

## **Mediation – thoughts from an experienced mediator**

Let me be clear – I am a big fan of mediation. Provided the parties truly are willing to try to settle the dispute.

Unfortunately, in the last few years it has become more apparent that one party or the other has little or no intention to settle. Perhaps it is the threat of no costs or an adverse costs order if they refuse to mediate. Or perhaps it is a tactic to intimidate the opposition. It used to be seen as a “fishing expedition” but the current tactic seems to be that mediation will not take place until disclosure has taken place and the dispute litigated by correspondence.

Then when the mediation actually commences intimidation by cross-examination seems to be a favorite tactic as well as putting forward cases that are either untrue or just fabrication. And this is all done on the basis that as the mediation process is Without Prejudice there will be no comeback later. I have been in mediations (yes, plural) where the legal representative has been shouting at the other side’s legal representative.

So, how is this avoided? The best way, in my view, is to make it clear from the outset that the parties agreement to act in a civil manner towards each other is an important consideration and that if one of the parties acts in a contrary fashion then they should expect that the other party will walk out and report the reason for the case not settling at mediation to the Trial Judge. Whilst the Judge is not entitled to know exactly what went on in the mediation, the Judge is entitled to enquire why it failed and award costs accordingly.

If you are getting to the point of walking out then the Mediator should be told what is going to happen. Most Mediators will be able to diffuse the situation restricting the walkout to the party’s private room rather than exiting the building!

### DIRECTORS

John Rubinstein Martin Lewis Jacques Smith Pui Yee Tang

### CONSULTANTS

Peter Phillips Imran Mian David Herbert

### ASSOCIATE SOLICITORS

Blair Gould Phyllis Charteris-Black Tessa Manisty Bhavini Nakeshree Louise O’Farrell