



**THE MOTOR
OMBUDSMAN**

**The mechanics of mediation in the
resolution of motoring disputes**

Published September 2024

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[TheMotorOmbudsman.org](https://www.themotorombudsman.org)

The Motor Ombudsman is the independent and impartial Ombudsman dedicated solely to the automotive sector, and self-regulates the UK's motor industry through its comprehensive Chartered Trading Standards Institute (CTSI)-approved Codes of Practice. Thousands of businesses, including vehicle manufacturers, warranty product providers, franchised dealers and independent garages, are accredited to one or more of the Codes, which drive even higher standards of work and service, and give consumers added protection, peace of mind and trust during the vehicle purchase and ownership experience.



Managing Director and Chief Ombudsman’s foreword



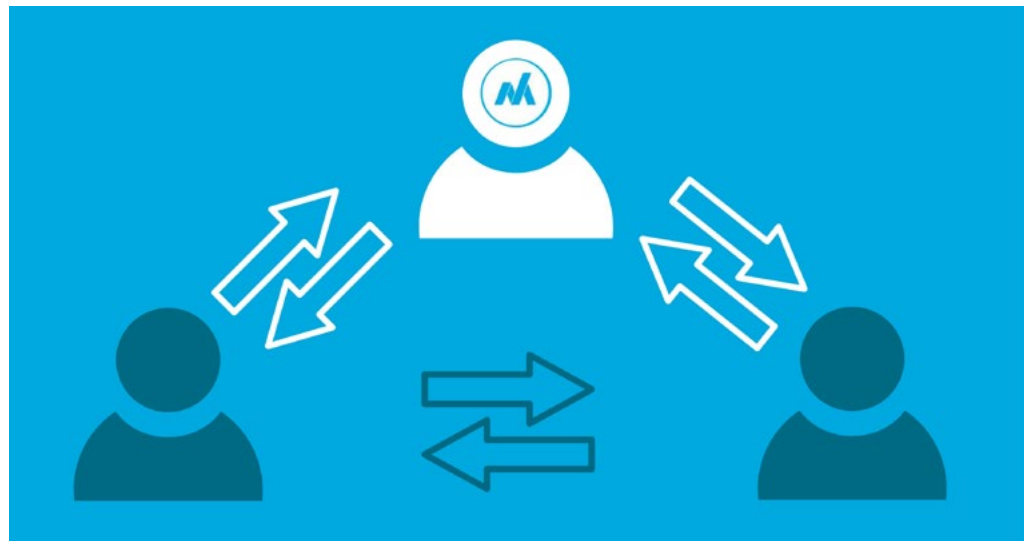
Bill Fennell
Managing Director

Mediation is an important tool in the sphere of Alternative Dispute Resolution (ADR) within the automotive sector. It is driven by open and honest communication in an impartial forum, and provides a flexible platform versus other more formal routes of resolution. This enables tailored, relevant and proportionate resolutions to be proposed by consumers and businesses themselves, helping to build bridges, resolve differences, and provide mutually agreeable resolutions.

Since integrating mediation into our early resolution process in 2021, success has been achieved in disputes where The Motor Ombudsman has been able to foster a spirit of collaboration, and facilitate an outcome that meets the interests and needs of participants. However, mediation does have its limitations, and therefore not all meetings end with a consumer and business seeing eye-to-eye on the issues presented. In this instance, they are encouraged to pursue adjudication via The Motor Ombudsman’s free-of-charge, end-to-end ADR service, as engaging in mediation does not forfeit the opportunity to resolve their case via The Motor Ombudsman’s independent and impartial adjudication service.

This paper has been written to highlight the importance that mediation plays in bringing consumers and businesses back on a single common and positive trajectory, where participants can move forward together as ‘one’. It has also been published to showcase the mechanics of mediation as used by The Motor Ombudsman, and how this practice can help to bring resolutions to less ‘complex’ motoring disputes.

This paper has been written to highlight the importance that mediation plays in bringing consumers and businesses back on a single common and positive trajectory, where participants can move forward together as ‘one’.



With mediation relying on voluntary engagement, this form of dispute resolution ultimately comes down to the willingness and open-mindedness of participants to propose a manageable and proportionate solution, guided by a qualified mediator who can confidently steer participants through the process to give the best possible chance of a mutually agreeable result. It is not about those involved in a dispute winning or losing, it is the taking part that matters, as this delivers a chance of breaking an impasse, and finding a route forward that both participants can agree upon, and thus resolve their dispute to their mutual satisfaction.

SECTION 1. An introduction to the core principles of mediation

The origins of mediation can be traced back to Ancient Greece, where in Roman times, mediators were referred to as mediums, conciliators and interlocutors¹. The practice has of course evolved considerably over the ensuing centuries, and came to the fore in the UK in the 1990s.

Despite being an area of resolution which remains without statutory regulation, many mediators choose to undertake professional qualifications and adhere to the high standards laid down by recognised UK bodies, such as The Society of Mediators, and the Civil Mediation Council.

Today, with the help of a neutral third party, such as The Motor Ombudsman, mediation is a completely voluntary and confidential form of Alternative Dispute Resolution (ADR)².

Mediation offers a channel for:

- ▶ Resolving complaints between consumers and businesses, either face-to-face or via a virtual video call (with the latter being the case for The Motor Ombudsman);
- ▶ Preserving sustainable and long-term positive relationships; and
- ▶ Achieving mutually agreeable solutions that are proposed by the dispute participants themselves.



An emphasis on open communication, collaboration, and tailored solutions distinguishes mediation from more formal and prescribed evidence-based routes of dispute resolution, such as adjudication, creating what can be seen as a less adversarial and more amiable process. This is an added benefit, especially for those who find confrontational situations unsettling.

Mediation delivered by The Motor Ombudsman is a free-of-charge end-to-end service for the consumer, in contrast to some legal avenues, which often carry charges. However, The Motor Ombudsman's mediation service can only be used if a dispute relates to one of the accredited businesses listed on The Motor Ombudsman's website³ (refer to Section 5.1).

The Motor Ombudsman uses '*facilitative*' mediation, which focuses on helping participants identify their common interests, and to work towards finding creative solutions that meet everyone's needs. It is also a process that gives participants more control over the outcome compared to other forms of mediation, but in contrast, may not be suitable for disputes that require legal or technical expertise, involve more than two participants, and could require the pursuit of more formal avenues, such as adjudication, to achieve a resolution.

In fact, facilitative mediation is also a form of 'interpersonal mediation', whereby the focus is turned to the relationship between the two participants, fostering a strong foundation of communication to prevent disputes arising again in the future. This is in contrast to 'commercial mediation', which is usually orientated around money and contracts, and the arrival at a tangible financial settlement to bring the dispute to a close.

