Mediating trust and estate disputes

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This practice note explains how best to use mediation to resolve disputes which concern trusts and estates. It does not seek to teach the skills of mediation, though it contains much information which will be useful to mediators. Rather it is aimed at those personally or professionally involved in trust and estate disputes, who are considering the use of mediation to resolve these disputes. This practice note shows you what to consider when preparing for a mediation, and how to make the best use of the day itself in order to maximise the prospects of achieving a good and lasting settlement.

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What is mediation?

Mediation is a voluntary and confidential process in which an independent third party, the mediator, assists the parties to achieve their own settlement to the dispute.
There are several elements in this definition.

- The process is **voluntary**, because the parties cannot be compelled to take part for longer than they wish, or even at all.
- The process is **confidential**. Anything which is said during the mediation will not be disclosed outside the confines of the mediation room. It is also confidential as between the parties. If one party discloses anything to the mediator privately, the mediator will not disclose that information to the other party without the first party's consent.
- The mediator is **independent**: he has no financial or other interest in the dispute. In some cases one or more of the parties may know him, but any such connection must always be disclosed to all the parties, and all parties need to agree on the choice of the mediator.
- Any settlement reached by the parties is **their own settlement to the dispute**. A common misconception is that the mediator is some kind of judge. He or she is not. The mediator is not there to express views as to the rightness or wrongness of anything done by either party, or as to the strengths of either party's case. He is there to help the parties explore

options for settlement. He may suggest possible solutions, but he does not and cannot impose them on the parties.

The key advantage of mediation, which has long been recognised, is that time and expense are saved and the tension that is often created by an adversarial trial is avoided.

A mediation usually takes the form of a series of meetings between the mediator and the parties, either as a joint meeting with all parties present, or with each party separately. The mediator controls the process, but he needs to keep the parties' goodwill while he does so. A mediation of a ***trust*** or ***estate*** dispute typically takes a day, though sometimes the day may extend quite late into the evening. If the dispute is particularly complex, or if there are several parties, it may be necessary to have a second day. If the parties do reach a settlement, this is recorded in writing (this itself may take some time) and signed as a record of what has been agreed.

The parties can agree to mediation at any stage in their dispute − from before proceedings are issued to one week before the trial.

Why mediate trust and estate disputes in particular?

There are many reasons to mediate trust and estate disputes in particular.

- To preserve the trust or estate assets for the ***beneficiaries*** rather than allow them to be frittered away on litigation.
- To avoid any escalation of family conflicts.
- To preserve long-term relationships between the ***trustees*** and the beneficiaries.
- To preserve the relationships between the beneficiaries.
- Because of the privacy, informality and confidentiality of the mediation process.
- Because of the flexibility in the types of solutions which mediation can achieve: for example, varying the trust to obtain a tax advantage.
- Because a refusal to do so may lead to adverse costs consequences in subsequent litigation.

A party who refuses to mediate and subsequently wins in court may be deprived of the normal order that the losing party pays the winning party's costs (*Dunnett v Railtrack [2002] EWCA Civ 303*; *[2002] 2 All ER 850, at paragraphs 12 to 15* and*Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002*).

Examples of trust and estate disputes suitable for mediation

Example 1

A testator executed Will A several years ago in favour of son A. One month before his death the testator executed Will B in favour of son B. Son A disputes the validity of Will B.

Example 2

A testator leaves his entire estate to his widow, and nothing to his mentally handicapped child. The child brings a claim for reasonable financial provision from the estate under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act).

Example 3

X and W have lived together for six years in a house purchased in X's sole name. X and W have now split up, and W seeks a share of the house.

Example 4

The two trustees of a trust are a family member and a stockbroker. The trustees make a very bad investment, and the trust loses 50% of its value. The beneficiaries accuse the trustees of a breach of trust and/or professional negligence.

Example 5

A dishonest trustee diverts part of the trust fund for his own benefit using an accomplice. The beneficiaries bring a claim against the trustee for breach of trust, and against the accomplice for dishonest assistance in a breach of trust.

Example 6

Members of a family are in dispute about the proposed exercise of the trustees' discretion. They accuse the trustees of always following the settlor's wishes, and never considering their needs.

