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THE BASICS: DO I REALLY HAVE TO CONSIDER MEDIATION?

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The dispute resolution process in England and Wales is light years away from its position 30 years ago. Back then, mediation was a new idea primarily emanating from the USA and viewed with some suspicion by all parties.

Nowadays, if you have a dispute that may result in formal proceedings, mediation must be considered at the very least, or you may face the risk of costs sanctions, irrespective of the outcome of the case.

Our dispute resolution experts set out what you need to know about mediation.

What is mediation?

Mediation is a confidential, consensual process where the parties use the help of an independent third party (the mediator) to facilitate discussions in the hope of resolving

their dispute.

Mediation is a form of alternative dispute resolution (ADR) - other forms include negotiation, conciliation and early neutral evaluation.

Why do I have to consider mediation?

There are many reasons why you might wish to try mediation to resolve a dispute, including the possibility of saving time and money (including management costs as well as legal costs) by reaching an early commercial settlement, keeping the dispute confidential and/or to protect an ongoing business relationship.

However, over and above this, if your dispute ends up in court and judgment is given in your favour, you will be at risk of a costs sanction if you have not at least given serious consideration to mediation.

Some contracts provide for mediation (or other forms of ADR) before formal proceedings are commenced. If this is the case, and one party seeks to enforce that provision, the court is likely to stay any legal proceedings that have been commenced whilst mediation is explored. However, even if there is a contractual requirement to explore mediation first, where there is an underlying limitation issue, parties should protect themselves by either agreeing a standstill or issuing a Claim Form and agreeing a stay of proceedings whilst the mediation process is undertaken.

What do I need to do in relation to mediation to protect my position on costs?

From the court's perspective, there are very few (if any) disputes that are **not** suitable for mediation.

Therefore, keep that in mind from the outset and plan for the costs of a mediation. Ensure that mediation is proposed in writing and that you can evidence your commitment to exploring a resolution.

Will a mediation weaken my position?

This used to be a strategic concern 20-30 years ago, but as mediation now has to be actively considered in all disputes by every party, it is unlikely to be perceived as an admission of a weak case; the opposite is probably now more likely in that a **refusal** to

mediate may well be seen in that light.

As mentioned above, the whole process is confidential and in fact, takes place on a without prejudice basis. This means that parties can talk openly, without the concern that what is said (including any concessions or offers made) being reported to the court (subject to certain exceptions) and thereby potentially prejudicing the court's final decision in the event that the mediation is unsuccessful.

Who should be the mediator?

That depends on the nature and value of your dispute.

Although a mediator doesn't actually make any decision in relation to the dispute (unless all parties agree and request him or her to do so), it can be helpful to appoint someone with relevant experience. Often this will be a lawyer or another professional (for example, a mediator who is also a quantity surveyor in a construction dispute).

There are various organisations that have panels of mediators, providing access to details of their experience and qualifications to assist selection. The appointment of a particular mediator has to be agreed by all parties so it can be useful to have various options. Practical considerations may also be relevant, such as when the parties and a particular mediator are all available on the same day.

What happens at a mediation?

There is no hard and fast rule on how the mediation process has to be conducted but in summary, it usually progresses as set out below.

- The parties agree on a mediator, a venue and a date for the mediation.
- Position statements/case summaries which set out the main arguments relied on by each party are exchanged and provided to the mediator in advance of the mediation.
- On the day of the mediation, key decision makers with the authority to settle need to be present - lawyers will also usually attend. If the claim is covered by insurance, it is important to ensure that agreement to any settlement can be obtained from the insurers during the mediation if the insurer is not present, even after close of business hours which is when most mediations actually result in settlement.
- The day generally opens with an introduction by the mediator and then each party makes a (hopefully!) short statement of their case.

- "Shuttle diplomacy" follows - this is where each team has their own private room and the mediator passes between the parties seeking to broker an agreement. The mediator tends to encourage each party to take a realistic view of the risks and costs of continuing to a final hearing thereby hoping to highlight the benefits of a compromise.
- If an agreement is reached, the lawyers will draft a settlement agreement which should, ideally, be signed before the parties leave the venue on the day of the mediation.

A mediation day tends to be long and intense for all parties. Ensure that you can make the most of this time and opportunity by being well prepared, both in terms of the presentation of your case and internal strategic considerations. Reaching a settlement or not is entirely consensual but it makes sense to keep an open mind during discussions.

Do I need to convince the mediator I am right?

Effectively, this is not relevant in mediation. Unlike a judge, a mediator is not openly concerned with the rights and wrongs (legal or otherwise) of each party's case - the mediator's only objective is to facilitate the parties reaching a final resolution, if at all possible.

Obviously it doesn't hurt if the mediator is sympathetic to your position but in reality, a settlement is likely to result from recognition of the commercial considerations by each party.

What happens if I settle at the mediation? What if no settlement is reached?

As set out above, if you agree a settlement at the mediation, a settlement agreement should be prepared and signed by all parties. If proceedings have already been commenced, the court will need to be informed and some procedural steps will be required to finalise the end of the court process.

If you reach an agreement in principle at the mediation but the settlement is not signed before parties leave the mediation venue, you risk a change of heart by one party overnight, which may leave you having to prove that a concluded agreement was reached during the mediation. This may not be straightforward. Our article 'The Basics: Do you have a contract? Is there a binding agreement in place?' covers what you need to know to form a contract.

If you don't reach a final agreement with the other party[ies] on the day of the mediation, it is possible that discussions will continue over the following weeks and that a resolution will still be achieved. If this is not the case, any extant court proceedings will continue (although the parties can agree to settle at any point, and, indeed, can decide to have a further mediation if they consider it appropriate). By taking part in the mediation, you will have protected your position on costs by demonstrating a willingness to resolve the dispute if at all possible. You may also have learned useful information which (although it cannot be referred to formally outside of the mediation due to the without prejudice nature of the mediation) may assist in the way the claim is progressed and in working towards a settlement, which could be by way of a formal written offer.

Who pays for the mediation?

Although the parties can make any agreement they choose in relation to the mediation costs, almost always, each party bears its own costs of the mediation and the fees of the mediator and the cost of the venue (if any) are then split between the parties.

Sometimes the parties agree that if the dispute is not resolved at mediation, the costs of the mediation can be included in the court's ultimate assessment of costs; in this case, the most likely outcome is that the "losing" party will be obliged to pay a significant proportion of the "winner's" costs, including the costs of the mediation.

A strategic tool

As no party to a dispute can now avoid (at the very least) a serious consideration of mediation without risking a costs sanction, knowing about the process can enable you to use the opportunity to your advantage, by emphasising the strength of your case and hopefully securing an advantageous early resolution of the dispute. Mediation is equally important if it transpires that your case or defence is not as robust as you had anticipated - knowing this at an early stage can inform strategy for settlement and enable you to limit your exposure going forward.

If you have any queries on this or related topics, please contact Andrew Litchfield or Sue Ryan.

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