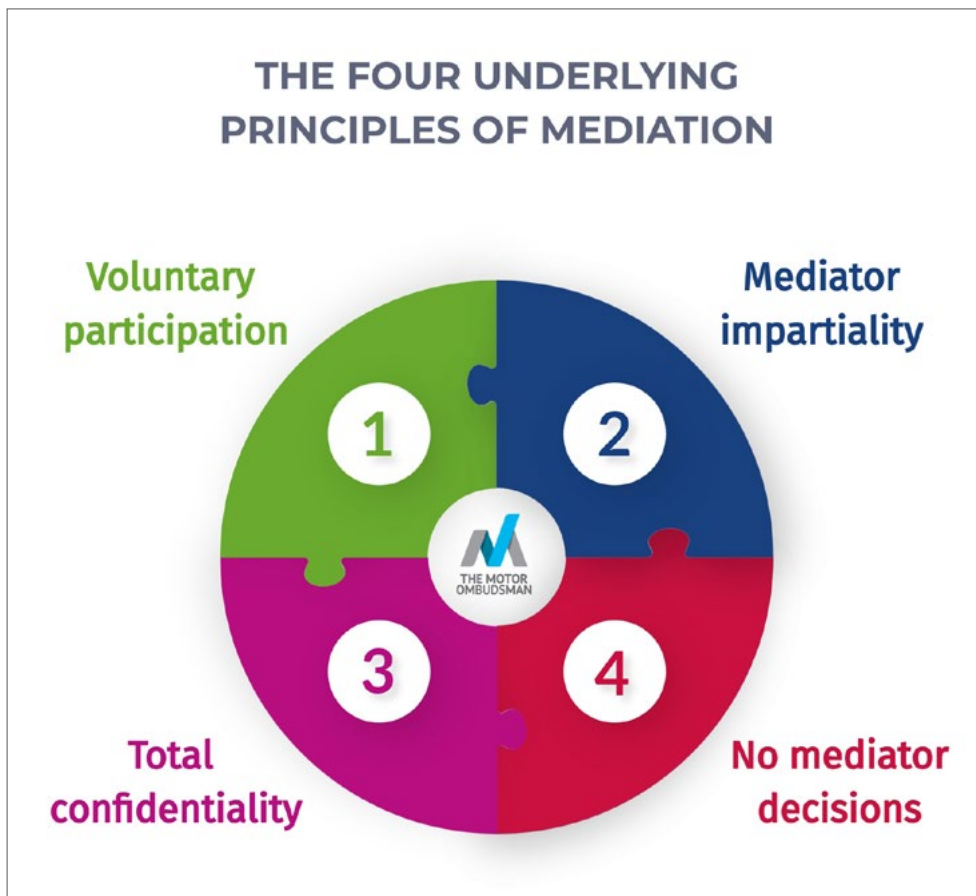
¹Source: Focus Mediation – <https://focus-mediation.co.uk/2017/04/04/a-brief-history-of-mediation>

²Source: RCS Solicitors – www.rcsolicitors.co.uk/family-law/mediation

³Source: www.themotorombudsman.org

The four underlying principles of mediation

Fig 1: The four underlying principles of mediation



There are four underlying principles of mediation⁴:

1 Participation is entirely voluntary

Mediation can only happen subject to the voluntary agreement and willingness of those involved in a dispute i.e. a consumer and a business, to participate in the process. At this juncture, it is important to note that private individuals and organisations, who engage in mediation, are often referred to as ‘participants’, rather than ‘parties’. This to reflect the more approachable and informal nature of mediation, versus other commonly-used forms of ADR.

2 The mediator remains impartial at all times

A mediator is an impartial (neutral) individual whose principal role is to facilitate and encourage discussion between participants to reach an agreement. They therefore abstain from taking sides or from giving advice.

3 The entire process is confidential

Information shared with the mediator by participants is completely confidential, and the mediator cannot disclose what is shared with anyone else at any time. This also applies if no agreement is reached, meaning discussions held within the confines of mediation would not be part of the evidence given to an adjudicator. However, any documentation forming the ‘factual’ written evidence, supplied by both the consumer and the business in relation to the dispute, may still be shared. The same would apply if the dispute were to reach the courtroom in the event that the ADR process is exhausted.

4 The mediator is not responsible for determining or delivering the outcome

The mediator is not tasked with delivering a suitable outcome from the discussions held, as this responsibility lies entirely with the participants – they effectively ‘own’ this part of the process. Therefore, as part of their neutral standing, a mediator cannot make any recommended resolutions or awards, or indeed be held accountable, if a joint meeting fails to result in a suitable outcome that is amenable to those around the ‘table’.

⁴Source: Ellisons Solicitors – www.ellisonsolicitors.com/news/the-four-fundamental-principles-of-family-mediation

SECTION 2. Key benefits and drawbacks of using mediation for the resolution of disputes

Mediation carries a number of benefits and drawbacks for consumers and businesses who choose to engage in such a process, and these are outlined in this section.

2.1 Five key benefits of mediation



1 A process conducted 'behind closed doors'

Confidentiality is one of the core underlying principles of mediation, which encourages participants to engage in honest and transparent discussion. Even though the process is confidential, this does not prevent factual case evidence being shared at a later date with an adjudicator, for example.

2 A platform of empowerment for individuals to speak up

Creating a 'safe' and protected space to talk, promotes a sense of freedom for participants to openly express their concerns and comments without fear of reprisal.

3 Flexible, tailored outcomes

With mediation considered an 'informal' route to resolution compared to a more prescribed approach, open communication can give added flexibility as to the type of outcome that both participants could ultimately agree to.

4 Preservation of positive relationships

Mediation can help participants to actively engage in constructive dialogue and maintain a positive relationship despite the process often stemming from a confrontational situation, where there has likely been points of disagreement.

5 Determination of potentially lasting results

With outcomes determined through often-constructive and open conversation, where participants have worked together towards a common goal, they are more likely to be honoured in the longer-term.

2.2 Five key drawbacks of mediation

Mediation, as a form of early resolution, comes with its challenges and limitations. Some of the most notable ones are as follows:



1 Mediation relies on mutual cooperation

Progress may be hindered without the buy-in of both participants involved in a dispute, and where there is a show of reluctance to participate during meetings despite voluntarily agreeing to do so.

2 Time needs to be proactively put aside

In contrast to more formal evidence-based forms of dispute resolution, mediation requires participants to make a concerted effort to 'put the time in' to engage with the mediator and one another, to give the best chance of a mutually-agreeable outcome being achieved.

3 A perceived imbalance of power

If, for example, a consumer feels that mediation creates a 'David and Goliath'-type scenario, whereby they deem a business to have the upper hand in the 'negotiations', this could portray an image of unfairness in terms of the balance of power or a sense of intimidation for individuals, especially if they are more of an introvert.

