establish if the mediation will be in person or online (is there a particular reason why the mediation needs to be in person?)

In person:

- The obvious stationary and laptop
- A copy of the bundle
- Your own papers in the case generally (in case a document that is not in the bundle becomes relevant)
- Copy of the agreement to mediate
- Copy of a draft agreement

By zoom:

- Establish a WhatsApp groups
- Good internet connection is essential
- Ask for a practice run if necessary to familiarise yourself with break out rooms etc



The mediation and the opening statement

- Explain why you have come to mediation and what you hope to achieve (this is not necessarily the moment to start setting out more detailed proposals). But it is an opportunity to express the desire to find a resolution.
- Explain the issues in order of importance and, where necessary, explain why they have personal and emotional significance (even where that may differ from the legal position or the primary focus of the mediation).
- Try to stick to your own agenda and only respond to points made by the other party if they are relevant.
- Acknowledge the impact the dispute has had on the other part. Apologise if it is appropriate.
- Make any concessions or proposals which signal your intention to work collaboratively.



Part 2: The Housing Mediation Pilot Scheme



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Background

- The housing mediation pilot scheme was launched in February 2021. It is a Ministry of Justice (MoJ) and Ministry of Housing, Communities and Local Government (MHCLG) initiative, who have jointly funded the £3m for the scheme. It was introduced for a period of 6 months and extended to March 2022.
- Mediation has been discussed by the MoR Working Group for some time, along with the housing possession overall arrangements. The WG itself was established in May 2020 because of Covid and the prospect that possession proceedings would overwhelm the court system.
- In seeking to avoid overwhelming the court, a number of options were explored, including the Overall Arrangements (outside the scope of this seminar), dispute resolution mechanisms and early legal advice.
- The pilot scheme must be seen against (a) the backdrop of the Civil Justice Council's report on compulsory alternative dispute resolution (b) the Queen's Speech and (b) the desire to change the 'culture' in housing possession cases.



How it works in practice

- The Housing Possession Court Duty Scheme (HPCDS) operates at the ‘R date’ and ‘S date’. HPCDS provides that a Duty Advisor is available to give free advice, when sought, on the possession claim. It is publicly funded and means testing is not required.
- The R date itself serves a number of purposes. In addition to the R date providing the opportunity for tenants to receive early free legal advice, it is also a gateway, where appropriate, to mediation.
- In practice, where the parties receive information from the court notifying them of the purpose of the R date and the possibility of being referred to mediation.
- Where a tenant takes up the offer of advice at the R date and approaches the DA, that DA will consider the claim and will refer the case to mediation where the following three requirements are met:
 - An agreement between the parties is not reached by or on the R date
 - Both parties consent to mediation
 - DA consider the case suitable for mediation (the DA is assisted in its decision by being provided with a R bundle).



How it works in practice

- Again, in practice, this means that If the DA deems the matter suitable, they will recommend this to the tenant and landlord and, if both parties agree, they will email the Society of Mediators, who are running the scheme.
- The Society of Mediators will then contact the parties directly to arrange the mediation within 2 days of the R Date.
- The Society of Mediators aims to conduct the mediation remotely within 10 days of referral.
- The DA has no further involvement in the mediation process thereafter. They do not attend the mediation and do not give legal advice during the ‘mediation process’.
- If an agreement is reached, the mediator will notify the court.
- If an agreement is not reached, the matter will proceed to a S hearing.
- Accordingly, mediation is to be offered at very early stages of the claim for possession, before any substantive hearing and most likely before any defence has been filed and served.
- The mediation itself is free to both parties.



Obstacles

- The take up of advice on the R date is relatively low.
- Referrals at the R date means that only those who seek advice from a DA would be considered for mediation.
- There is currently no guidance to duty advisors as to how and when to refer a case to mediation.
- There are discussions as to what housing matters are suitable for mediation. A view held by many (including myself) is that not all housing cases are suitable for mediation, particularly where mediation is offered pre pleadings and pre disclosure and potential defences are yet to be identified.
- The mediators providing the service receive some training but it is not compulsory that they have housing experience (although some might). Given the complexity of housing law and types of orders available, this creates difficulties.
- The mediation is limited in time.
- There is no legal representation during the mediation or in respect of the mediation.
- It is not clear how the pilot is being monitored or evaluated.



The Future

- The process is likely to change as the pilot progresses so ‘watch this space’.
- It is hoped that there will be more training for mediators but this remains unclear.
- It is also hoped that there will be more guidance as to the cases that are/aren’t suitable for mediation.
- There have been calls for free legal advice during the mediation process (rather than before or after it).
- It is currently unclear whether, should the mediation scheme remain, it will be open to all mediators or whether it will remain in the hands of one service provider.



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Introduction

- Costs
- Who pays?
- Legal aid parameters



Costs

- Incentive to mediate – see [*PGF II SA v OMFS Company 1 Limited*](#) [2013] EWCA Civ 1288
- Schedule of costs before mediation
- Mediation settles – what about costs?
- Information about costs paid by the other side and/or award to be paid would need to be provided in order for LAA to take into account the impact of the statutory charge



Who pays?

- Fee for the mediator – split (equally) between the parties
- Civil legal services will include **advice** in relation to mediation provided that the case is in scope under LASPO
- Legal Help – claim as disbursement incurred by the provider
- Investigative representation – seek prior authority for disbursements? LAA will assess what costs were reasonably incurred
- Legal fees of solicitor/counsel



Legal Aid parameters

- [The Lord Chancellor's Guidance](#) – para 6.17
- *A solicitor or counsel acting under a certificate for full representation cannot themselves provide mediation or arbitration services in the same case, but the fees of a mediator or arbitrator can be claimed under such a certificate as a **disbursement** except in family cases.*
- The hourly rate is £100.80 for the mediator's fee (as for some experts) and is payable including at pre-permission stage in judicial review claims
- Fees of solicitor/counsel attending a mediation is at risk
- Work undertaken can be paid at LAA's discretion



Thank you

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