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# ResolveUK

**Mediation & Arbitration**  
**Dispute Resolution**

[www.resolveukmediation.co.uk](http://www.resolveukmediation.co.uk)

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## Mediation Guide: Russell Evans

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### Mediation

Mediation is a private and confidential process focused on dispute resolution involving the appointment of a qualified Mediator to assist all parties to resolve their dispute. Mediation is highly effective in resolving disputes and is encouraged by the Courts & Judiciary. It often saves significant cost, stress and time.

### Mediation Process

The mediation process is flexible. It can be designed to fit the circumstances of the dispute and the parties. It will usually involve private meetings between a party and the Mediator to discuss and consider issues and explore settlement options as well as joint meetings where these are approved by the parties. Comments made by any party in this process are confidential and can not be repeated in court. The process is designed to enable parties to **TALK, THINK & EXPLORE SOLUTIONS** in a safe environment. Settlement is concluded by a Settlement Agreement set out in writing which is duly signed.

### Pre Action Protocols

Pre Action Protocols & Practice Directions are in place requiring parties to consider Mediation prior to going to court. [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct)

**Para 1.** Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings.

**Para 8.** Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of **ADR** might enable them to settle their dispute without commencing proceedings.

### Ministry of Justice Approved Mediators

Finding Solutions For You

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# ADR

ADR means Alternative Dispute Resolution. It is an alternative to determination by the court. Mediation is the most effective and most common form of ADR process used.

## Court Rules

The Civil Procedure Rules apply to all cases where court proceedings have been issued. Parties are obliged once again to consider mediation.

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

### 1.1

(1) These Rules are a new procedural code with the **overriding objective** of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –  
(b) saving expense;

(c) dealing with the case in **ways which are proportionate** –

(d) ensuring that it is dealt with expeditiously and fairly;

(f) enforcing compliance with rules, practice directions and orders.

### 1.2

The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules

### 1.3

The parties are required to help the court to further the overriding objective.

### 1.4

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(e) **encouraging** the parties to use an **alternative dispute resolution** procedure

## Sanctions for Failing to Mediate

The Court has power to and frequently imposes cost sanctions against parties who refuse to mediate.

**PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288**

**Lord Justice Briggs:**

1. An unreasonable refusal to participate in ADR has, since 2004, been identified by this court as a form of unreasonable conduct of litigation to which the court may properly respond by imposing costs sanctions: see *Halsey v Milton Keynes General NHS Trust* [2004] 1WLR 3002.

22. The *Halsey* case was the first 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.

24. In the nine and a half years which have elapsed since the decision in the Halsey case, much has occurred to underline and confirm the wisdom of that conclusion.

34. In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable.

56. Finally, as is recognised by the weight placed on the judge's decision in the passage in the ADR Handbook to which I have referred, **this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR** ..... 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** which, even if a little more vigorous than I would have preferred, nonetheless operates **pour encourager les autres**.

## Attempts to Avoid Mediation

The court is very weary of attempts to avoid mediation and these are usually given a short shrift response. Indeed Mr Justice Turner in Laporte characterised refusing to mediate as a 'high risk' strategy.

### **Burchell v Bullard (2005) EWCA 358**

#### **Lord Justice Ward**

41. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense.

#### **Lord Justice Rix**

50. I agree that mediation here would have had a reasonable prospect of success and that a party cannot rely on its own obstinacy to assert that it would not.

### **Laporte & Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)**

#### **Mr Justice Turner quoting Mr Justice Lightman - Hurst v Leeming [2003] 1 Lloyd's Rep 379**

53. 'what appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution.'

## Other Judicial Dicta

### **Burchell v Bullard (2005) EWCA 358**

#### **Lord Justice Ward**

43. Halsey has made plain not only the **high rate of a successful outcome being achieved by mediation** but also its established importance as a track to a just result running

parallel with that of the court system. Both have a proper part to play in the administration of justice. **The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.** The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued.

### **Lord Justice Rix**

50. The court is entitled to take an unreasonable refusal into account, even when it occurs before the start of formal proceedings.

### **Oliver and another -v- Symons and Another [2012] EWCA Civ 267**

### **Lord Justice Ward**

53. It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an **experienced mediator**, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come.

## **Consequences of Failing to Mediate**

### **PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288**

**Sanction Applied - Party penalised £250,000 Costs**

### **Laporte & Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)**

**Sanction Applied - Party penalised One Third of Costs**

### **Rolf v De Guerin [2011] EWCA Civ 78**

**Sanction Applied - Party penalised All of Costs**

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(This note is intended for outline information purposes only. It does not constitute or purport to be legal advice)

**Russell Evans is a Director & Immediate Past President of the Hampshire Law Society. He is a full time Mediator and has judged the Finals of both the UK & International Mediation Competitions.**

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