4 An amenable outcome is never guaranteed

The 'utopian' picture is to achieve a compromise or a 'win-win' outcome for participants after engaging in mediation. However, one of the key aspects to bear in mind with this process, is that it does not guarantee a resolution that is amenable to all those involved in the dispute, regardless of the best efforts of the mediator. This is because mediation is ultimately a 'managed attempt' to find a suitable compromise in an impartial and neutral environment. On this note, if the process does not result in an acceptable outcome, it does not hinder the opportunity for the dispute to progress beyond the early resolution stage to The Motor Ombudsman's formal adjudication and ombudsman process, or legal action, if this is something that participants wish to pursue.

5 Outcomes agreed during mediation are non-binding

This is because mediation sees participants discuss matters in an open forum on a voluntary basis, where they are not being legally bound to any offers or concessions made⁵. A resolution agreed between the two participants within a joint session hosted by a Motor Ombudsman's mediator, therefore relies on both mutual trust and goodwill for it to be actioned. On this point, it is in the best interests of a business to adhere to the agreed route forward, to help retain a positive long-term relationship with a customer, and to build loyalty and repeat business.

⁵Source: www.mediateuk.co.uk/is-mediation-legally-binding

2.3 The ‘spectrum of sentiment’ seen in mediation



Once participants meet around a table during mediation, ‘walls’ can often start to drop, as respective positions and rationale for feeling the way that they do become clearer to one another.

During the mediation process, a spectrum of emotions is often witnessed, and may sometimes see a notable negative-to-positive shift on both sides, as progress is made. For example, prior to coming into the meeting (on the premise that a consumer and business have agreed to voluntarily engage in mediation), emotions can run high, and it could be one or both participants who may be perceived to be displaying a dismissive demeanour, as seen in Fig.2 later in this section. This could range from aggression and frustration – which could be construed as ‘confrontational’, to being withdrawn and non-compromising, despite the possibility of suitable and proportional solutions.

From a consumer’s perspective, negative sentiment may result from them deeming to have been wronged or misled by a business – a feeling which may be amplified because often a high-value item, namely a vehicle, is at stake, on which they may be heavily reliant. Similarly, a business may take the stance that they have done all that they can to help a customer, or consider that the resolutions offered were either deemed fair, or maybe that an award was not even applicable in the circumstances, therefore creating an unwillingness to compromise to find an alternate outcome. This subsequently drives a feeling of deadlock, which may spur a motivation, on both sides, to come together in a neutral environment to find a solution to get beyond this hurdle.

Once participants meet around a table during mediation, ‘walls’ can often start to drop, as respective positions and rationale for feeling the way that they do become clearer to one another, which may not always be evident when participants communicate with one another via written means, such as e-mail. This is of course an added benefit when concerns are aired in a confidential forum, where open conversation is actively promoted. Ultimately, the purpose of mediation is to ‘move the dial’ as far as possible from the red ‘unhappy / dissatisfied’ zone into the green ‘satisfied’ area (as represented by the graphic in Fig.2). As the needle moves round this metaphorical ‘spectrum’, it is hoped that both emotion and approach expressed by the individuals involved, see a gradual shift to both participants having a positive and constructive attitude to find the optimum middle ground, where a relationship that was once under strain, becomes one that is repaired and sustainable, thereby benefiting both the consumer and the business in the longer-term.

Fig 2: The spectrum of sentiment during the mediation process*



There may indeed be scenarios where it has not been possible to move the ‘dial’ from red to green, and this is where the skill of the mediator comes into play in order to identify if it is necessary to bring the meeting to a close, on the premise that stumbling blocks remain. This goes back to the point that not all mediation meetings will achieve a mutually agreeable outcome.

In the first quarter of 2024 for example, 60% of mediation meetings hosted by The Motor Ombudsman saw a resolution that met the expectations of participants. There can be a number of reasons why mediation does not end with a ‘win-win’ solution:

- ▶ There is an unwillingness for one or both participants to compromise;
- ▶ Continued aggression is shown by one or both participants, thereby obstructing progress;
- ▶ A consumer is looking for a business to be penalised for their actions, rather than the meeting being seen as an opportunity to move forward;
- ▶ A consumer has a change of heart and no longer wishes to maintain a relationship with a business based on the standard of work and / or service received;
- ▶ There is a perceived imbalance of power, whereby a consumer feels that the business will always have the upper-hand in the outcome of the dispute; and
- ▶ The resolutions that were worked towards during the meeting were ultimately not deemed to be fair or viable in the eyes of one of the participants.

It is important to note that, despite there not being an agreement at the end of the mediation process, there has nevertheless been an opportunity for the concerns that drove the dispute to be brought to the fore. This thereby allows participants to better understand their respective positions on the matters in hand, and to narrow down the key points of contention, as efforts continue to tackle the problems that have been brought to light, through other means of resolution, such as adjudication.

***Please note that the cited emotions above are merely examples of sentiment that may be apparent during the mediation process, and the lists shown are not exhaustive.**

SECTION 3. Approaches to mediation in the Ombudsman sector

Mediation in the Ombudsman sector creates an interesting juxtaposition from the point of view that one of the core requirements of an Ombudsman is to be fully transparent in its work, up to the point of preserving the identities of consumers and businesses involved in disputes. However, mediation goes against the very essence of the concept of transparency, because it is essentially a meeting of participants behind closed doors, where any discussions and associated communications remain fully confidential.

Therefore, this raises a potential subject of debate, as to what degree of learning can be taken away from the mediation process, if the crux of the detail in disputes cannot be shared in the public domain. This very point highlights limitations when discussing the finer elements of mediation, such as specific causes of disputes and the types of vehicles and businesses involved, readily presented as part of anonymised case studies⁶ published by The Motor Ombudsman. Therefore, even for the purposes of this paper, one can only look at the process of mediation from a broad or holistic perspective, to be able to discuss the intricacies of this type of early resolution in the motor industry.



► There is no ‘one-size-fits-all’ approach to mediation in the Ombudsman sector

In the Ombudsman sector, the way that mediation is delivered is non-uniform, meaning there is no standardisation when it comes to the approach or the terminology used to describe the process of bringing two participants together to reach a mutually acceptable agreement in an informal setting.

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When looking at just a few examples of how approaches differ in the Ombudsman domain, **The Pensions Ombudsman (TPO)** has a process following the underlying principles of mediation called the ‘Early Resolution Service’. This is an initiative staffed by volunteers, where, through the process of informal resolution, they determine if participants can mutually agree on the way forward before the case is reviewed formally via an adjudicator⁷.

At the **Public Health Sector Ombudsman (PHSO)**, the equivalence of mediation is referred to as a ‘joint meeting’⁸. This is where all participants come together in a discussion facilitated by a caseworker to find an outcome that everyone is happy with.

When looking at the stages of the dispute resolution process employed by the **Furniture & Home Improvement Ombudsman (FHIO)**, mediation is termed as ‘conciliation’. It is described as a process where the organisation will try and encourage the participants involved in a dispute to reach an agreement. If this succeeds, the case will be closed, but like The Motor Ombudsman, it will be passed to adjudicators for a formal decision, if no outcome has been reached through more informal means. As with conventional dispute resolution, the adjudicator will start afresh, using the evidence provided in order to determine their decision.

