WHEN IS THE BEST TIME TO MEDIATE?

Early mediation can engender a spirit of cooperation between lawyers but sometimes it can be premature.

One often hears lawyers say that a matter is "not yet ripe for mediation". Often a position is adopted to gain more information but there is no absolute correlation between being inundated with information (at significant cost, likely wasted) and a better outcome for the clients.

Statutes, contractual requirements and court orders have removed the decision of when to mediate from parties but there are many factors that may impact on early mediation. Early mediation in, for example, a building dispute could prove useless unless expert opinions, reports or defect cost estimates are available to be exchanged.

However, early mediation can often engender a spirit of cooperation between lawyers and obviate entrenched and polarised positions, contrary to when significant amounts have been spent on legal fees, making the challenge much greater. Mindful that there's no guarantee of a good outcome, cutting your losses in mediation even at a late stage, can be a smart decision despite being a hard sell to the client.

Going to early mediation provides an opportunity for the mediator to highlight to the parties the inroads on time, elevated stress levels and money that litigation will usurp – and the fact that no one has control of the outcome. It's interesting to then see the appetite to march on to court dissipate. Even if the matter does not resolve – statistically 80 per cent of mediations do – the consequence of an early mediation can often be the clarification of the issues in dispute and sometimes discovery of surprising information that may promote settlement shortly thereafter.

One downside to an early mediation is that it can potentially drain resources that could have been better used going to a hearing if it's obvious that the dispute is unlikely to resolve at mediation.

The French philosopher Voltaire said: "I was never ruined but twice: once when I lost a lawsuit and once when I won". Some parties who have traversed the litigation continuum may identify with those words.

The problematic issue of when to mediate was well put in *Nigel Witham Ltd v Smith (No 2)*[1] where the UK judge opined that: "A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which makes any subsequent attempt of settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible".

I recall an exchange of emails with a barrister after an emotionally draining estate dispute. The matter resolved and I emailed the barristers and solicitors noting that my work had been made a lot easier through the sensible approach taken by counsel and instructors. One barrister responded observing that it also helped to have sensible clients, which made their job a whole lot easier. Perhaps therein lies the answer as to whether to mediate early or later. ■

TIPS

- A premature mediation wastes time.
- A delay in mediation can mean costs become an obstacle to success.

ADOBE STOCK

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1. [2008] ADR.L.R. 01/04 Alternative Dispute Resolution Law Reports. [2008] EWHC 12 (TCC) 1.