Practice Note on
Mediation

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This note is divided into two sections being:-

1. Introduction
2. The importance of Alternative Dispute Resolution
3. Mediation

Dealing with each section in turn:-

1. Introduction

As is set out in our Practice Note on Litigation Procedure, the way in which disputes are dealt with in the Courts are governed by The Civil Procedure Rules 1998 ("CPR").

Under the CPR the parties to a dispute are encouraged to follow a series of steps known as "Pre- Action Protocol" where the parties are encouraged to exchange information with each other with a view to trying to refine the issues in dispute and resolve them without litigation. This includes a requirement to consider some form of Alternative Dispute Resolution whether that be by way of a formalised process (such as Mediation) or more informal negotiations. Issuing legal proceedings is intended to be the last resort. The usual starting point under a Pre-Action Protocol will be to send a Claim Letter to the intended Defendant setting out the basis of your claim. The intended Defendant has a set period of time, say, 28 days to respond to that. Once we know how your opponent proposes to respond to the allegations you have made, that quite often dictates how the dispute is dealt with.

Essentially though there are three likely scenarios as to how the matter with the intended Defendant might develop once the intended Defendant has responded to our Claim Letter. It is difficult to predict exactly which one of those scenarios is going to happen in practice, but the likely possibilities are:-

1.1 The intended Defendant responds constructively to the correspondence and agrees to meet and there is then a series of commercial negotiations between you and the intended Defendant which results in a concluded settlement of the dispute.

1.2 The intended Defendant simply dismisses the Claim Letter and leaves you with no option but to issue proceedings.

1.3 The intended Defendant responds as per 1.1 but agrees to use a formalised dispute resolution mechanism such as a Mediation.

These three scenarios contemplate either litigation or the use of a formalised dispute resolution mechanism, e.g. Mediation. Even where the intended Defendant simply dismisses the Claim Letter (paragraph 1.2 above), for the reasons set out in Section 2 below, it is still worthwhile trying to explore the option of the parties engaging in some form of Alternative Dispute Resolution procedure once proceedings have been issued.

2. The importance of Alternative Dispute Resolution

As we have said above, there is now a requirement for parties to consider some form of Alternative Dispute Resolution, whether that be before proceedings are commenced or once litigation is on foot.

All of the Pre-Action Protocols require the parties to give some consideration to alternative forms of dispute resolution and the parties could be required to provide evidence to the Court that Alternative Dispute Resolution was considered.

In the event that a party does not comply with the requirements of the relevant Pre-Action Protocol, whether generally or specifically in relation to a failure to consider Alternative Dispute Resolution, the Court has the power to take this into account when giving directions for the future management of the claim and also by imposing cost sanctions. The Court could, for example, stay the proceedings (i.e. put them on hold) until certain steps within the Pre-Action Protocol have been complied with.

When the parties file their Directions Questionnaires, they are required to state whether or not the provisions of the relevant Pre-Action Protocol have been complied with and, again, the Court may make an Order that the parties should consider some form of Alternative Dispute Resolution prior to litigation continuing.

It is important to note that if the Court considers that a party has unreasonably refused to mediate a dispute, it could well impose cost sanctions on that party. In the case of a party which is ultimately successful in the litigation, that party may be unable to recover all or some of its costs. In the event that the party whom the Court deems unreasonably refused to mediate is the losing party, that party could be ordered to pay the successful party's costs on an indemnity basis.

In light of this, it is very important for the parties to give active consideration to some form of alternative dispute resolution procedure and preferably at an early stage in the proceedings or before any proceedings have been commenced.

Mediation is the most common form of formalized dispute resolution mechanism and we thought it would be helpful, therefore, to provide you with some further information about Mediation.

3. Mediation

Mediation is effectively the process whereby the parties to the dispute agree to appoint an independent neutral third party (often a trained professional such as an accountant, solicitor, banker, etc.) as a Mediator. The parties' legal representatives then set up a formal Mediation, usually at an independent venue, with the Mediator running the Mediation and seeking to broker a resolution of the dispute between the parties. This is the most formalised way in which disputes can be resolved, with the appointment of a Mediator through an organisation such as the Centre for Effective Dispute Resolution ("CEDR").

It is open to the parties to attempt their own settlement negotiations, but the introduction of a formal process and the appointment of an independent neutral third party (for whose services, of course, the parties pay equally) often, in our experience, tends to crystalise the issues and concentrate the minds of the parties so they are really doing their best to try and resolve the dispute.

The following information is intended to give you a better idea about how the Mediation process works with the appointment of a Mediator:-

3.1 Mediation is a consensual process - in other words, it is an agreement between you and the party with whom you are in dispute to enter into a process whereby you see if an independent third party (i.e. the Mediator), can effectively broker some settlement of the dispute between the parties. Mediations are confidential and without prejudice.