⁶Source: www.themotorombudsman.org/category/case-studies

⁷Source: www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Early%20Resolution%20Service%20March%202022.pdf

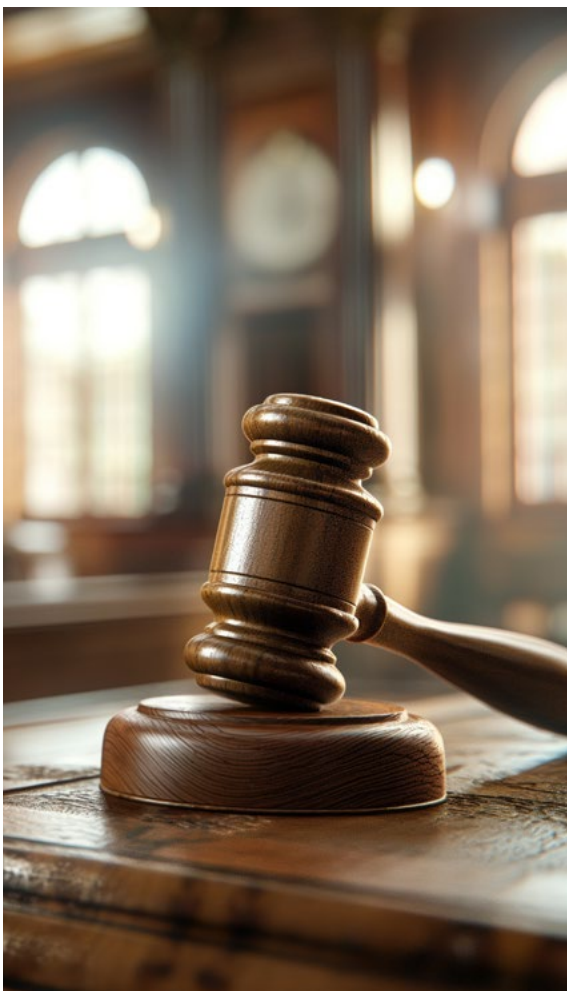
⁸Source: www.ombudsman.org.uk/making-complaint/how-we-deal-complaints/dispute-resolution

SECTION 4. The cost and value of mediation: Ombudsman versus Court

The provision of mediation by the courts in this country is in itself not a new concept. Nevertheless, a change was brought in, as recently as May 2024, by the Ministry of Justice (MOJ)⁹, whereby consumers who make a claim via the court system are now required to take part in a 'free' compulsory one-hour mediation session hosted by the HM Courts & Tribunals Service (HMCTS). The principal reason for this is to provide an early opportunity for parties to attempt to resolve their case by agreement rather than embark on the lengthy process of waiting for their case to be resolved by a court hearing. In addition, this helps alleviate pressure on the court system as a result of early settlement, and opens up the court timetable for cases that cannot be resolved by mediation. This is on the proviso that mediation tends to be a quicker and more cost effective way of resolving disputes in comparison to going through formal litigation procedures.

When referring to this particular mediation service, the word 'free' is alluding to the fact that there is no charge to the consumer when compared to arranging mediation that is not a court appointed mediation scheme and/or having a case heard by the court, both of which carry an associated cost. On this point, the costs of non-court appointed mediation are usually split equally between the parties and vary depending on a number of factors, including but not limited to, the mediator's fee and mediation venue fee.

Furthermore, to issue a claim with the court system, there is an increasing scale of obligatory fees depending on the value of the claim made by the individual. As highlighted by the GOV.UK website, the minimum court fee in the UK is £35 for a claim of up to £300¹⁰, increasing to a maximum fee of £10,000 for claims of £200,000 and above. In addition to the claim issue fee, there is also a hearing fee which is payable on or by a date ordered by the court in advance of the hearing of the claim, which ranges from £27 for a claim of up to £300, increasing to a maximum fee of £1,175 depending on the value and complexity of the claim. The consumer must also bear in mind that, once a claim is issued, the consumer (claimant) is exposed to the risk of paying the defendant's costs if the claim is not successful. Therefore, the word 'free' may be viewed by some as potentially misleading terminology, because to access mediation via the HM Courts & Tribunals Service, a consumer is still required to pay the appropriate issue fee for the claim in the first instance to get the ball rolling with the courts.



To use an analogy, this can be compared to having to pay an entrance fee to get into a venue that also includes a free experience or product, once inside. However, the consumer would only receive this 'promotion' after paying this cost at the door. Furthermore, by way of a 'real-world' automotive example of what a consumer could be expected to pay when filing a claim with the court with respect to rejection of their vehicle for the full price paid, the average price of a new car in the UK stands at around £45,000¹¹, and is in the region of £17,000¹² for a used model. This means that if a consumer was to file a claim through the court to have their case heard, this would fall into the claim value bracket of £10,000 to £200,000, thereby attracting a fee equal to 5% of the claim value, that being the sum claimed by the consumer for a refund of the vehicle, according to the current civil court fee scale.

Based on this illustration, even before vehicle owners have the opportunity to engage in this so-called 'free' mediation service, they would have to have already paid an average of £2,250 as a new car owner, and £850 for an average claim relating to a second hand car to bring their claim¹³. These are not negligible amounts, particularly at a time when consumers are already under strain due to cost-of-living pressures.

It is also worth bearing in mind that court fees paid at the front end of the court process (and in general) by consumers are non-refundable, and costs in general may not be recoverable. Having gone to the expense of issuing a claim to get to the stage of participating in court appointed mediation, the consumer must bear in mind that there is no guarantee that mediation will reap a positive mutually-agreeable outcome for both participants, and of course, if the case were to go before a judge, there is no degree of certainty that the consumer bringing the claim would end up with their desired result, namely a ruling in their favour. As such, there is a real risk that a consumer can incur costs which cannot be recovered and fail to achieve the desired outcome. It is important to note that the general principle with regard to the costs of a claim, is that costs are usually awarded to the successful party, the amount of which is either agreed between the parties or assessed by the court. Furthermore, such costs are rarely recovered in full.

⁹Source: www.gov.uk/government/news/faster-resolution-for-small-claims-as-mediation-baked-into-courts-process

¹⁰Source: www.gov.uk/make-court-claim-for-money/court-fees

¹¹Source: www.autoexpress.co.uk/opinion/363624/average-new-car-price-ps40k-simply-too-high-most-people

¹²Source: <https://cardealermagazine.co.uk/publish/decreases-in-used-car-prices-halt-for-first-time-this-year-says-motors/301295>

¹³Source: p.14 - www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf

When weighing up the merits of ADR and mediation provided by an Ombudsman, including The Motor Ombudsman, it can be seen as being a far more beneficial avenue to concluding disputes than engaging in mediation via the courts and the court system as a whole, which can often be viewed as a time-consuming and costly route to achieving a resolution.

