

Litigation, Frustration or.....Mediation ?

Recently the courts have given guidance and encouragement to parties in dispute to settle their differences out of court by using a Mediator. Roger Bolt gives some practical advice on the subject.

(1) What is “mediation”?

Mediation is one form of Alternative Dispute Resolution whereby a neutral person actively assists parties in working towards a negotiated agreement . Mediation is voluntary but refusal to participate can have adverse costs consequences. The process is confidential and nothing said in the mediation is admissible as evidence in court proceedings. Any settlement achieved only becomes binding on the parties when terms of agreement are signed by the parties

(2) How does it work?

- A mediator is chosen by the parties, the mediator must be suitable for the particular dispute in terms of his or her qualifications, experience and status. Some courts have independently arranged mediation facilities and there are several organisations which specialise in the mediation process. See for example

www.cedrsolve.com; www.adrgroup.co.uk; www.littletonchambers.com; www.nationalmediationhelpline.com;

- A date is fixed at an appropriate neutral venue and arrangements made for simultaneous exchange of case summaries and documents. Usually the mediator will resolve any logistical difficulties and will be in touch with the parties before the mediation takes place
- On the day of the mediation the mediator will meet with the parties and their representatives and suggest a structure for the day and clarify the nature of the process. Each party will usually make an opening statement to the mediator and other parties
- The mediation continues with a series of private and joint meetings with the mediator as appropriate. There will be a private room available for each party to use. Typically the mediator will ask the parties to describe the strengths and weaknesses of their respective cases, to disclose

previous negotiations – if any, and settlement options will be discussed.. The mediator is there to guide and facilitate and will help each party to understand the other's views and expectations. Crucially the mediator will not pronounce judgment on the whole or part of any case advanced by the parties.

(3) What outcomes can be achieved?.

- Settlement of the whole or part of the claim. A written agreement is signed by both parties
- Mediation adjourned perhaps because one or more of the parties needs to obtain more information
- Mediation ended by a party or the mediator. This is possible at any time.
- Mediation unsuccessful. The parties are free to pursue any other form of ADR or litigation

(4) Advantages of mediation

- Client is a participant in the whole process – does not give evidence as in a trial
- Likely to succeed. Experience from one provider shows that about 70% of cases do settle at mediation
- Speedy result. Mediation can usually be arranged within weeks
- Cost effective. This may be an advantage - depends on the timing and amount in dispute.
- Parties have control. Can choose whether to settle or not.
- Existing amicable relationships can be maintained; less hostility. This may be particularly relevant to employment or commercial disputes
- By agreeing to mediation a party gives an informal signal that there is scope for a settlement – also a disadvantage!
- Outcomes not available at trial can be achieved e.g. apology
- Settlement of all issues including costs can be achieved on one day

- May break an impasse allowing other disputed issues to be agreed outside mediation process e.g. liability split

(5) Disadvantages of mediation

- Involvement of mediator introduces a third party who may –rightly or wrongly - be perceived by one party to favour the other
- Cost may be prohibitive e.g. Predictable Costs claim
- Physical proximity of parties may be undesirable in informal context.
- A party who has previously taken an entrenched view and refused to negotiate may now be perceived as a party who is willing to compromise
- Costs issues may be harder to agree even if other points agreed
- Can be exhausting day (s). Parties may lose concentration
- Probably unsuitable where serious disagreement on points of law
- May be agreed in principle but actual mediation delayed because of failure of one Party to disclose documents and no power to enforce disclosure

BUT mediation can run alongside litigation

(5) What does it cost?

Costs can vary and it is worth shopping around.

Sometimes a small mediation provider will be cheaper than one of the bigger providers – but if specialist expertise in the subject matter is needed cost may not be the only consideration

Check that you are comparing like with like. Does the fee cover all parties, the venue, mediator's travel expenses, any preliminary activity, the same number of hours?

(6) Can one party refuse the offer of mediation with impunity?

In the leading case of **Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 3 Costs L.R. 393 CA (Civ Div)** the court laid down a non exhaustive list of six criteria to help a judge decide whether a refusal was reasonable:

- a. **Nature of the Dispute** Certain claims are always going to be more suitable for trial for example where there is a dispute on important or novel points of law or construction of a commercial document of continuing importance.
- b. **Merits of the case** This is confined to a reasonable belief in the merits of ones case rather than the natural optimism or obduracy of the litigant.
- c. **Attempts at other settlement methods** This is unlikely to be conclusive because mediation is advanced as a settlement means which can succeed where other means have failed.
- d. **Where costs of mediation would be disproportionate** Formal mediation with lawyers may be as or even more expensive than a short trial or the amount in dispute in a low quantum case.
- e. **Delay in suggesting ADR** If a trial has been fixed or substantial costs incurred before an offer is made it will affect the reasonability of refusal (although it may beg the question why the recipient of the offer has not himself made an earlier offer if the case is fit for ADR).
- f. **Whether mediation has reasonable prospects of success** The burden falls upon the unsuccessful party to show that there was a reasonable prospect that mediation would have succeeded.

The general tenor of this Judgment is caution against overuse of mediation offers as a means of costs protection. Whilst underlining that refusal of offers to mediate must be reasonable the court also emphasised that lawyers who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

In Burchell –v- Bullard [2005] EWCA Civ 358 The Court of Appeal gave further guidance. In this case at no stage did a Judge order or recommend that ADR should be attempted. The key offer of mediation in the case was made before proceedings were issued. Ward LJ ***“Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also it’s established importance as a track to a just result running parallel with that of a court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession that must become fully***

aware of and acknowledge its value. The profession can no longer with impunity shift aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so". Rix LJ "The court is entitled to take an unreasonable refusal into account even when this occurs before the start of formal proceedings: See CPR Rule 44.3 (5) (a)".

(7) Joint Settlement Meetings

These can take place informally and have been operating successfully in different forms for many years. However the court can now order such meetings and some courts have more formal arrangements in place. See e.g. www.northerncircuit.org.uk and the Manchester JSM Code of Best Practice

Such meetings can

- i. Reduce delay and costs
- ii. Bring pressure on parties to meet
- iii. Penalise un co-operative lawyers in costs
- iv. Save on mediation costs
- v. Be less demanding on clients who are usually not involved

Jaw not war...

Conclusion; Mediation is here to stay and all solicitors including litigators should be alert to its advantages and disadvantages and advise clients accordingly. It is almost certainly negligent not to do so !

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