

1975 Act mediations: improving your outcomes

Notes from a short talk given in June 2023

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1. **Why mediate** in 1975 Act cases?
 - a) General advantages apply (save time & cost, avoid litigation risk etc) but specific benefits as follows...
 - b) Better than litigation at handling fraught emotions
 - c) Capacity to preserve / rebuild relationships – eg cousins, which is often important to litigating generation and cousins
 - d) Speed – duration of distressing dispute is shortened
 - e) Cost savings especially valuable when the only purpose of the dispute is access to the value in the estate (cf other civil disputes often driven by additional factors)
 - f) Informality and privacy
 - g) Flexibility of outcomes – eg tax efficient settlements

2. Cases where negotiated **settlement not possible**? Rare, but 2 potential examples:
 - a) Binary issues at stake (eg domicile) although consider preliminary determination and come back to mediation
 - b) Costs have become an obstacle to settlement

3. **When to mediate**
 - a) As early as possible
 - b) Before the costs position means insufficient value in the net estate
 - c) But wait until issues and facts are clear (see also below re financial info)
 - d) Bear in mind the section 4 limitation – might be too short to allow proper preparation, in which case:
 - i. 'Stand still' agreement, but bear in mind discretion lies with court, or
 - ii. Issue and then stay for mediation

4. **Which format** – in person v online?

- a) General preference for 'in person' – more effective communication, but...
 - b) Covid has normalised the online format, which works well
 - c) Various pros and cons, but in 1975 Act context 2 benefits:
 - i. Participants (eg elderly) remain in comfort of own home
 - ii. no risk of awkward meetings in the lift / loo
 - d) Both have their advantages – depends on the circumstances
5. **Choice of mediator** – experience of 1975 Act claims important
6. **Preparation** is really important:
- a) Educate inexperienced clients – ie not a mini trial, mediator not a judge etc
 - b) Remind clients that focus is the financial perspective and not the emotional or historical context
 - c) Ensure the necessary financial info is available:
 - i. Evidence of means & needs, up-to-date value of net estate (draft accounts?)
 - ii. Exchange info early – new info exchanged late is destabilising
 - iii. Try to agree valuations in advance – eg real property
 - d) Manage expectations about the challenging experience of mediation
 - e) Think about (but don't reveal) bottom lines & red lines
7. Fix an **online pre-mediation meeting** with mediator to save time on the day:
- a) Develops understanding between mediator and parties
 - b) For online mediations, familiarise with technology to avoid delays on the day
8. **Who attends / participates?**
- a) claimants, beneficiaries
 - b) executors if likely to be helpful (eg provide info on liabilities); perhaps join after lunch / available remotely
 - c) Tax advice (eg IHT, CGT) available remotely
9. Should there be an **opening joint session** and if so how to approach it?
- a) Different views:
 - i. Often beneficial, eg unique opportunity to speak direct to other parties without filter of legal advice / outside defensive legal correspondence
 - ii. But... be cautious about risk of damaging exchanges due to high emotion
 - b) How to approach? 4 suggestions:
 - i. Encourage clients to express commitment to good faith negotiation
 - ii. Encourage clients both to express feelings about the case whilst showing respect for others, and to listen to others respectfully (the sense of 'being heard' is very powerful in conflict psychology; see my

short 4 min podcast episode on this:

<https://amomentonmediation.podbean.com>)

- iii. Bear in mind mediation is negotiation and negotiation is about persuading the other side(s) to give you what you want. So... think about what the other side(s) needs to hear to be persuaded to give you what you want (and then say it!)
 - iv. Remember a key role of lawyers at mediation is to set the right tone – crucial for constructive negotiation, and lots can be done to promote / damage this
10. How to **negotiate most effectively**? Lots that could be said here, but here are 3 suggestions:
11. Suggestion 1: be willing to **make a sensible early offer**. Parties typically reluctant to go first but 3 reasons to do so:
- a) Sign of good faith – sends positive message to the other side(s)
 - b) Humans hate to feel indebted. Illustration: in the 1970's a US psychologist sent Xmas cards to 600 random strangers plucked from phone book and received hundreds back. Why? Because human nature is to reciprocate. So make a sensible offer and you're more likely to get one in return
 - c) Allows you to exploit the 'anchoring' concept: make the first offer and you ensure that every subsequent one is judged relative to that, ie to some extent you define the negotiation zone
 - d) BUT the offer needs to be realistic; an insulting one will be counter-productive
12. Suggestion 2: **don't push too hard**.
- a) Remember (see above) the importance of reflecting on what the other side(s) needs to hear from you
 - b) Ie almost certainly not an aggressive attack re the law / facts / their conduct
 - c) Attack triggers defence of self-esteem, 'amygdala hijack', fight-flight response. This suppresses capacity to think clearly, engage in realistic risk analysis, respond rationally to settlement proposals, recognise the sense in compromise, etc
 - d) Ie pushing too hard is usually counter-productive
13. Suggestion 3: Remember that **conflict over property** (especially homes) – generates **unusually strong emotions**.
- a) This is also evolutionary, developed from aggression in early hominid conflict over resources. The adaptation survives today as high emotion in property disputes
 - b) In emotionally fraught inheritance disputes the risk of extreme emotional distress is higher than almost any other context

- c) So don't be surprised about irrational responses in arguments over family homes and land, and generally be especially sensitive to all parties when dealing with property
14. Two short points on **settlement agreements**:
- a) Beware the risk of drafting complex agreements late in day when everyone tired, so
 - i. Think about HoTs if necessary, although
 - Be absolutely clear whether binding, and
 - If not, remember the risk of a change of mind after the day's momentum has dissipated
 - b) Consider whether court approval required under CPR Part 21 (eg minors or those without capacity) and the need for counsel support
15. Finally, please do **get in touch** to discuss any mediation-related queries, and have a listen to tips and tactics here: <https://amomentonmediation.podbean.com>

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