► **The overriding merits of mediation offered by an Ombudsman versus the Courts is clear**

When weighing up the merits of ADR and mediation provided by an Ombudsman, including The Motor Ombudsman, it can be seen as being a far more beneficial avenue to concluding disputes than engaging in mediation via the courts and the court system as a whole, which can often be viewed as a time-consuming and costly route to achieving a resolution. On this point, there are no monetary 'barriers' for consumers to engage in Ombudsman ADR and mediation services from the outset, because the entire process from beginning to end is free-of-charge, making it accessible to everyone, without affordability on the part of the consumer ever coming into the equation.

This 'no-strings-attached' model is particularly pertinent in the sphere of mediation, because when looking at consumers who engage in mediation via the court system, they would already have been subject to a financial 'loss', which could be substantial, at the very start of the process before entering into these informal discussions with a business. Therefore, this may put added pressure on a consumer and create a more tense atmosphere during the session, as they may be looking to recoup both the costs commanded by the courts, plus their desired award as a satisfactory outcome. This insinuates that there is more to play for from the point of view of the consumer, especially if significant detriment has been suffered in relation to a vehicle, which drove the occurrence of the dispute in the first place.

In contrast, taking part in mediation through The Motor Ombudsman, for example, both parties start on an equal footing, where neither participant i.e. the consumer or the business, have paid any additional financial sum to get the mediation process underway. Therefore, in the absence of any monetary barriers or previous spend, which once again puts forward an argument that the court system is less compelling as a proposition, discussions can instead focus on the very essence of mediation – the one-to-one engagement of participants to find common ground and a suitable outcome without the added stress and tension associated with a financial burden from the outset that would be seen with participating in mediation via the court system.

Engaging in mediation through an Ombudsman also does not, in turn, prevent a dispute from entering formal ADR channels should an agreement not be reached, or a consumer pursuing legal action at a later date should this be required.



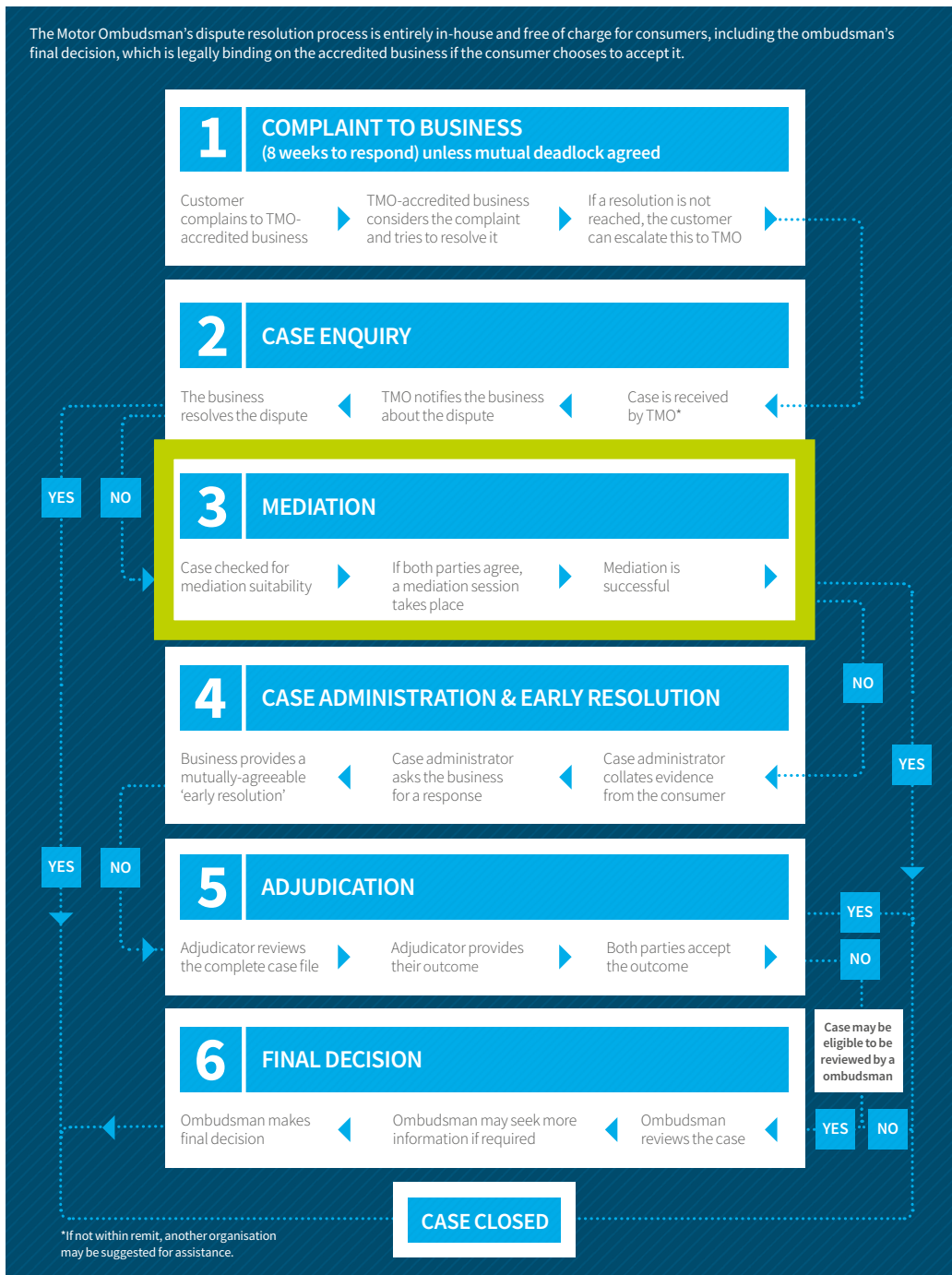
SECTION 5. The use of mediation in The Motor Ombudsman’s in-house Alternative Dispute Resolution (ADR) process

The Motor Ombudsman added an in-house mediation service to its existing early resolution¹⁴ process in 2021, and runs parallel as an alternative avenue to the body’s adjudication and ombudsman case decision-making processes.

Two key driving factors behind bringing mediation into The Motor Ombudsman’s ADR offering, were to:

- ▶ Provide the opportunity for consumers and accredited businesses to settle their differences quickly through open and constructive dialogue; and
- ▶ Reinforce The Motor Ombudsman’s commitment to further driving down the time it takes to bring disputes to a close in accordance with guidelines laid down by the Chartered Trading Standards Institute (CTSI).

Fig 3: Mediation with The Motor Ombudsman’s Alternative Dispute Resolution (ADR) process



¹⁴Early resolution’ is for complaints that can be resolved simply with minimum intervention from The Motor Ombudsman.

