July 2025 | Part 2

KINGS CHAMBERS

Costs Mediation

Costs Newsletter

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Manchester, Leeds and Birmingham
10th July 2025

Introduction

Mediation isn't a passing fad – it's become the go-to way to resolve disputes. By 2019–20, for the first time there were more civil and commercial mediations than trials in England and Wales, and by 2023 mediation activity had surged another 50%. The potential savings in costs, and speed, not to mention privacy, make mediation very attractive to litigants facing deteriorating standards of civil justice and court backlogs. In short, our overworked courts and clients desperately want something faster, cheaper and less adversarial.

The law has caught up. In **Churchill v Merthyr Tydfil [2023] EWCA Civ 1416,** the Court of Appeal held (overturning the old Halsey rule) that a judge can lawfully order parties to engage in ADR (like mediation) so long as it doesn't impair their basic right to a fair hearing either at common law or under article 6 ECHR. In practice this means judges now see ADR as part of their case-management toolbox.

Further, the Civil Procedure Rules were amended from 1 October 2024 to spell this out. For example, the Overriding Objective now explicitly says courts should "promote or use ADR", and case-management powers expressly let judges order the parties to participate in ADR. Costs awards to parties as part of the wider issue of conduct of the parties must now take account of any failure to engage in ADR. In short: mediation is moving towards being compulsory unless a judge agrees it's pointless.

The carrot has become a stick. **Churchill** has swept away any judicial reluctance to encourage or compel the parties to litigation to undertake ADR and has made clear the courts want people to try ADR. Judges have begun penalising hold-outs: refusing to mediate without good reason can lead to reduced costs awards. If you "unreasonably refuse" to try mediation, you will likely be penalised by a reduced costs recovery. The message from the judges is blunt: don't ignore mediation and hope to get your full costs, because the the court may take a dim view of any unreasonable failure to engage in mediation.

This sea-change has been a long time coming, but the direction of travel has been anticipated for some time. Kings Chambers was the first set outside London to launch a specialist *costs mediation* service. Even back in 2016 our clerks noted that judges were actively encouraging mediation and would penalise those who didn't consider it. That prediction has proved accurate. Mediation is no longer a nice optional extra, but is now firmly part of the civil litigation landscape, including or even especially for cost disputes. Solicitors and costs lawyers should have it on the radar from the very start of a case, or risk being caught unprepared by the shift in judicial attitudes.

Practical guide to costs mediation

Costs mediation works just like any other form of commercial mediation, but with an exclusive focus on "the price tag" of litigation. It is a voluntary, confidential, without-prejudice negotiation supervised by a neutral mediator. The idea is simple: if two sides can't agree how much one must pay the other in costs, they sit down (usually for a day) with a mediator, who acts as a facilitator to thrash out the bill. The parties remain in control of the outcome, not a judge. All offers and discussions are without prejudice and off the court record. The mediator doesn't decide who's right or impose a ruling, a mediator's rule is to guide and encourage settlement by helping the parties explore each side's case. In other words, mediation is an assisted negotiation.

Agreement and preparation

First, both sides must agree to mediate. Often this is proposed by one party's lawyer and accepted by the other. Once a mediator is chosen usually out of a selection of nominated individuals,, the parties sign a Mediation Agreement which sets out the rules of confidentiality and defines the mediator's role. The mediator then works with each side before the mediation day, with an introductory discussion and reviewing the papers and planning the session. Importantly, the parties usually exchange succinct position statements and key documents with each other and the mediator ahead of time. These submissions outline each side's facts, legal issues, common ground and differences. A good position statement is a factual chronology plus highlights, not a court bundle.

Opening meeting

On the day, the mediator greets everyone and ensures logistics are sorted. After introductions, the mediator conducts a joint meeting with all participants. They start by confirming ground rules (strict confidentiality, voluntary nature, who's there, etc). Then each side gives a short opening presentation – a high-level pitch of the case on costs. It's often the first time each side hears the other's full argument face-to-face, which alone can narrow the gap.

