

## Why Mediation is a Very Good Idea

Some questions and answers

### **What is mediation?**

Mediation is a process under which a trained mediator helps the parties to negotiate and then to make an agreement which resolves their dispute.

### **If I mediate, can I be made to do anything that I do not want to do?**

Absolutely not. The essence of mediation is agreement. Therefore, nothing will happen unless you agree.

### **Why should I mediate instead of getting on with the case?**

One reason is that today's Court procedural rules encourage it, and positively require all litigation lawyers to consider it. Litigation risk is a fact of life. Although your lawyers will give an opinion as to the likely outcome of your case, they will have told you that there is no such thing as certainty. A lawyer can do no more than make an educated guess about the witnesses whom the Judge will believe or about the decisions which the Judge will make about the relevant law.

And even if you win, the result is not guaranteed because the other side might appeal. Also, you cannot be sure that you will be able to enforce your judgment if you do win.

Mediation usually provides a better way.

- It is cheaper than litigation
- It is less stressful
- It is more certain. Because it leads to an agreement, the result is less open to attack than a decision which the parties can appeal.

### **Are there any other advantages to mediation over litigation?**

Definitely.

In litigation, there is only one kind of outcome. The Court decides whether or not the Claimant will get the remedy he seeks.

With mediation, the parties can make any deal which appeals to them, even if it has nothing to do with the dispute. This is especially valuable where it is necessary or desirable for the parties to continue to deal with each other - for example where they are related or where one offers goods or services which they other still wants to buy. The possible deals are as varied as the circumstances of the parties. A loan can be rescheduled, an employee given another job, a new order can be given, the circumstances of the dispute can be kept private. Sometimes, a case can be settled by a simple apology. The outcome is governed by whatever the parties decide, rather than by what the Court can impose.

But even if the parties are never likely to have dealings with each other again, they can still benefit from the flexibility of mediation. For example, where the claimant thinks that the Defendant may not be good for the money, the agreement can include features which will make it more likely that the agreement can actually be turned into cash.

#### **Isn't mediation just an extra cost?**

Although it represents an extra cost, it is usually a wise investment. One day with a mediator usually costs a fraction of what a contested hearing would cost, and even if it does not achieve a complete settlement, it can enable the parties to narrow the issues and at least reduce the costs.

Sometimes, mediation does not work right away, but even then it can succeed eventually. Many lawyers know of at least one case where a mediation broke up without an agreement, only for the parties to make a deal days or weeks later on terms very similar to the ones which were explored at the mediation.

Another point to remember is that if a party refuses unreasonably to mediate, and if he goes on to trial, the Court may decline to award him some of the legal costs which he would have recovered if he had not refused.

#### **My opponent is a multi-national corporation. Why should they be interested?**

Large companies, as a rule, do not like litigation any more than anyone else does. Litigation ties up busy people in unproductive meetings with the company's lawyers and in Court hearings. Also, if the case is lost, the people in charge of it will have the uncomfortable job of explaining to their line managers what went wrong, especially if bad publicity results.

To give an example of what mediation can achieve, one of our mediators once took part in a case involving 3 franchisees of a very large company. Through mediation the parties managed in just one day to settle two High Court cases, two County Court cases and an appeal in the Court of Appeal!

**My opponent is extremely stubborn and would never agree to settle this case.**

There is no such thing as a case that cannot be lost. This is a fact which a mediator can make clear to most litigants by asking a few questions in private. The fact that he is completely impartial will assist him in this task. Once it is accepted that the case could be lost, parties become much less stubborn. Like everyone else, they work out the risks, and they decide how much they should "pay" to avoid those risks. For a Claimant this usually means taking less than what he hoped for; for a Defendant it usually means paying more than he feels that he should. In either case, the payment or the reduction is a kind of insurance policy that each side pays in order to avoid fighting a case and losing.

**Is mediation always appropriate?**

No. For example, there are times when it is genuinely necessary to establish a point of principle. These cases are relatively rare, however. Remember that every lawyer has experience of clients who want to fight "because of the principle of the thing" until the strain and costs of litigation become too much for them to bear.

**At what stage is it appropriate to mediate?**

There are different views on this, and it depends on the particular case. Sometimes it is best to mediate at the earliest opportunity after the dispute has arisen. Some practitioners think that it is best to wait until the parties have set out their cases in formal "Statements of Case" so that the issues are precisely defined, or until documents have been disclosed or witness statements exchanged. What is generally agreed, however, is that it is best to mediate earlier rather than later. The more that the parties have spent on legal costs, the more the costs become an additional issue between them, and the more difficult it therefore becomes to achieve a settlement.

On the other hand, the parties should never give up on mediation. Huge savings can be made from a settlement, even one achieved in the middle of a trial.