5.1 Assessing the suitability of a dispute for potential resolution by mediation

Not every dispute that comes to The Motor Ombudsman is suitable for early resolution, or indeed, mediation. The tens of thousands of cases submitted by consumers to The Motor Ombudsman every year, are first assessed to ensure that they can be worked on, as outlined by the Terms of Service¹⁵ governing The Motor Ombudsman's ADR service, i.e. that:

- ✔ The dispute relates to a Motor Ombudsman-accredited business;
- ✔ The dispute falls within the scope (remit) of The Motor Ombudsman's Codes of Practice;
- ✔ The dispute is not concurrently being worked on by another Ombudsman or ADR provider;
- ✔ The dispute is not already being reviewed by the Court or there has not been a judgment made;
- ✔ It has been less than six years since the event that caused the dispute occurred, or it has not been more than 12 months since a consumer received the final complaint response from the business;
- ✔ The consumer has exhausted the business's complaints procedure and given them eight weeks to provide their final response;
- ✔ The consumer's vehicle was not purchased in the name of a business or is not primarily used as a business vehicle; and
- ✔ The dispute brought by the consumer is not considered frivolous and / or vexatious.

Once the dispute has been qualified, it is at this point that the mediator can look at the 'accepted' cases, in order to ascertain which would be suitable 'candidates' for resolution through the means of mediation. On this note, The Motor Ombudsman works to pre-defined criteria to assess suitability for a dispute to be resolved by mediation.

Five factors that need to be considered when assessing the eligibility of disputes for mediation, are as follows:

Fig 4: Eligibility criteria for The Motor Ombudsman's mediation process to start

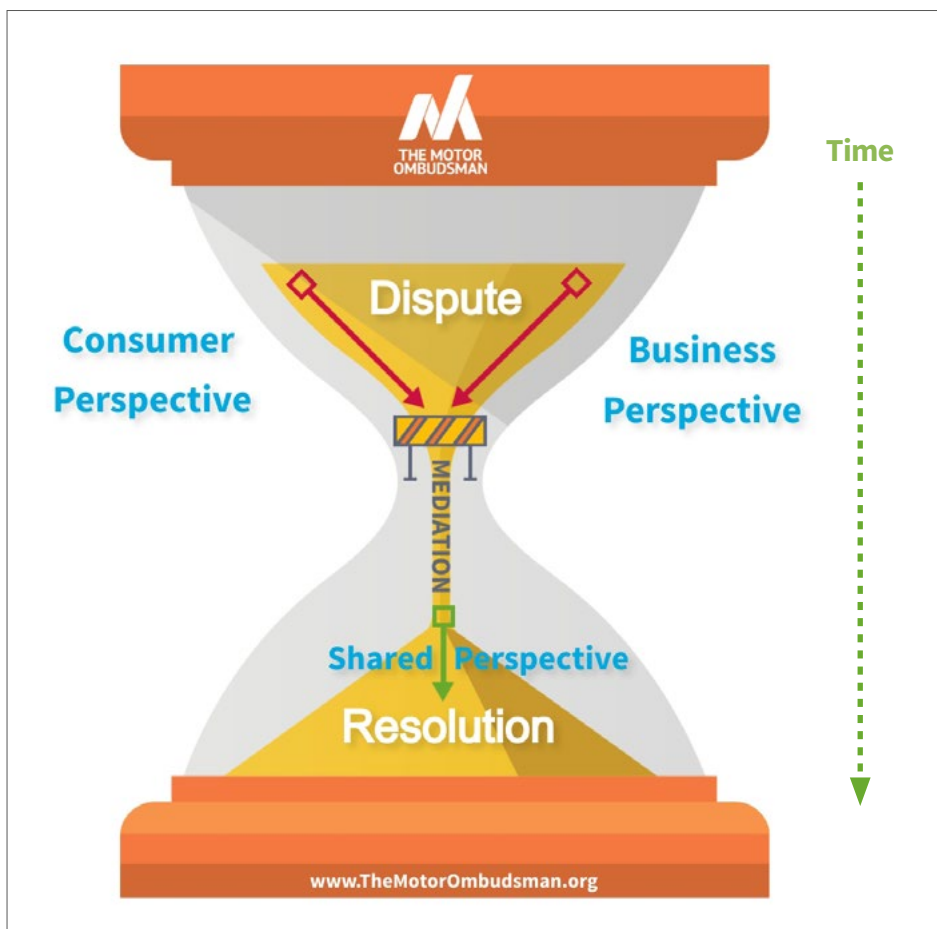
When can a dispute be deemed suitable for mediation?

- ✔ **The business and consumer have attempted to resolve the dispute directly between themselves, and have reached a state of deadlock**
- ✔ **A relationship still exists between the business and consumer following the occurrence of the dispute**
- ✔ **The dispute involves a single business that the consumer has raised a complaint against**
- ✔ **The dispute results from the standard of customer service delivered by a business, rather than the cause being a technical / mechanical issue**
- ✔ **Both participants voluntarily agree to engage in the mediation process if the above criteria for suitability have been satisfied**

If a case meets these five key 'tests', with a critical one being that both participants are willing to voluntarily engage, as mediation is seen as providing an opportunity for engagement, rather than being a strict obligation, the mediation process can formally begin. From a general point of view, on an annual basis, around 10% of cases accepted by The Motor Ombudsman could be suitable for review by the body's mediation service.

¹⁵Source: www.themotorombudsman.org/dispute-resolution-terms-of-use

5.2 The Motor Ombudsman’s ‘hourglass’ illustration



The Motor Ombudsman’s ‘hourglass’ has been designed to illustrate how disputes can evolve from single participant perspectives to a shared ‘win-win’ resolution for a consumer and business via the means of mediation.

A **dispute** is the primary catalyst for any kind of resolution process being enacted. It will typically begin when two participants i.e. a consumer and a business, have differing **perspectives** on the issue(s) that have arisen (denoted by the red arrows), driving the initial occurrence of the customer’s complaint.

For example, in the automotive sector, a dispute could result from a vehicle purchased by a consumer, or a repair that was carried out on their vehicle, being perceived as sub-standard. However, a complaint could also encompass a consumer deeming that the proposed award or actions needing to be taken to put things right from their point of view, was inadequate, or in contrast, there could have been an absence of any kind of resolution put forward by the business to help bring the disagreement to a close.

Being unable to find compromise and common ground despite the efforts of a business to allay the concerns of a consumer can, to use a motoring analogy, create a **roadblock**, i.e. a stalemate, preventing any progress in respect to the participants being able to move forward. This does not necessarily mean that a business-consumer relationship has broken down at this point.

One of the mechanisms to remove this ‘roadblock’, and to get the dialogue flowing, i.e. the sand, to use the hourglass illustration, is mediation, subject to the aforementioned criteria highlighted in Section 5.1 being satisfied. If mediation is successful, conversation i.e. the metaphorical sand, will flow freely again. This will then lead to a common or **shared perspective** on the issue(s) at hand, and in turn, a mutually acceptable ‘win-win’ resolution for both participants.