Caucuses (private meetings)

After the joint session, the mediator moves to private meetings. Each side goes to its own room while the mediator shuttles between them. In each caucus, the mediator explores strengths and weaknesses and underlying interests. Nothing said in caucus is repeated without permission. Parties must be prepared for waiting while the mediator is with the other side.

Negotiation and shuttle

After the private sessions, the mediator brings offers back and forth. Each side can refine figures or conditions. The mediator tries to keep momentum and avoid impasse by focusing on realistic outcomes.

Settlement or aftermath

If a deal is reached, the lawyers usually put it in writing immediately. This might be a simple Heads of Terms or a full consent order. It's binding once signed. If no agreement is reached on the day, many disputes are settled soon afterwards on the back of what was negotiated.

Mediation styles

Most commercial mediations (including costs) are facilitative. The mediator acts as a neutral process-manager. They do not tell you who's right or give legal advice. By contrast, an evaluative mediator might offer views on the likely outcome if the case went to court. Very few costs mediators are strictly evaluative, but it can happen if parties want that assessment.

Advantages over litigation

Mediation is typically much faster and cheaper than a long court battle. Most mediations resolve in a single day. The cost of the mediation is usually dwarfed by what both sides would spend on hearings and written evidence. Mediation also gives parties control: they craft the solution instead of having a rigid court-imposed result. It is also confidential and interest-based. Crucially today the courts want you to try. Refusing without justification can lead to reduced costs recovery.

Kings Chambers Costs Mediation Team (Manchester)

Barristers at Kings Chambers (Manchester) also serve as experienced costs mediators. Kings was the first chambers outside London to launch a specialist costs mediation service. We now have six accredited costs mediators in our Manchester costs team.

They have handled everything from modest solicitor-client bills to multi-million-pound cost claims. The kinds of cost disputes our mediators settle include detailed assessments, summary assessments, costs budgeting battles, solicitor-own-client disputes, wasted costs applications, and cross-border costs issues.

Matthew Smith: (Call 1991)
Matthew has a broad niche practice on retainers and fixed costs issues. Matthew is an experienced costs mediator and Costs ADR panel member. He handles multi-party assessments and solicitor-client disputes.

Andrew Hogan: (Call 1996)
Andrew is a leading costs specialist. He is a trained costs mediator Andrew undertakes costs mediations and Costs ADR. He has a vast experience of mediations, starting as a participant nearly 30 years ago.

Paul Hughes: (Call 2001)
Paul is a versatile costs barrister with a growing reputation. He handles high-value clinical negligence and PI costs, conduct and wasted costs disputes. Paul has considerable experience advising on and mediating commercial, property and planning costs disputes.

Craig Ralph: (Call 2002)
Craig has a national practice in costs and litigation funding. He is particularly noted for his expertise in costs incidence, broken retainers and conduct issues. Importantly, Craig "is a qualified mediator" and "is an experienced costs mediator and CADR Panel member". Clients often ask Craig to act as mediator in multi-party cost claims, leveraging his skill at bridging gaps between competing solicitor and client positions.

Kevin Latham: (Call 2007)
Kevin combines his busy costs litigation practice with his role as a Deputy Costs Judge (appointed 2021). He regularly acts for paying and receiving parties in high-value assessments and appeals. Kevin's is an experienced costs mediator and CADR Panel member.

Erica Bedford: (Call 2012)
Erica came to the Bar as a solicitor and Cost Lawyer, and practises exclusively in costs. She advises both paying and receiving parties on the full spectrum of cost litigation. Erica is an experienced mediator – a member of the Civil ADR panel since 2015. She is a Deputy District Judge (appointed 2020) and a Deputy Costs Judge (appointed 2021). She brings technical expertise and a clear, practical approach to mediating disputes.

Each of these barristers brings a combination of advocacy skill and neutral insight to costs mediation. They can be instructed both to represent clients or to act as the mediator. In either role, they cover disputes involving all kinds of costs.

For more information or to arrange a costs mediation, contact the clerks at Kings Chambers (Manchester): **Harry Young (hyoung@kingschambers.com)** and **Louie Morrissey (lmorrissey@kingschambers.com)**.

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