Example 7

Members of a family disagree on whether the trustees should sell the large family estate which the trust has owned for generations.

Example 8

The members of a charity comprise two main factions. One faction seeks to oust the other from control of the charity.

Obviously, if you can resolve the dispute without the need for a mediator, there is no reason to pay for one. But a mediator brings "added value" to the negotiation table:

- Helping plan the mediation so that it is most likely to lead to a settlement.
- Encouraging trust through his or her independence.
- Focusing on each party's real concerns, rather than just the legal merits of the case.
- Being able to discuss the dispute confidentially with each side.
- Reality-checking each side's views.
- Handling emotions constructively.
- Exploring possible solutions with each side in a non-confrontational style.
- Bringing closure − in most cases by way of settlement.

When is the right time to mediate a dispute concerning a trust or an estate?

There are several factors to put into the balance.

- Mediate before costs become disproportionate. The following example illustrates the failure of mediation because of disproportionate costs:

Example − failure of mediation where costs disproportionate

A typical probate claim concerned a relatively small estate of £200,000. It was alleged that the ***testatrix*** lacked capacity to make the will; that she did not know and approve of its contents; and there was also a proprietary estoppel claim to the house, which was the main asset in the estate. The mediation took place two weeks before the trial. The total costs already incurred were £120,000. If the mediation failed, a further £70,000 would be incurred in the costs of the five-day trial.

The mediation failed: the fact that costs already amounted to 60% of the amount in dispute was too big a stumbling block to enable the parties to reach a settlement.

- Each side needs a certain amount of information to assess the strength of its case. In many disputes it may not even be necessary to issue proceedings. If proceedings have been issued, a sufficient assessment can usually be done after basic disclosure. It is probably not necessary to have exchange of witness statements. The longer the case goes on, the more the legal costs are likely to become an insurmountable stumbling block.
- Psychological readiness to settle. There comes a point in many disputes where "litigation fatigue" sets in. Mediation may be a quick way out.
- The need to get a point across. You may consider the other side's lawyer is shielding their client from realising what is at stake. The mediation is your opportunity to speak directly to the other side. You can ram the point home at the mediation.
- Your side wants a way to restore or handle relationships before positions become entrenched and relationships are irretrievably broken.

Generally it may be said, mediate sooner rather than later. But you need to know what you are in dispute about before you can settle.

When is the best time to attempt mediation?

"It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt [alternative dispute resolution] or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which make 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." *Nigel Witham Ltd v Smith [2008] EWHC 12 (TCC) at paragraph 32 per* Judge Peter Coulson QC (not a case involving a trust or an estate).

How to choose a suitable mediator

Should you use a mediation service provider?

Ten years ago most people contacted an organisation such as the *Centre for Effective Dispute Resolution (CEDR)* or the*ADR Group* for them to nominate a suitable mediator. Now many solicitors have experience of individual mediators or know colleagues who can recommend a particular mediator, so the need for a mediation service provider's expertise is less. However there may be cases when they can give added value to the process, for example in persuading one of the parties to take part in the mediation, making practical arrangements where this would otherwise be difficult, and (of course) in recommending suitable mediators if the parties and their advisers are unable to agree on one.

A number of court schemes and organisations provide a simple and inexpensive time-limited mediation service. However, these schemes are normally not suitable for trust and probate disputes, unless the amount at stake cannot justify a full day's mediation, because:

- The mediators on the scheme may not have experience in or expertise of trust and probate litigation.
- Trust and probate mediations frequently need longer than a half-day to cover all the issues; especially so where there are more than two parties at the mediation.
- Much time is often needed to draft the settlement once terms are agreed in principle. If this is rushed because of time constraints, mistakes are likely to be made and issues will be not covered properly in the drafting.

Qualities of a good mediator

By far the most important qualification a mediator should have is practical experience. Many mediators have trained and been accredited with an organisation such as CEDR, the ADR Group, or the *Chartered Institute of Arbitrators*; but what really counts thereafter is experience. Ideally you should be looking for a mediator who has done at least a dozen mediations. Some mediators have done over 50 mediations; a very few have done hundreds.