If in contrast, mediation does not prove effective, and the roadblock remains, this will mean that other forms of resolution would need to be pursued to help bring the dispute to a fair and practical conclusion.



SECTION 6. The diverse skillset used in mediation to drive participant engagement and resolution

Mediation is essentially a ‘people profession’, and techniques used by mediators, as well as their experience, will both evolve over time through experience and training. Mediation requires individuals to call on a number of skills concurrently, as seen in Fig.5 below, which converge to guide participants on the journey to them agreeing a shared and common direction.

Fig 5: The diverse skillset brought to the fore in mediation



► Clear communication

Clear, approachable, and concise communication, is vital from the moment participants first engage with the mediation process, because for many, it will likely be the first time that they would have taken part in this process, making it unfamiliar territory for the majority.

Furthermore, during any single or joint meetings, a mediator’s non-verbal communication i.e. their body language and expression, is just as important as the words being said by the mediator, so as to ensure that they promote positive engagement and continued interest in the discussions between participants.

► Impartiality

Impartiality is one of the cornerstones of The Motor Ombudsman’s ‘raison d’être’¹⁶. This means that the mediator must never take sides, never show any element of bias, and in turn, give equal weight to the perspectives presented by those involved in the dispute, to ensure a fair platform free of prejudice.

► An ability to listen

Mediators must listen attentively to concerns, emotions, and viewpoints expressed by participants, and be able to reflect in the moment about what was said, and understand the underlying feelings and motivations of those present to help guide conversation.

¹⁶Source: www.themotorombudsman.org/motor-ombudsman/how-we-remain-impartial

► Empathy

Empathy is defined as “*the ability to recognise, understand, and share the thoughts and feelings of another person*”¹⁷. A mediator therefore has to understand and empathise with each of the participant’s emotions and viewpoints to help build trust and rapport, so as to ensure that everyone involved in the discussion feels heard and valued. In the sphere of the motor industry, a mediator showing empathy is of particular importance, because, with vehicles regularly being a high-value item, and often an emotional purchase, a dispute may have caused a consumer a notable degree of distress, especially if something significant has gone wrong, and where there may be great reliance on their car as a mode of transport. Similarly, for the business, a mediator needs to be empathetic that a business may feel they have gone over and above for a consumer to resolve an issue, yet an impasse remains.



► Negotiation

Mediators need to be confident in the art of negotiation, to help participants explore options, compromise, and reach agreements that are satisfactory to all involved. On this point, discussions may involve trade-offs, compromises, and creative problem-solving, to suit the unique circumstances and needs of those present.

► Adaptable approaches

Every mediation meeting is unique in terms of the participants in attendance, as well as the subject matter being discussed. Therefore, a mediator must be flexible and adaptable, and be able to adjust their approach to fit the specific needs and dynamics of each case.

► Facilitation

The mediator is there to facilitate the flow of the joint discussion, and ensure conversations remain constructive and free of any hostile topics, so as to be able to move the needle on the spectrum of sentiment illustrated previously in Fig.2. Facilitation equally involves ensuring that any ground rules outlined at the start of the mediation process are kept to, and any areas that are ‘off-limits’, such as personal attacks, are avoided.

► Cultural awareness

Alongside personal circumstance, an understanding and awareness of cultural differences is vital, as mediation can involve participants from diverse backgrounds. Furthermore, English may not be a participant’s dominant language, which may also impact communication. Therefore, navigating cultural sensitivities carefully reduces the risk of misunderstandings and any element of bias being implied.

Similarly, mediators need to be aware of any possible governance or regulatory matters which would compromise the mediation meeting. This includes the Proceeds of Crime Act 2002¹⁸. Amongst the aims of this legislation is to ensure that, where someone could become aware that they are a party to a process that could involve money laundering, relevant anti-money laundering and fraud agencies are notified without indirectly tipping off the people involved who may be in breach of that law.

¹⁷ Source: Psychology Today - www.psychologytoday.com/gb/basics/empathy

¹⁸ Source: www.legislation.gov.uk/ukpga/2002/29/contents

SECTION 7. Evaluating the effectiveness of mediation

The Motor Ombudsman has a comprehensive evaluation framework in place to measure the effectiveness of its mediation service, and to gain feedback from the businesses and consumers that actively engage with it. The primary purpose of this, is to drive continued process improvement and to refine methodology.

As part of this evaluation process, both the business and consumer are asked to rate aspects of the mediation service (out of a maximum five), which allows The Motor Ombudsman to track performance. Subjects that are scored, include:

- ▶ The level of impartiality and communication displayed by the mediator;
- ▶ The provision of a safe and confidential environment for the purpose of discussion;
- ▶ Being able to come closer to finding a resolution; and
- ▶ The overall level of satisfaction with the service received.

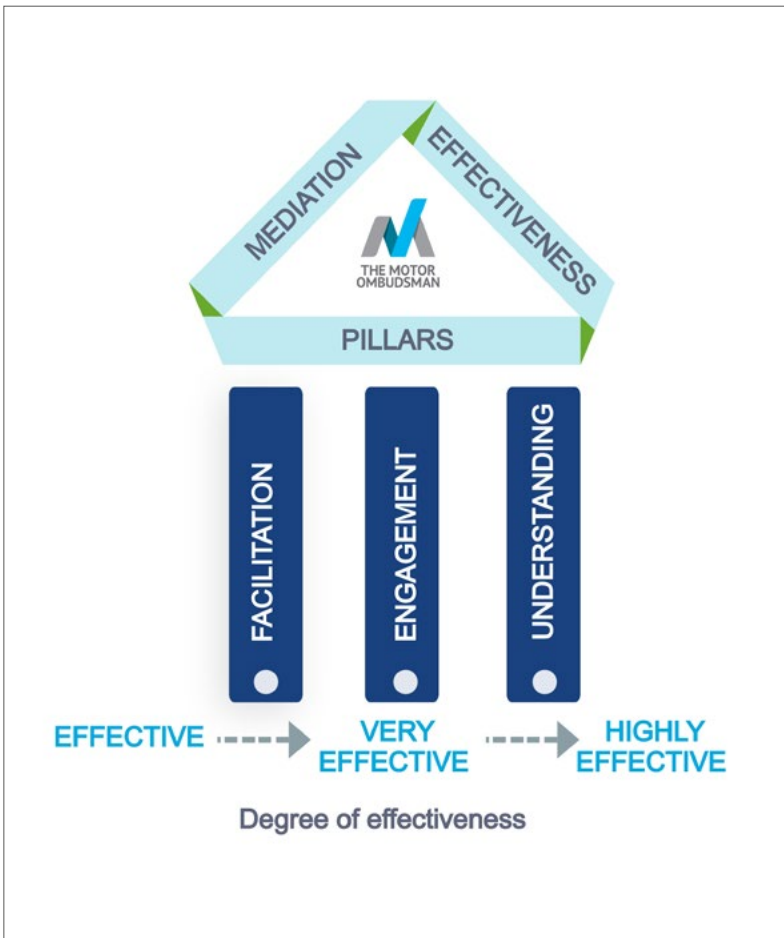
In addition, both the consumer and business are asked for verbatim comments in order to gain an understanding of the perceived value of the service provided by the mediator.

