

Mediation in an age of social distancing

The outbreak of Covid-19 is affecting litigation in Jersey and other jurisdictions in a variety of ways, and the [recent briefing](#) from Partner Bobby Christie considered the measures introduced here by the Bailiff of Jersey to keep the wheels of justice turning. These measures, while welcome, cannot fully replace the existing Court infrastructure (especially for cases involving live evidence) and delays may result. So how can you obtain an early resolution of your dispute in a cost-effective manner without compromising on social distancing?

Alternative dispute resolution such as mediation can be very effective, in the right circumstances. Widely available technologies such as FaceTime, WhatsApp and Zoom can enable participants to remote in to a “virtual mediation space” from the comfort of their own living rooms. All of the paperwork relating to the mediation, such as mediation position statements, replies, bundles and correspondence can be circulated online. All of the leading mediation practices in London are fully up to speed with this technology – geography is therefore no bar.

The technologies are especially well suited to the procedures of mediation, enabling multi-party meetings, breakout sessions between the parties and their respective legal advisers, confidential discussions with the mediator in the absence of any other party, and even the opportunity for a one-on-one face-off between the principals.

So, is mediation an effective alternative to the court when seeking to resolve disputes? The short answer is - it depends. It may depend on the nature of the dispute. For example, a dispute concerning the construction of a legal agreement, or one which seeks a declaration as to the existence of a legal right, may not be amenable to ADR. Equally, whether mediation fits may depend on the nature and mindset of the parties involved. For some clients, the prevailing atmosphere of antagonism and mistrust may put them off a procedure where they must enter the same, virtual room as their opponent, engage in a mutual, collaborative process that seeks to find answers rather than to pose questions, and which has as its aim the negotiation of an ultimate compromise to the dispute. They may just want their proverbial day in court. That is fine, but only (at the moment) for those who are prepared to wait.

In our experience, even the most apparently intractable disputes, such as those that can arise between members of a warring family in the context of a trust or estate, may be amenable to negotiated settlement through mediation with the right attitude.

The advantages of mediation are many and varied, but in particular we would highlight the following.

BRIEFING NOTE

Control

Both as to procedure and outcome, the parties are the authors of their own destiny. They can agree how much or how little of the procedure is necessary, such as how much disclosure is required and what, if any, evidence should be given. Critically, the parties are themselves directly involved in negotiating their own settlement. The mediator is not there to decide rights and wrongs and cannot impose settlement upon the parties against their will. By contrast, the outcome in Court room is a judgment from which the only recourse is an appeal, leading to more delay and costs.

Confidentiality

Mediation is conducted on a “without prejudice” basis. This means that anything said in the mediation, or any information provided cannot be taken outside of the mediation context and used in open court. Clients can therefore speak their minds, unfettered by the consequences. This can go in one of two directions. Either the mediation is very brief, or the outbreak of openness and honesty breaks down barriers. Such openness can even foster a degree of trust where there was mutual enmity and distrust, and from that can spring the conditions for a negotiated resolution. The outcome and terms of settlement are strictly confidential.

Convenience

The technologies are already in place. Mediation can be set up in relatively short order and in conditions which are fully compliant with Governmental lockdowns. Documents, correspondence, and discussions can all be freely exchanged online. No-one need travel anywhere and, provided parties have their own printing facilities at home or are otherwise happy to review documents on the screen, there is not even any need for the delivery of hardcopy documents.

Speed and Costs

Mediation can, if effective, result in very swift outcomes. The parties and their legal advisers will invariably wish for a fully and effectually binding settlement agreement to be signed, sealed, and delivered at the conclusion of the mediation – so, same day result. Generally, costs are greatly reduced in comparison with litigation. If there is a full and final settlement, the agreement is enforceable in court, if necessary, and there will generally be no appeals process.

No admission of fault

For some commercial parties in particular, a mediation resulting in a strictly confidential settlement will invariably be on the basis of no admission of fault. This can be very relevant for companies concerned by the risk of other claimants emerging from the woodwork.

Role of the mediator

Whereas it is possible for parties to set up their own virtual settlement meetings using the same technology, and to seek to “bash heads together” to resolve the dispute, the reality is that this is often unachievable given the personalities involved. This is where the experience of the mediator pays dividends. Mediators are generally formerly practicing practitioners (such as QC’s and leading solicitors). The parties have the opportunity to check the background and experience of the mediator and can specify a mediator knowledgeable and experienced in the matters in dispute. In civil litigation in Jersey, you have no options in the choice of your judge and jurors. Mediators are trained in working in difficult situations. So far from acting as judge in determining the merits, the mediator acts as a neutral facilitator to support the parties in finding a solution.

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Preservation of relationships

One of the most overlooked features of mediation, since it is a collaborative, rather than adversarial process, is that it can facilitate the resolution of the dispute in such a way as to preserve some aspects of the interpersonal relationships after the dispute. This is relevant in the context of commercial arrangements between habitual counterparties. But it is also relevant in family/personal relationships. Parties emerging from a mediation have a far greater prospect of moving on with their lives and (in time) letting bygones be bygones.

Conclusion

Litigation through the Courts may be subject to delays in the weeks and months that follow. Yet clients will still need effective means of resolving disputes quickly, particularly given the deteriorating economic conditions resulting from COVID-19. Mediation provides an effective and appropriate alternative means for clients to resolve their disputes. We at Dickinson Gleeson have significant experience of advising and representing clients in relation to all forms of ADR and would be very happy to discuss whether mediation might work for you.

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