The *Association of Contentious Trust and Probate Specialists (ACTAPS)* is able to provide a list of mediators with suitable experience. The *Bar Council* list of barrister mediators lists each mediator's areas of expertise. Unfortunately the Society of Trusts and Estate Practitioners (STEP) is not at present able to provide a list of suitable mediators.

Next, consider what sort of mediator your case needs. Do you want a person who can challenge the other side's perception of its case? Or do you need someone with a more human touch, a person good at handling the emotional aspects of the case? Do you want an authority figure who can perhaps be more evaluative than facilitative, or do you want a bridge-builder who can help restore relationships for the future?

Evaluative and facilitative mediators

An evaluative mediator is one who may well express his own view on the merits of the case privately to each side in order to encourage a settlement.
A facilitative mediator helps the parties to reach a settlement without expressing any view as to the merits of the case.
In practice the distinction is not clear cut. Many good mediators are accustomed to vary their style: in some cases adopting an evaluative approach, in others a facilitative approach.

A good trust lawyer may be an advantage. Certainly he or she would be aware of the special problems inherent in trust and estate litigation. However if there are experienced trust lawyers on each side, this is less of an issue. In such cases, a non-lawyer may bring other skills to the mediation.

Do you go with the other side's suggestion as to a suitable mediator? Usually, yes. But check the person's experience in will and trust disputes. Someone with experience of trust and estate disputes, especially someone who has acted as mediator in such disputes, is likely to be far better than a good mediator who has no experience of the area.

The fees charged by mediators vary from less than £1,000 a day to several thousand pounds a day. Generally the more experienced mediators are the more expensive: you get what you pay for. And the difference in cost between may be trivial in comparison with the amount in dispute.

How should you choose a suitable venue?

A mediation may be held anywhere where the parties feel comfortable and there are the necessary number of rooms. The home or business address of one of the parties, a set of rooms hired for the day, or rooms provided by one side's solicitors are typical venues.

Rooms in a solicitors' office may work very well, especially where the rooms are close together and are rooms designated as conference or meeting rooms. Conversely, mediations where rooms are far apart may result in the mediator wasting much time going between them throughout the day. And a room which is someone's office rather than a designated conference room can be less than welcoming.

There may be occasions where physical distance is an advantage. Feelings between members of a family in trust and estate disputes are sometimes so high that they are unwilling to be on the same floor as each other. And the idea of meeting each other for a joint session may be a non-starter. In such a case, flexibility is called for.

Maintaining physical distance between the parties to a mediation

Example 1:

In a mediation between two brothers over their father's will, David was not prepared to be in the same room as his brother John. During the joint session, David's solicitor met with John while David stayed in another room. Later in the day when the dispute was settled, David still refused

to sign the settlement document in the same room as John. "I'll sign it here, but not in there with John. The next time I see John, he will be in a box." The mediator had succeeded in resolving the will dispute; but there were clearly underlying emotions which he had not been able to touch.

Example 2:

Two members of a family refused to participate in a family meeting to resolve a dispute if they could see each other. The mediator managed to position these two members of the family on either side of him so that they could not easily see each other − and that way their presence at the joint meeting was secured.

Generally you need one room for each side, and one room for everyone to meet for the joint session. For most cases three rooms should be sufficient, though there may be occasions where four rooms or even more are needed.

Discuss whether sandwiches are to be provided or whether each side will go out and get their own lunch. It may be convenient to eat on the go, but some parties prefer to break for an hour and leave the building.

Do not have wine until the mediation is over and the settlement is signed. Then of course it is time to relax.

Some parties may be anxious that their private conversations cannot be overheard outside their room. The parties need to be far enough apart so that this is not an issue. In one case a party had the mediation room swept for bugs (of the James Bond variety) before the mediation began.

The mediation contract

Most mediators have a standard form of contract for their services. This should cover the following topics:

- The parties.
- The mediator. Some mediators like to work with an assistant. Some contracts require the assistant also to sign the mediation agreement.
- The mediation fee: when it is payable and in what proportions. Does it cover travel expenses of the mediator? The fee may be a fixed fee, an hourly fee, or a combination of the two − for example, £X up to 6.00 pm, and £Y an hour thereafter.
- Preliminary work to be carried out by the parties before the mediation: in particular, who is to prepare a file of the relevant documents for the mediator, and when each side is to send the mediator (and the other side) its summary of how it sees the issues.
- The date, place and time of the mediation.
- Who will be present at the mediation?
- Confirming that the representative for each side present on the day has authority to settle the dispute.