Examples of anonymised feedback received by The Motor Ombudsman, are as follows:

Consumer A, said: *“The mediator was truly excellent at their job, professional, but most importantly, approachable. They didn’t make you feel like you were disputing something insignificant, nor made any judgement. They were impartial and considerate to both participants.”*

Consumer B, stated: *“The mediator was excellent. They were clear, calm, supportive, and balanced in their interactions with both participants. It felt like a safe, constructive and productive session - for which I was very appreciative.”*

Fig 6: The Motor Ombudsman’s model for evaluating the effectiveness of mediation



Aside from continually collecting and aggregating data within a set framework after participants engage in a joint mediation meeting, The Motor Ombudsman has developed a ‘mediation effectiveness’ model (see Fig.6). This is to help the organisation ascertain and evaluate the degree and overall level of success of the joint mediation meeting from a more granular perspective in relation to the people actually involved in a session, regardless of the outcome achieved. Just because a mediation does not see a ‘meeting of minds’ i.e. a positive or mutually acceptable outcome, this does not automatically render the meeting ineffective, or indeed suggest that it was not the optimum route to resolve a dispute from the outset.

The three pillars which are central to this model are:

- ▶ **PILLAR 1: ‘FACILITATION’** - The mediator has created an open and ‘safe’ space for dialogue between the consumer and the business, and both participants have voluntarily agreed to take part in the meeting.
- ▶ **PILLAR 2: ‘ENGAGEMENT’** - The consumer and business have proactively and constructively engaged both with one another, and the mediator, to give the best chance of finding a mutually-agreeable resolution; and
- ▶ **PILLAR 3: ‘UNDERSTANDING’** - The consumer and business have developed a mutual understanding of each other’s viewpoint on the issues at the heart of the dispute, which was not the case prior to the meeting, particularly if the relationship was under strain.



The pillars can be described as ‘interpersonal’, as they stem from the core foundation of communication and personal interaction, which underpins such a meeting of individuals. By having these three metrics, which are of course intertwined, the degree of effectiveness of a joint mediation session can be measured on an exponential scale of ‘effectiveness’, according to how many pillars are witnessed by the mediator in the joint session – with one pillar present being classed as ‘effective’, to three pillars being seen as ‘highly effective’.

From a mediator’s perspective, the ideal scenario is to witness all three during the meeting, and although they have a certain amount of influence on this, recording the presence of each pillar eventually relies on the participation and willingness of those present.

If the mediator has facilitated an open and ‘safe’ space for dialogue, and has brought the two participants around a ‘table’ on a voluntary basis, this can still be seen as ‘effective’ or a ‘win’. This is because it is a new opportunity that has been created for resolution, especially if the customer-business relationship has been under strain, but has not broken down completely, thereby leaving some margin for restoration and progress.

A ‘very effective’ mediation meeting can be classed as one where there is proactive dialogue between the two participants, but where common ground cannot be reached during the meeting in terms of reaching a mutual perspective on the same issue. Nevertheless, there has still been the opportunity to openly air respective views, and may similarly pave the way for a faster resolution at a later date if the dispute were to go through more formal resolution channels.

Lastly, if the mediator successfully breaks down barriers, and facilitates open and ‘safe’ dialogue, both participants engage constructively, and gain an understanding of mutual viewpoints, this may lay the grounds for a potential resolution and a shift to a more positive and long-term consumer-business relationship, meaning the mediation meeting has been ‘highly effective’.

However, if an acceptable conclusion is not reached during the session, this still lays the grounds for a more positive interaction between the participants, and an assumed higher chance for resolution, should a case be passed for adjudication by The Motor Ombudsman, for example.

SECTION 8. Conclusions to be drawn from this paper

In summary:

- o Mediation has an important part to play within the realms of ADR in the automotive sector
- o There is no uniform, “one-size-fits-all” approach to mediation in the Ombudsman domain
- o A robust framework to qualify the suitability of cases for mediation from the outset is essential
- o The degree of effectiveness of mediation can be measured using both a quantitative and qualitative framework
- o Mediation is only as good as the level of engagement and commitment shown by participants involved in the process

The following key conclusions may be drawn from the observations noted in this paper:

► **Mediation has an important part to play within the realms of ADR in the automotive sector**

Mediation is a key tool in the early resolution process of ADR to help bring motoring disputes to a close with minimal intervention. Although the outcome is never guaranteed, this practice nevertheless grants a valuable and flexible platform to bring participants together in a neutral environment, in a bid to maintain positive relationships, and resolve any issues in a quicker timeframe than more formal ADR avenues.

► **There is no uniform, “one-size-fits-all” approach to mediation in the Ombudsman domain**

Despite sharing core underlying principles, mediation, especially being an unregulated process, does not share a uniform format in the Ombudsman domain. Instead, it is a process that has been tailored and applied to the organisation and sector in which it serves. This leaves room for interpretation when it comes to process and execution, and affords the possibility for different ways of thinking, adoption, and opportunities for learning by Ombudsmen in respect to best practice and improvement in the sphere of mediation.

► **A robust framework to qualify the suitability of cases for mediation from the outset is essential**

Having a tried-and-tested framework to qualify cases for mediation is essential, as this ensures that those that are deemed suitable are given the chance to benefit from the service, and a quicker form of resolution. This also alleviates applicable cases from being passed for more formal methods of ADR in the first instance.

► **The degree of effectiveness of mediation can be measured using both a quantitative and qualitative framework**

Although it is important to quantify feedback in a numerical capacity, this paper has highlighted that measuring effectiveness of mediation can go beyond the boundaries of evaluating solely the process and outcome. Looking at the milestones that were actually witnessed during a joint meeting (i.e. facilitation, engagement, and understanding) is also a useful benchmark to ascertain whether some of the very crucial elements of mediation were witnessed.

► **Mediation is only as good as the level of engagement and commitment shown by participants involved in the process**

No matter how skilled and experienced the mediator, the success of mediation ultimately relies on the mindset shown by the participants. A willingness to put differences to one side to find a route forward that alleviates the concerns that have been highlighted, and to build a sound relationship for the future is paramount. Without this, gaining a result that works for all is an uphill struggle that would be hard to achieve.



THE MOTOR OMBUDSMAN

**For further information on The Motor Ombudsman's
mediation service, visit:**

www.TheMotorOmbudsman.org/kb-cats/mediation