

Mediation? “The most expensive sandwiches I have ever eaten...”

*Mediation Symposium
Thursday 12th May 2016
Holborn Bars, London EC1N 2NQ*

Tony Willis
William Wood QC
Stephen Ruttle QC
Geoff Sharp
John Sturrock QC
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Simon Thorley QC
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AGENDA

1. Is mediation being used as often as it should? Or used too often? Have we reached peak mediation? If there is resistance how should the Courts or the mediation community respond? What are the sticking points?
2. Are parties generally prepared to negotiate or are there still cases in which they are box-ticking or pursuing other agendas? Do they routinely attend with inadequate authority?
3. Preparation, preliminary meetings, telephone calls , questionnaires,? How do we set the mediation day(s) up best?

INTERVAL

4. Joint sessions: do you like them, can we improve them, should we abandon them?
5. What in general are the most effective forms of assistance the mediator can give the parties during mediation?
6. After-care: the long-tail mediation. is this the way things are going?

Informal discussion and close.

PANEL

- ◆ Tony Willis
- ◆ William Wood QC
- ◆ Stephen Ruttle QC
- ◆ Geoff Sharp
- ◆ John Sturrock QC

MEDIATION AT BRICK COURT

OUR MEDIATORS HAVE ESTABLISHED THEMSELVES AS LEADERS IN THE RAPIDLY DEVELOPING WORLD OF COMMERCIAL MEDIATION BOTH IN THE UNITED KINGDOM AND INTERNATIONALLY. THEY HAVE CONDUCTED SOME 250 MEDIATIONS IN THE LAST 12 MONTHS AND HAVE ASSISTED IN SETTLING CLAIMS WORTH OVER £5 BILLION

The dedication of Tony Willis, William Wood QC, Stephen Ruttle QC and John Sturrock QC to mediation is reflected by their rankings in Band 1 of Chambers & Partners, and the presence of the first three, together with Geoff Sharp, in the top ten of the International Who's Who of Commercial Mediation. 50% of the UK ranked mediators in Who's Who Legal 2016's leading silks are from Brick Court. Tony Willis is the sole holder of the title Who's Who Legal Global Commercial Mediator of the Year being awarded the title, based on votes by peers and clients as well as feedback and research, in the five consecutive years since its inception.

In addition to conducting mediations in London, our mediators often work elsewhere in the UK and also in the Bahamas, Dubai, Hong Kong, Kenya, New York, New Zealand, Singapore, South Africa, Trinidad, Qatar, Belgium, Guernsey, Greece, Ireland, Jersey, Romania and Switzerland.

Please contact Kate Trott with any enquiries on 020 7520 9813 or email: kate.trott@brickcourt.co.uk.

Mediation is a process whereby a neutral third party spends, typically, a day with the parties to a dispute and tries to facilitate a settlement. The process is confidential. The mediator does not act as a judge or arbitrator. He expresses no views of his own as to the rights and wrongs of the dispute or the likely outcome of any litigation.

The mediators at Brick Court Chambers have undertaken thousands of mediations and have long experience of helping parties design and plan the process for maximum effectiveness.

It is of the essence of Mediation that it is a flexible and adaptable process. The parties can design what they need in the particular circumstances of their dispute.

BRICK COURT MEDIATION 2016 SURVEY RESULTS

1. Are there still cases in which parties should mediate but either do not suggest mediation or refuse the other side's suggestion?