- Confidentiality. Mediation agreements usually provide that no transcript or recording shall be made of the mediation.
- Settlement. Nothing is binding until a settlement agreement is signed.
- The parties' own costs of the mediation.
- Ending the mediation. Either party or the mediator may end the process at any time.

If the mediation contract has not already been signed it is important to get it signed before the mediation gets under way.

Who should attend the mediation?

Trustees, personal representatives and beneficiaries

The parties to the trust or estate dispute are usually trustees (or ***personal representatives*** or persons claiming to be entitled as such) and beneficiaries of the trust or estate who are of full capacity. Plainly the trustees or personal representatives need to be at the mediation in almost all cases. In some cases the dispute may be between the beneficiaries, and the trustees' role is simply to implement what is agreed between the beneficiaries. It is no good agreeing a settlement which the trustees are not prepared to implement, so it is best to have them present at the mediation.

If their interests may be affected beneficiaries should be at the mediation in person or by someone representing them. If several beneficiaries have the same interest it may not be necessary for all of them to be at the mediation if one of their number can represent the others. However any beneficiaries who are not present should be contactable by telephone on the day.

Parties who lack capacity to give consent to a settlement

In cases where the settlement agreed at the mediation affects the interests of ***minors***, potential beneficiaries who are yet unborn, unascertained persons, mentally incapacitated persons or members of a large class (such that it is not appropriate for all members of the class to be made parties to the dispute), the correct procedure is to make an application to the court under CPR 19.7 to approve the settlement. The court will only approve a settlement on behalf of such persons if it is satisfied that it is for their benefit. This is normally achieved by instructing counsel for such persons to write an opinion as to the merits of the proposed compromise from their perspective. If the opinion is in favour of the compromise, then it is put before the court on the application for approval of the settlement, and it is likely the court will give its approval. If counsel feels unable to recommend the settlement on behalf of the party on whose behalf he is instructed, then it is unlikely the court will give its approval.

For this reason it is important that counsel for the minors and others is present at the mediation. He needs to "buy in" to the settlement on the day, so that he can confirm on the day that he can recommend it to the court.

Lawyers

Lawyers are usually present at commercial mediations, though of course there is no obligation on a party to have a lawyer at the mediation. Where counsel has been involved in a case, his advice may be very helpful at the mediation. He can give a different perspective to that of a solicitor. He is usually the main spokesman for a party at the joint meeting. He is also likely to be helpful at the drafting stage where a settlement has been agreed in principle.

There is no need to have the full legal team from the QC down to the junior paralegal. A sense of proportion is required, even in the biggest case.

Moral supporters

No objection should be raised to a spouse, partner or other family member who is there to provide moral support. If a supporter's presence causes particular concern to another party, then this must be resolved before the day. For that reason each side should be open about who is going to attend the mediation. If there is a difficulty, it may be sufficient for the supporter to be with the party in the party's own room, but not attend the joint session.

Accountant

Generally it is not necessary to have an accountant present during the day to give, for example, tax advice. But he should be contactable throughout the day by phone, including after office hours.

Experts

The same is true about other experts who may be involved in the case: hand-writing experts in a case of a forged will, investment advisers, or valuers. They will have given their advice before the mediation. At the mediation, the parties need to take responsibility for their own decisions. It may be useful to arrange for experts to be available on the telephone if needed, including after office hours.

Guardians for minors

Minors lack capacity to settle. Their parents or guardians (that is, other persons who have day-to-day care of the child) have a good idea what is for their charge's benefit and what is not. They should be welcome, together with counsel for the minors (see *above*). If the parent or guardian has their own interest which may be affected by the settlement, then this may conflict with the interest of the minor. In such circumstances, it may be better to have someone completely independent to represent the minor.

