



Judicial Review and Mediation

Private Law for Public Law Practitioners

The Public Law Project

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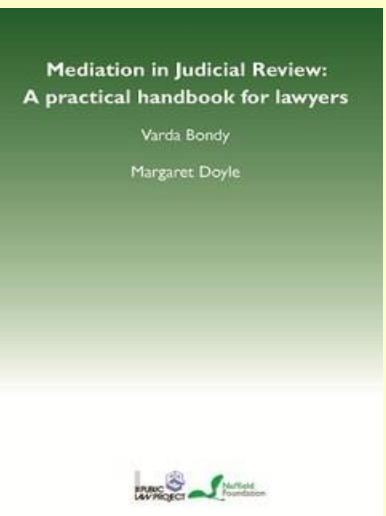
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Research in public law

- Judicial Review research
- Examples
- What does research tell us about mediation in public law?
- Why more research is needed





The Terminology Salad

- Mediation
- Round table
- ADR
- Informal Resolution
- Does it matter?





Settlement and Mediation

- To understand how mediation can feature in the context of judicial review, it is necessary to understand the dynamics of judicial review and settlements
- Types of settlement
- The limitation of judicial review remedies
- Who is afraid of mediation?





Cheaper, quicker, better...

- Or is it?
- Mediation in judicial review claims are rare; why? (most cases settle anyway)
- Reasons given by practitioners for not considering mediation
- The ambivalence of mediation in public law – is it justified?





Process, Policy, Practice

- Ombudsman
- Place for wider public interest if confidential process
- Policy (eg abolish PCT)
- Almost 20% of final hearings involved issues of policy and practice
- How can lawyers extend beneficial outcome to one individual
- What can broaden the appeal of mediation?





Influencing Factors

- Will judicial review deliver what the claimant needs?
- What ADR is available?
- Mediation may not produce an offer, likely to bring clarity/transparency
- Using the process effectively
- Managing expectations
- Avoiding costs sanctions (see PGF)
- How could each party benefit from using mediation?



MEDIATION



Hallmarks of Mediation

- Voluntary agreement by parties to mediate
- Neutrality of mediator
- Confidentiality
- Parties decide the outcome
- Creative solutions
- Ground rules
- Cost-effective
- Neutral venue, agreeable to all parties
- Authority to settle (right people there)
- Opportunity to be heard





What makes mediation work?

- Confidential; Agreement to Mediate will contain confidentiality clause
- Options explored without prejudice
- Voluntary
- Impartial, neutral facilitators
- The parties create the outcome
- Focus on the needs of the parties
- Being aware of strategic games





MEDIATION



What are the benefits?

- Decision reached by the parties, not imposed
- Availability of outcomes which court cannot order eg apology/explanation
- Limits possible reputational damage
- Cost-effective if outcome secured
- Avoids stress of litigation
- Can influence future policy decisions
- Certainty and speed of settlement





Timing – when to mediate

- Pre-action protocol
- Internal procedures
- Too soon
- Too late
- Proposal and refusal
- Letter before claim
- Protect client's position
- Parallel processes





MEDIATION



The Mediation Process

- Welcome introduction – ground rules
- Joint session
- Opening statements
- Private (caucus) sessions
- Exploring options
- Encouraging momentum
- Keeping it confidential
- Working towards resolution





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]





MEDIATION



Purpose of the Position Statement

- To ensure the Mediator and other party understand the case from the your client's perspective
- Demonstrate an openness to settle
- Identify strengths, weaknesses and areas of agreement
- Briefly summarise facts and issues
- Indicate the type or range of what would be an acceptable settlement





What happens at the Joint Session

- The Mediator will ensure the Agreement to Mediate is signed by all present
- Each party speaks for 10-15 minutes. If the client is going to speak, prepare what will be said beforehand
- If position statements have been exchanged, more information/clarification can be given
- Initial new query/information gap filled
- A positive response to any proposals



MEDIATION



CMC
CIVIL MEDIATION COUNCIL



Confidentiality

- Provide for future disclosure or confidentiality of the settlement
- Expect publicity? Agree press release
- Establish clear understanding of parameters between the parties
- Understand confidentiality applies to the mediator too (but see *AB v CD Ltd* [2013] EWHC 1376)
- Manage client's expectations



Funding & Costs

- Mediation paid for in advance
- Costs to date – have a schedule
- Know the impact of the funding arrangement on the outcome for the client
- Legal Help pre-permission
- Legal aid rates versus inter partes rates
- Keep in mind the progress that's been made on agreeing central areas of dispute – some mediations falter on costs
- Be prepared to be proportionate!



Outcomes

- Creative solutions can be legally binding if written down and signed
- Confidential and Enforceable
- Apologies can be given without an admission of liability
- Be clear on who is doing what, when and consequences of non-compliance
- Costs and cost efficiencies
- Form of the settlement agreement
- Follow-up – more examples – tell us!