A Client's Guide to preparing for mediation

The unique feature of mediation is that it is chaired by a specially trained, neutral mediator. The mediator does not direct who is right and wrong nor can he award compensation or force the parties to reach any specific agreement. Mediation is therefore safe. The worst that can happen in mediation is that the parties fail to reach a settlement, and are then free to pursue their legal rights through the courts.

As a client, you have nothing to fear from agreeing to mediation. As to what it can deliver for you, statistically somewhere in the region of 80% or more of all mediations achieve a settlement on the day and so the process does offer a very serious opportunity to settle a dispute on terms that are within your control, and to avoid further legal costs and the risk of uncertain outcomes at trial. Mediation does not just settle the "easy" disputes. Client comments made after successfully mediating frequently refer to how they thought their case was "too tough" and the parties "too entrenched" to be resolved by agreement.

The key to maximizing your chances of a favourable outcome lies in being well prepared for your mediation. Before the mediation you should have given some thought to, and if you have a solicitor acting for you, have discussed with them, the following issues:

- What are my realistic prospects of winning? (This is different to the question "am I in the right?") In the light of your answer to this question, then think about the likelihood of losing, and to what extent the outcome is dependent on things outside your control such as third party witnesses, expert reports or the contents of documents you may not yet have seen or may not ever be able to locate.

- What are my legal costs incurred to date?

- What will my legal costs be by the time I have fought the dispute to trial?

- If I win, how much of these costs will I be unable to recover from my opponent? Is my opponent solvent or might he be unable to pay me anything even if I win? If I lose, what are the total costs I am likely to have to pay? (Usually this is your own legal costs plus a proportion of your opponents costs?)

- What do I want from this dispute? A court can only order the payment of money, or in certain circumstances require a party to do or stop doing specified acts. It cannot preserve a trading relationship, allow confidential settlements, allow creative settlements involving third parties, settlements over extended periods of time or settlements which are based on bringing in non monetary solutions.

- What might a realistic outcome be? (A "bird in the hand…")

- What can my opponent afford to do and what is simply beyond his means or authority and hence is unobtainable even if he wanted to give it?

- If I take into account the amount of time and money the dispute will require to take it to a trial, and allowing for the risks of me losing, or winning and still not

recovering all of my outlay from my opponent, how much value can I place on being able to have certainty of outcome and saved costs now? Can I contribute some or all of that value towards a settlement to end the dispute quickly?

- If I do not arrive at a settlement now, what are my alternative options to resolve this dispute?

Mediation is a flexible process and so experienced mediators vary the way they structure mediations to best suit individual cases. A typical mediation is however likely to adopt the following process.

Before the mediation the mediator will have asked you or your lawyer to prepare a **Position Statement** (sometimes called a Case Summary). The purpose of this document is to tell the mediator the essential points of the dispute, and to provide him with an indication of what it is you seek and the obstacles you see in the way of that outcome. It should tell the mediator of any past settlement offers or efforts to resolve the dispute. The Position Statement does not need to include all relevant facts and it should not be more than 5 to 10 sides of A4.

You should exchange a copy of your Position Statement with your opponent at the same time as sending it to the mediator. Your opponent should provide you with a copy of their Position Statement. There is no need to reply to or argue with your opponent over the contents of their Position Statement, even if you do not agree with it.

If you wish, you can also provide a **confidential statement** to the mediator which is not shared with your opponent. You may wish to do this if you already have views on where your settlement position might be, or if there are other factors which it would be helpful for the mediator to know about your settlement position in advance of the day. The more you can tell the mediator, the better prepared he will be to assist you.

The parties are encouraged to agree a **joint bundle of key documents** to be provided to the mediator at the same time as the position statement. If agreement is not possible, separate bundles can be provided.

Before the mediation the mediator will usually **make contact by telephone** with you or your lawyer. The purpose of this discussion is to make sure you are comfortable with the process, to answer any initial questions you may have, and to clarify any points the mediator has arising out of your Position Statement.

At the mediation the mediator or the parties will have arranged for each side to have separate rooms which are private and for their use throughout the day. The mediator will introduce himself, ensure you are comfortable with the process and indicate a likely timetable and structure for the day.

As well as the parties themselves, their legal advisers (if they have retained lawyers) and the mediator, sometimes also present will be an assistant mediator who will be a qualified mediator in their own right attending to assist the mediator and the parties. If an assistant mediator is to attend you will have been advised of this in advance.

In addition to the private rooms their will also be a **joint session room** which will be large enough for everyone to be brought together as one group by the mediator.

Often, mediators will have a joint session of the parties at the start of the day, to allow introductions, to remind the parties of the nature and principles behind the mediation process and to focus the parties minds on the objective of exploring settlement. All parties will be required to have signed a mediation agreement which provides for **confidentiality in the process**.

The first joint meeting, also called the **opening session**, provides an opportunity for the parties or their lawyers to make **opening statements**. The opening statement is not compulsory and a party may chose to say nothing more at this stage, but it does represent an excellent opportunity to summarise the key issues in front of your opponent. A party may chose to make the statement themselves or to have their lawyer make the statement. Statements can last only a few minutes but are usually 5 to 15 minutes in length. After the opening statements, there may be a period where issues are explored jointly if the mediator feels it is appropriate but more usually the parties will break at that time and each retire to their private rooms.

When **planning your opening statement** you should aim to keep it to the point, highlight only the key issues, make clear any concessions already offered, set out what you perceive to be the strengths of your position, indicate any relevant emotions which may be driving the dispute and overall aim to influence your opponents perception of your position. It is then just as important to listen carefully to your opponent's opening statement as it may contain information which you have not previously heard, or contain indications as to how your opponent might see the dispute being resolved.

A large part of the rest of the day is spent in **private sessions** with each party. In these private sessions, comments made and information shared with the mediator is not passed to the opponent. The mediator will be exploring the detail of each party position, identifying common ground, looking for areas where there is scope for progress or movement and testing the strengths and weakness of each party cases. The mediator may play devil's advocate, testing how well you will be prepared to answer and deal with points which your opponent will want to make at court; this does not mean he feels your position is poor or does not empathise with your position. The mediator's job is to assist the parties in arriving at realistic assessments of their own positions in order that they can accurately asses the true merits of pressing on to a trial or alternatively reaching a compromise.

If a settlement is reached the parties or their lawyers will be expected to sign a binding agreement on the day. Unless and until any agreement is signed the parties are free to walk away from the process at any time. Once an agreement is signed, the dispute is settled and it simply remains for the parties to implement the terms of that settlement, whatever they may be.

During the day there may be times when it does not seem as if any progress is being made. You should remember that you will not know the nature of the discussions taking place in your opponents private sessions and the only person who will be in the unique position of knowing the full extent of the parties' ability and willingness to settle, is the mediator. If the mediator feels that there is no prospect of settlement he will advise the parties of this and close down the mediation. Unless he does this, you can assume that there are still some prospects for reaching a settlement and accordingly there is good reason for you to persevere with the mediation.

Full day mediations usually last up to 8 hours. They can however carry on into the evening if the mediator feels there is merit and providing the parties agree to do so.

In the event that no settlement is possible on the day, all may not be lost. Many of the mediations which fail to settle on the day do in fact settle in the weeks immediately after the mediation, with settlement based on the better understanding each party has gained of their opponents' position.

The key to maximizing your chances of securing a good outcome in mediation is to have good preparation beforehand.