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MEDIATION

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MEDIATION

1 INTRODUCTION

1.1 Often in a commercial relationship there is a dispute of some kind, usually when one party has not performed their duties under a contract, causing the other party to suffer some sort of financial loss or commercial disadvantage. In such a situation, there are number of procedures available to a wronged party dependant on what remedy is best sought.

1.2 Litigation is the procedure where one party brings a claim against another, usually in court, and a judge decides on the outcome and the parties are bound by that ruling. Litigation occurs in a whole host of commercial relationships, be it supplier-purchaser, company/ partnerships, families and landlord and tenant relationships.

What is unique about the relationship of landlord and tenant in the context of disputes is that usually when a dispute forms, there is a shared goal to resolve it without incurring too much time and expense. This is often the case where the relationship is ongoing such as a rent review.

1.3 The civil litigation system has adapted over the years to better serve litigants which would rather resolve a dispute much faster and cheaper than the court system. The court system is simply too overwhelmed to deal with each case in a swift manner. Instead, the court have started to scrutinise the need for parties to properly attempt to resolve disputes 'out of court'.

For over a century the Legislature has sought to encourage parties to resolve their disputes other than by litigation. Those alternative means have become known as 'alternative dispute resolution' (**ADR**). Parties to litigation can choose to try and settle a dispute by using ADR at any point during the course of court proceedings.

Continued development in ADR procedure has led to more and more disputes being dealt with outside the court system. Arbitration and expert determination has proved to be an effective and cost effective tool to resolving a dispute where an expert in the particular field can make a neutral and binding decision.

2 THE REQUIREMENT FOR PARTIES TO CONSIDER ADR

2.1 The Practice Direction on Pre-action Conduct and Protocols (**Pre-action PD**) and the specific pre-action protocols provide a framework for the pre-action conduct of claims, and specifically flag up the need for parties to consider ADR.

The aim of the Pre-action PD and the protocols is to enable parties to avoid litigation wherever possible by agreeing a settlement of the claim even before the commencement of proceedings.

2.2 The Pre-action PD requires the parties:

2.2.1 To consider whether ADR would be suitable and to continue to consider this throughout the proceedings.

2.2.2 To provide evidence, if required by the court, that ADR was considered.

2.3 Arbitrators and the Tribunals will generally consider and apply similar principles when determining costs in those jurisdictions.

3 FORMS OF ADR

3.1 Some forms of ADR are designed from commencement to result in an outcome which is binding on the parties. They involve the parties either electing, or being compelled, to have their dispute determined by a third party. This can be through Arbitration or Third Party Determination.

Other forms of ADR do not inevitably result in a binding outcome. These forms include those in which the parties agree to try and settle the matter by agreement, through negotiations, discussions, meetings and correspondence and often through mediation. The outcome will not be binding unless and until the parties have reached an agreement, and the agreement is sufficiently evidenced (e.g. in a signed document).

3.2 The main types of ADR commonly used by litigants are:

3.2.1 Arbitration.

3.2.2 Mediation.

3.2.3 Third party determination (also known as expert determination).

These notes focus upon mediation.

4 MEDIATION

Mediation is a flexible, voluntary, and confidential form of ADR in which a neutral third party helps parties work towards a negotiated settlement of their dispute, with the parties retaining control of the decision whether or not to settle and on what terms.

The Court, Arbitrators, and Tribunals tend not to direct parties to mediate, but a party that unreasonably refuses to mediate may be faced with an adverse costs order.

There are different styles of mediation, but the most common is facilitative mediation whereby unlike a judge or arbitrator, the mediator does not decide the case on its merits, but works to facilitate agreement between the parties.

That is not to say that a mediator cannot evaluate the strengths and weaknesses of each parties' claims. Indeed, the mediator is often called upon to do that to find an

agreement between the parties. Mediation is flexible and different approaches will suit different cases.

Mediation is entirely private and prior to entering into a mediation, the parties will be required to sign a mediation agreement agreeing to treat all discussions and documentation disclosed at the mediation without prejudice. This means that whatever information is shared at the mediation cannot be used later in proceedings if the matter does not settle.

Mediation can be used in most cases, to resolve an entire claim or to narrow the issues between the parties.

Mediation can take place at any time during a dispute up until the matter is determined. The opportune time for mediation will differ in each case, dependent on the particular facts. However, parties are expected to engage in ADR as soon as possible, in line with the Court's overriding objective to deal with matters justly and proportionately.

4.1 Practicalities of the mediation process

First, the parties will agree the identity of an appropriate mediator or if that is not possible, they will do so by nomination of an ADR organisation.

The parties will provide the mediator with an agreed bundle of key documents and will often provide the mediator with a case summary. It is also standard fare for the parties to provide the mediator with position statements, setting out their respective positions.

It is usual for the parties themselves to attend a mediation, together with their advisors. However, it is a matter for the parties as to who attends the mediation. Mediations can take place in person or virtually. Since the Covid-19 pandemic, there has been an increased number of online mediations.

There are no hard and fast rules as to how the mediation will be conducted and each mediator has their own style. The usual position is for the mediator to conduct an opening session and for the parties to then break off into separate rooms whereby the mediator will go back and forth throughout the day until a deal is ultimately reached. The mediator will remain impartial throughout. It is not the mediator's role to advise the parties or to impose any binding decision on the parties.

The parties are free to withdraw from the mediation process at any time.

If a deal is reached, the parties will sign a settlement agreement recording the terms that were agreed. It is good practice for that agreement to be completed at the mediation itself, in the presence of the mediator. This avoids a deal unravelling once the parties have left the mediation.

4.2 Costs of the mediation

The usual position is for the parties to share the mediator's fees and to each pay their own costs of the mediation. However, the parties have complete freedom to agree alternative arrangements.

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