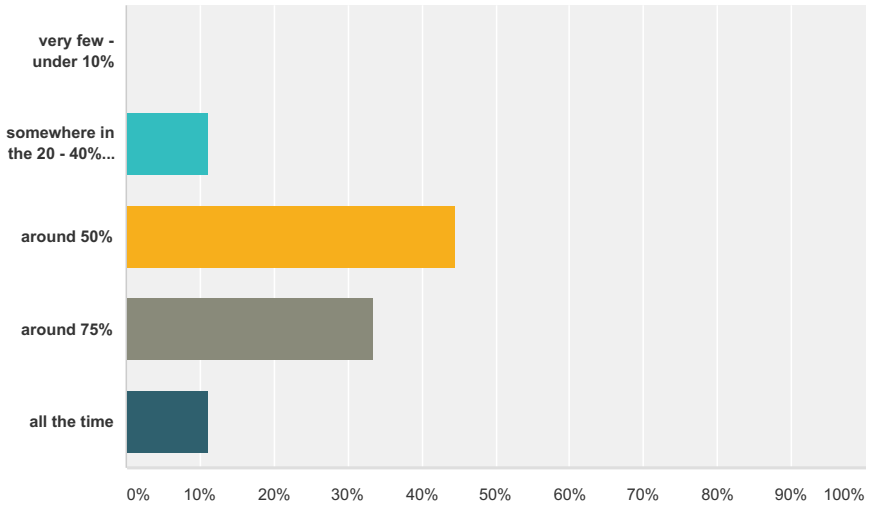
- ◆ *Yes, of course*
- ◆ *Pretty rare these days*
- ◆ *Driven by the court process parties have little choice not to mediate*
- ◆ *Yes, undoubtedly there are still cases that don't mediate that should but they represent a recalcitrant minority of litigants and lawyers*
- ◆ *No. But there are plenty of cases that mediate too late in the process.*
- ◆ *Still cases not being mediated that should be. My sense is the top end stuff gets well looked after and will be mediated if appropriate but the bulk of mid-range litigation is not being optimised*
- ◆ *Yes, lots*
- ◆ *Absolutely. For a whole range of reasons.Law firms and corporates that are mediation enthusiasts are usually so because of the influence of small numbers of supporters internally and personnel changes can affect organisational behaviour.*
- ◆ *[A senior GC] says 19 out of 20 requests he makes for mediation are refused by the other side. This is often because mediation is non-binding and there are issues with enforceability. When the backdrop is the UK Courts, the level seems about right, with certain areas - PI, clinical negligence abstaining. Likewise its use in international arbitration is negligible.*

2. What can mediation, mediators or the Courts do to overcome resistance to mediation?

- ◆ *Spend more time identifying and promoting the benefits of mediation. Educate the market.*
- ◆ *The courts are already as close to compulsion as they can be without it breaching the parties' right to have the case tried (even if this means facing a heavy costs penalty)*
- ◆ *They should not try - if parties do not want to mediate I guess that is for a good reason in the current climate*
- ◆ *There is little more that can be done. The recent resistance to mediation that I have seen is because the parties were too entrenched and not prepared to compromise sufficiently to reach a deal*
- ◆ *There are very specific reasons often, so not much. The courts can order it, but you can lead a horse to water etc. Still you never know when you get started. Maybe all commercial cases should be ordered to mediate if not already done so at close of pleadings.*
- ◆ *Some participants just view mediation as a box-ticking exercise. Improve the standard of mediators. Reduce the cost. Require proper position papers. Limit the time for opening statements and keep those short and focussed. Reduce the scope for tactical games in mediations.*
- ◆ *I don't see much resistance to mediation, what I see is mediation being used as a tool rather than a real attempt to settle - it is to some extent going through the motions if too early in the case. That is the problem - how can you mediate cases effectively, early, before costs become a governing factor.*

