



**Costs Impact of Delaying
Mediation: Costain Ltd v
Charles Haswell & Partners Ltd**
by
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In this case a delay of seven months between the TCC pre-action protocol meeting and a mediation was held by the court to be¹:

“[C]onsiderably too long once it was clear that the process of mediation was the next step to take. At the latest I would have expected a mediation to have been capable of being organised within a period of 5 months after the Pre-Action Protocol meeting.”

This led to a diminution of *Costain’s* costs award to reflect the amount of time wasted by the unwarrantable delay in setting up the mediation.

So it is not enough just to agree to mediation; it is essential that mediations are carried out without delay. It should be noted that—although the *Costain* case itself was a high value claim—for litigants to be able to reap the cost-savings advantages of mediation, it is important for mediation to be built into proceedings at an early stage. Talking of their view for the cost saving use of mediation, Karl Mackie and Tony Allen suggest that²:



“[T]he norm should be for mediations to precede issue of proceedings, with sanctions where this is not attempted. This is especially important with fast-track cases, where full mediation after issue is less likely to be cost-effective... In multi-track cases, mediation should be built into the case management timetable in all cases except where good reason is given for excusing it.”



There can, however, be difficulties with proceeding to mediation too quickly. In two cases where mediation was sought early in the proceedings, the refusing parties successfully claimed that they had been reasonable to refuse mediation because they had not had enough information from the other side to ensure that there could be an effective mediation.³ Clearly it is important that there is sufficient information available at mediation so that the process is not rendered pointless.

* *Costain Ltd v Charles Haswell & Partners Ltd* [2009] EWHC 3140 (TCC).

¹ *Costain Ltd v Charles Haswell & Partners Ltd* [2009] EWHC 3140 (TCC) at [285].

² Karl Mackie and Tony Allen, “The Costs Crisis—Mediation as a Solution? CEDR’s Submission to the Jackson Inquiry into Legal Costs” (CEDR, July 2009), p.5.

³ *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC); [2008] T.C.L.R. 3 and *Wethered Estate Ltd v Davis* [2005] EWHC 1903 (Ch); [2006] B.L.R. 86.