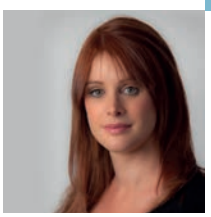
LOW-VALUE MEDIATION: A GUIDE FOR THE UNINITIATED



By Alice Sims

As well as her work as counsel, Alice Sims is an experienced mediator and ADR practitioner who specialises in construction and engineering disputes along with professional negligence, regulatory and insurance claims related to these sectors. She is applauded for her patient, non-confrontational yet firm and decisive approach and is able to draw on her extensive judicial experience when acting as a mediator. She has an excellent track-record of successfully settling disputes.

What is a low-value mediation?

A number of organisations, including CEDR and the Civil Mediation Council, run fixed fee mediation schemes for disputes of low-value. At Keating Chambers, the fixed fee scheme applies to any claims and counterclaims collectively valued at £600k or less. This can be a cost-effective way of mediating smaller disputes by a qualified and experienced mediator.

What are the benefits of mediating low-value disputes?

Parties to disputes of all shapes and sizes have come to realise the benefits of mediating their disputes but there are a number of reasons why mediating a low-value dispute can be so advantageous:

- The early resolution of a dispute can be a huge relief, with savings being made in management time and productivity. This is particularly the case for smaller organisations or individuals who may be spending a disproportionate amount of their time and "head-space" on a low-value dispute;
- Low-value construction claims, due to their technical complexity, are often not dissimilar in terms of litigation costs to disputes of significantly greater value. Engaging with a specialist construction mediator can put an end to these costs at an early stage;
- As with all mediations, the opportunity, if appropriate, to settle without an admission of liability or to give and receive apologies can be a great benefit;
- The ability to pro-actively shape and control the settlement agreement rather than having a decision imposed by an external third party (such as a Judge or adjudicator) makes mediating attractive for a number of clients;
- A successful mediation can preserve or cement business relationships and the parties can include compromise provisions not obtainable in other forms of dispute resolution such as ongoing trade agreements;
- Even low-value disputes, particularly in the construction arena, frequently involve multiple parties and an adept mediator can work with multiple participants to achieve an overall settlement package;
- The confidential and without prejudice nature of mediation is, of course, one of its fundamental features and this applies equally to low-value disputes;
- Mediation can be incredibly flexible and can be used in conjunction with other forms of dispute resolution or even to resolve certain aspects of a larger and more financially significant dispute.

Are there any tips for successful low-value mediations?

Here are my top tips for a successful low-value mediation:

- **Prepare the client:** I always encourage the client to attend the pre-mediation online meeting along with their solicitor. This is especially important if the client hasn't mediated before because, during this call, we will discuss the nature of mediation, the structure of the day and the nature of the client's expectations. Trust between a client and a mediator is paramount and I will use this call to start to build rapport and a sense of confidence in the process.
- **Inform the mediator:** It is not uncommon for a relationship between a solicitor and a client to be slightly strained or for the solicitor to have concerns about the client's realistic expectations. The more that I am aware of issues such as these, then the more nuanced I can be in my approach to facilitating a settlement. Send me a confidential email or ask for a 5-minute phone-call (separate to the mediation pre-call with the client).
- **Mediate at the right time:** All mediations work best if the case for and against each party is reasonably well developed. The parties are very unlikely to settle if the claim is lacking detail or is vague. That doesn't necessarily mean that a mediation should only take place after pleadings have closed, but it does mean that there needs to be a comprehensive letter of claim and response (or similar) for a mediation to work most effectively. This is the case even in a low-value construction mediation because the issues are rarely straightforward.
- **Make the best use of your position paper:** A position paper which repeats or recites the pleadings at length is usually a waste of time. A short summary of the key issues between the parties, followed by a punchy list of the strengths of your client's case, finishing with a paragraph about expectations and a commitment to the process is usually all that is required and is a cost-effective way of making a strong first impression in a low-value dispute.
- **Participate in a joint opening:** In my experience there can be a misconception that a joint opening meeting is unnecessary and wastes time. I am alive to those concerns and will always,

if appropriate, keep an opening joint session to a minimum in terms of time. However, an initial joint meeting is an opportunity for the parties to briefly meet each-other and a cordial welcome is often a great start to a process that has not infrequently been previously characterised by ill-feeling between the parties. I also use the joint session to remind the parties that the day is a collaborative process where we're all working together to achieve a settlement, as well as explaining that it's likely to be hard work with some expected low-points throughout the day.

- **Set the right tone with an opening speech:** An overly aggressive or hostile opening is unlikely to have a positive impact on the mediation process. Deliver a speech which is firm, succinct, and clear as to your client's expectations but is also cordial and delivered in a collaborative tone. Remember that you are trying to persuade the other side to settle on terms advantageous to your client and being overly-aggressive can be counter-productive to this. Consider also who will deliver the speech. This can be done by multiple people if desired and, in my experience, a few words from the client can often have great impact.
- **Give your client realistic advice about costs:** I will always ask each solicitor to come armed with a figure for their costs to date and their anticipated costs to trial. The costs can often dwarf the damages in issue in a low-value mediation. At some point during the day, I will start to have a confidential conversation with each party in private session about the realistic prospect of any costs award ordered by the Court (or similar). It is far better if the Client is already aware of how the costs regime is likely to work if they were to proceed to trial, for example, and also the fact that they are unlikely to be awarded all of their costs even if they are the successful party at the end of a trial.
- **Be flexible:** Mediations have the least chance of success where, early on in the day, one client declares that "X" is their final offer and that "enough is enough". I will always try to dissuade a client from making an offer on those terms: what if the other side offered £100 less than "X" for example, surely, you'd accept it? Try to lead your client away from such rigid thinking and work with the mediator to help the client avoid any unnecessary posturing and recognise the broad benefits that a settlement to the dispute would bring.
- **Have a settlement agreement prepared:** Low value disputes often don't warrant an agreement in principle on the day followed by a lengthy drawn-out negotiation process about the exact terms of a settlement. Using the mediation to resolve any wrinkles or areas of disagreement in a settlement agreement is the most cost-effective use of time, but this is only likely to be possible if the structure of a settlement agreement has been drafted in advance.

Keating Chambers' Fixed Fee Mediation Packages

Keating Chambers operates four packages depending upon the total value of the claim and counterclaim:

- **Package 1 (under £75k): ½ day mediation: £500 per party**
- **Package 1 (under £75k): full day mediation: £1000 per party**
- **Package 2 (£75k to £200k): ½ day mediation: £1000 per party**
- **Package 2 (£75k to £200k): full day mediation: £1500 per party**
- **Package 3 (£200k to £400k): ½ day mediation: £1500 per party**
- **Package 3 (£200k to £400k): full day mediation: £2000 per party**
- **Package 4 (£400k to £600K): ½ day mediation: £2000 per party**
- **Package 4 (£400k to £600k): full day mediation: £2500 per party**

A considerable advantage of mediating at Keating Chambers is that the fixed fee mediation package includes all of the necessary mediation rooms as well as a pre-mediation online meeting between the mediator and each party.

The current success rate of the Keating Chambers fixed fee mediation scheme is 93.5%.

Please contact our ADR Clerk, Oliver Goldsmith, if you would like to discuss the ways in which Keating Chambers' mediators may be able to assist you or your organisation.