3. In what percentage of mediations do parties come to mediation genuinely ready to negotiate in an effective fashion?

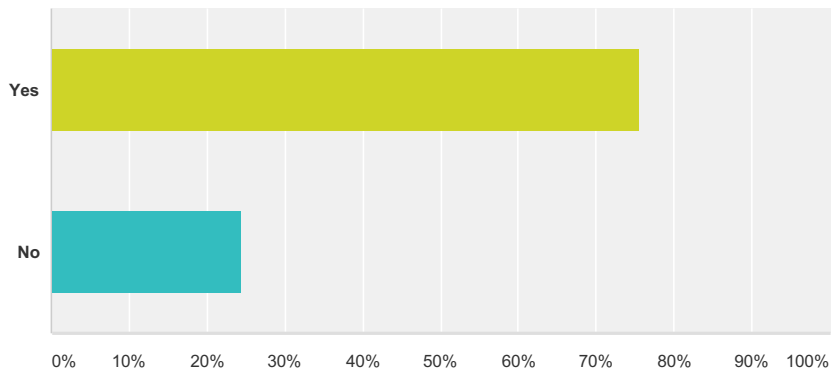
Answered: 36 Skipped: 13



4. If we assume that the standard preparatory steps in a one or two day mediation are: initial meeting or phone call (private or joint) with the mediator exchange of relevant mediation documentation position papers ... what else could the mediator do in the lead up to mediation which would be helpful and feasible in ensuring that the mediation day works really well?
- ◆ *Ensure face to face meeting with parties before the day. Prepare the parties to get the most out of the day. Make sure they have realistic expectations and arrive in the right mindset.*
 - ◆ *We believe in appropriate cases initial meetings should happen early (eg two months before the mediation day) to identify issues, blocks to progress, format of settlement agreement etc and how the parties might address those to assist negotiations on the day itself*
 - ◆ *Arbitration with Cedric Barclay et al was informal, but the procedure soon became encrusted with court-like barnacles. People looked to mediation really to get back to the informal old-style arbitration. But almost inevitably, mediation is being formalised just as arbitration was....*
 - ◆ *Not a lot. In addition to the above an off the cuff call from the mediator the day before is perfect.*
 - ◆ *Where it is possible I think step 1 should take place well in advance to identify issues and resources required and a second call (usually private) nearer the day. It's only marginally more work but parties ought to be happy to pay for it.*
 - ◆ *Following the mediator receiving the position papers and documents, they should read them early on (bring the deadline forward a week) and then have further conversations or distribute points which need further thought or will be a particular focus on the day. The mediator needs to play a much more active role in the run up to a mediation to ensure that the day can be as useful and speedy as possible.*

5. Do you typically find joint sessions useful?

Answered: 37 Skipped: 12



6. What more could be done to make joint sessions useful?

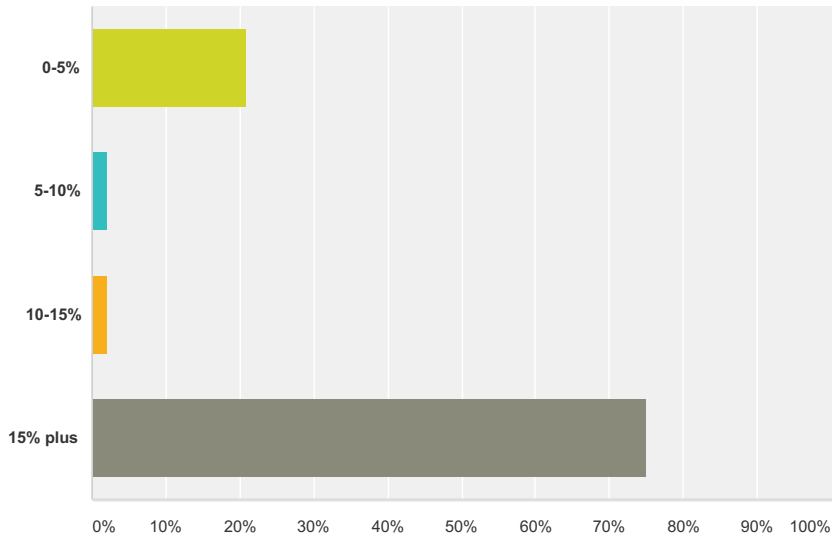
- ◆ *Prolong them even more! Prepare for them more.*
- ◆ *Less formal positioning style presentations. In our experience joint sessions should happen early in a longer process with meetings of mediator/lawyers only and separately involving clients so that by the time of the mediation the relationships have been cemented sufficiently to move straight to negotiating key issues blocking progress.*
- ◆ *Exclude the lawyers!*
- ◆ *Don't take them for granted. Use them. Mediators don't buy into the lawyers spin that we are better to be in separate rooms. If I'm going to mediation I want to speak to the other side of the problem at length about it, not just meet and greet and go to our corners,*
- ◆ *Widespread use of pre-mediation questionnaires to direct parties to think about issues that they will need to address. Greater emphasis on mediation advocacy as a skill that needs some training (because standards are still often low) - but this isn't an invitation to the Bar, I am afraid, to add to the ranks at the mediation day.*
- ◆ *Mediators should not be shy about continuing the plenary. Better to get as much necessary detail out on the table - the mediator should not be used as a messenger with facts. An argument in the plenary is not a problem. The mediator has to use his judgement as to when to draw stumps on the plenary.*
- ◆ *If the mediator has an agenda then set it out before the mediation. Taking up an hour listening to the mediator on how he wants the mediation to go is not useful. Then guide the parties, but let them do the speaking including via their lawyers.*