3.2 The Mediator is normally trained via one of the various Mediation Agencies or bodies that now exist. We have already referred to a successful and well known Mediation Agency

known as CEDR above, of whom we have fairly extensive experience . All the Mediators are neutral and independent so there is no suggestion of there being any bias by selecting one Mediator in preference to another. It is the job of the Mediator not to make any judicial findings or judgements on the rights and wrongs of the case but to facilitate a commercial resolution to the dispute.

3.3 Once a Mediator has been appointed and a date fixed for the Mediation, the Mediator will set a timetable for the preparatory work necessary for the Mediation to take effect. As part of the preparation for the Mediation, each party will be required to produce a Case Summary (or Position Statement) setting out their position in relation to the dispute.

3.4 The parties' Case Summaries provide the Mediator with an analysis or description of what are the issues that are in dispute and sets out the parties' respective stances in relation to them. There are no hard and fast rules about the form of the Case Summary and it is open to us to include as much information and supporting documentation/material as we wish. Equally it is quite common to have a separate bundle of documents to which reference is made in the Case Summary. As a result, if there are items of correspondence, notes of meetings etc. that you would want to use or rely on in the Mediation to set out your position and support the allegations that you make in your Case Summary then there is ample opportunity to do so. The simple point is that you are not necessarily constrained by any Court rules or procedure as to the amount of information and documentation that you put in the Case Summary and supporting bundle of documents.

3.5 The Mediation is usually held at a neutral venue convenient to all parties. The actual form of the Mediation on the day is up to the Mediator but, broadly speaking, a Mediation will usually proceed along the following lines:-

3.5.1 Initial meeting conducted by the Mediator with all parties present at which the purpose of the Mediation is outlined and the genuine desire to reach a commercial settlement by all parties is embraced.

3.5.2 The Mediator and the parties then break out into respective rooms - the effect of this is that there will be one room allocated for you and your legal representatives together and an entirely separate room allocated for the other party and their legal representatives. The Mediator will also have his or her own separate room.

3.5.3 The Mediator will then spend time with each of the parties separately to ascertain what their positions are in respect of various allegations in the case and to see how best the parties might be able to reach an agreement. The Mediator will also put any offers from the parties to the other.

3.5.4 This process can often take quite a long time, in fact, some of the Mediations we have been involved with lasted the best part of a day and sometimes do not conclude until late into the evening or the early hours of the following day. There are often long periods of time when we are sitting in our room together with no contact from the Mediator. That is because the Mediator will either be considering what steps to take next to facilitate the resolution of the dispute or spending time with the other party asking them what their terms of settlement would be and sounding them out on certain parts of their case.

3.5.5 Prior to the Mediation starting the parties are required to sign and complete a Mediation Agreement which is in effect a confidential Agreement that sets out the terms on which they agree to enter into the Mediation. The Mediation would normally conclude (assuming a successful resolution is reached) with the parties signing there and then a Settlement Agreement. That Agreement is often drafted during the course of the Mediation once the basic terms of settlement have been agreed. That way the parties put their names to an Agreement at the end of the

Mediation and it eliminates the possibility of one party then either reneging on any agreement that has been reached or any delay in formally recording the terms of such an agreement.

Put simply, therefore, Mediation is generally speaking regarded as a much quicker and cheaper method of resolving disputes than litigation. It is, however, consensual and no party can be forced to enter into a Mediation. The advantage of at least inviting your opponent to a Mediation through our correspondence with them will be in relation to costs. As we have said above, the Courts have in recent years disallowed the costs of a successful party in litigation because that party unreasonably refused an offer to mediate which would, had the Mediation taken place and been successful in resolving the dispute, have resulted in a considerable saving in Court time and costs. It is also, from a common sense point of view, better to give settlement of the dispute every chance of succeeding at a Mediation which could avoid the parties becoming enmeshed in legal proceedings.

In terms of timescale, it is normally possible to conduct a Mediation within about 1 - 3 months of the dispute first starting. If the dispute was to be resolved at Mediation, that is a much better prospect than having to face perhaps 12 months-worth or more of litigation.

In terms of costs, Mediations are again much more economic. Whilst Mediators and the advice which solicitors dealing with Mediations provide is obviously not free, the costs are generally speaking much more proportionate to the amount at stake. The costs of litigation can easily become disproportionate to the amount in dispute whereas, as a very general guide, our costs of a Mediation would be in the order of £5,000 - £10,000 plus VAT and disbursements.

If you have any queries in relation to the contents of this Note or there are any points in respect of which you require clarification, please do not hesitate to contact us.

Taylor Walton LLP
Updated March 2016

This note is a general guide only and should not be relied on as a substitute for specific legal advice

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