7. What are the most effective ways in which a mediator can assist you in negotiation either before or during mediation?

- ◆ *Test both parties' positions to demonstrate any weaknesses in their arguments and highlight any strong points the other side might have. Be quite strong with the clients as often as the client's adviser it can be difficult to press them as hard as is occasionally necessary.*
- ◆ *Be flexible. Don't use staff to insist on deadlines. Some mediators can be patronising and it slows things down.*
- ◆ *It very much depends on how each party is approaching the process, but I have found it works better when the mediator engages reasonably frankly with each party, rather than acting as a shuttlecock*
- ◆ *Not all parties are able to review the merits of their case and the need to settle in an unbiased and critical fashion. Sometimes the mediator can assist the solicitor by working with her/him to ensure that the client is fully aware of the risks and stresses of litigation.*
- ◆ *Give me strategy advice. Not merit based but based on the dynamics to that point. Rehearse me through the next offer and beyond and give me whatever signals they can about how she thinks my offer will land. I can learn a lot from that.*
- ◆ *Read papers and get more involved earlier. Would pay more for earlier intervention.*
- ◆ *Put a stop to salami slicing at an appropriate time*
- ◆ *Put the other side's point of view across in constructive non-hostile language with their own view as to what they think about the points being made*
- ◆ *Avoid bullying the parties*
- ◆ *My personal preference is for mediators to push the parties quite hard and start active negotiation fairly early in the process, not waiting until late in the day to discuss numbers*

8. In the last 12 months, what percentage of your mediations settled in the days/weeks/months following mediation day?

Answered: 48 Skipped: 1



9. In those matters where the mediator remained involved after mediation day, what did the mediator do to assist moving the matter towards resolution?

- ◆ *Played an active role chasing the parties which can be difficult for one of the parties to do*
- ◆ *Call the parties on numerous occasions, draft the heads of terms summarising both parties' positions, remained patient and persistent*
- ◆ *Perseverance by the mediator was the key. His timing was a little off so it was slow work but then eventually the stars aligned. Just knowing the mediator was still on the job, willing to assist gave the parties the motivation to get it done.*
- ◆ *Holding parties to the framework for settlement agreed in the face to face part, dissuading against moving the goal posts*
- ◆ *Remained in contact with both sides, usually by phone, but also in- person meetings privately with each party*
- ◆ *Nothing!*

10. What more could mediators do to add value and assist matters after mediation?

- ♦ *Be involved at an earlier stage than the day of mediation itself so that for more complex cases the "mediation" day is the final part of the process*
- ♦ *Send a note of key issues agreed, issues yet to be resolved, suggested actions to keep the parties engaged in meaningful negotiations.*
- ♦ *In certain circumstances they could summarise their views on the strengths and weaknesses of the claim and send them independently to each party*
- ♦ *Think long term. It's unlikely going to settle the next week after mediation day but regular check in, capturing progress as it happened by email, being optimistic about settlement even when it didn't seem likely.*
- ♦ *If the long tail model is right - and it probably is - then being more confident about proposing to parties a structured process of engagement to follow - meetings, a review in X weeks or months, a second mediation or wp discussion etc. In other words being confident that the role is about a dispute resolution process manager to partner with the lawyers.*
- ♦ *Keep in regular contact, update promptly and badger when needed*
- ♦ *Review their billing approach to support expectation of active engagement before and after a mediation meeting and not fill their diary with mediation reading and meetings, to leave time for follow up*
- ♦ *Continued active involvement. Some mediators tend to move on to their next mediations and largely cease involvement in our mediation.*

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