Insurers

If the dispute concerns allegations of professional negligence against trustees or other advisers, it is likely that insurers are involved. In the absence of the insurers, it may not be possible to reach any settlement at the mediation. So they should be invited to attend.

What information do you need to obtain before the mediation?

The two vital pieces of information are:

- Up-to-date valuations of any property in dispute, whether it be the trust fund, the estate, shares, or real property. You need to know how much you are in dispute about.
- The costs that each side has incurred to date, and the likely costs each side will incur if the dispute proceeds to trial.

Mediation position statements

The purpose of a mediation position statement is:

- To give the mediator a summary of how each side sees the dispute.
- To give a flavour of the parameters for negotiation.
- To signal to the other side:
  - how you see the strengths of your case and the weakness of the other side;
  - your desire to put the dispute behind you and to reach a settlement if possible;
  - that your intentions are genuine in coming to the mediation.

They are best if short: not more than two pages. There is no need to treat them as a formal statement of case. Nor do they need to be drafted by counsel.

A confidential statement to the mediator can sometimes be useful to supplement the disclosed position statement: for example the confidential statement may suggest a possible structure for settlement.

Joint sessions − how to use them effectively

Usually near the beginning of the mediation the parties all meet together for a joint session. Some presentations at a joint session are a wasted opportunity. There is no point in a party just summarising what is already in the statements of case. Nor should parties recite lines like children on stage in their first school play.

The joint session is your best (and maybe only) opportunity to speak directly to the other side before the trial.

So plan what you want to say carefully. Decide who is to speak, what about, and most importantly, why. What is your objective in making your presentation? Does this serve your purpose, or hinder it?

So, for example, you may want to showcase your star witness. You may want the other side to feel uncomfortable either as to the merits of their case, or as to what they have done to your client. You may want to give your client a chance to have his say − to get matters off his chest. Don't miss out on this opportunity.

You can use the joint session to pose questions to the other side − but it is up to them whether they answer them or not.

Some mediations stay throughout in joint session. Community mediations almost always do this. If parties can co-operate in suggesting and working towards a solution, there is no reason to separate. However if the case is just about whether one side has to pay the other, and how much, then the parties will probably feel more comfortable separating after the joint session.

Conflicts of interest

Special care is needed to deal with conflicts of interest which arise in trust and estate cases.

- A party may be at the mediation in more than one capacity.
- Two people present in the same capacity may need to be separately represented.
- In a claim against a trustee, his fiduciary duty requires him to disclose information to the beneficiaries which may be against the trustee's personal interest.

Conflicts of interest

Example 1

H dies appointing his wife W as his sole executor and leaving his entire estate to her. H and W's infant child C brings a claim under the 1975 Act against H's estate. Plainly someone other than W should be present on behalf of C at the mediation.

Example 2

A and B are trustees of a discretionary trust under which the beneficiaries are A, A's wife, and their children. B is a stockbroker and the trust contains a professional charging clause. A claim is made by a creditor of A alleging that the trust is a sham and should be treated as part of the assets of A. If the claim succeeds, B would not be paid his fees. A and B should be separately represented.

Example 3

Beneficiary A brings a claim for breach of trust against trustee B for the loss of certain trust assets. A believes that these trust assets were worth X, and is prepared to settle the claim against the trustee for X/2. B knows that the lost assets were in fact worth 10X. If B does not reveal this information, the claim is settled at the mediation for X/2, and A later discovers the true value of the assets, A will be able to set aside the settlement.

Settlement

Suggestions by the mediator on how to settle

After a joint session and a number of private sessions between the mediator and each party the mediation is likely to move into the negotiation phase when the parties seek to negotiate a deal that will end the dispute. In some cases this may resemble bargaining in a bazaar, and a deal may be reached quite quickly. In other cases the parties may ask the mediator to recommend a figure to offer. A mediator should be cautious before doing so for three reasons. The first reason is that in recommending a settlement figure the mediator moves from being merely facilitative into being evaluative. He may have formed a view about the strength of each side's case, but he should be extremely cautious before expressing this. The second reason is because in recommending a settlement figure he is likely to take into account matters which have been said to him in confidence by one side during a private session and which the other side does not know about, and therefore has not had an opportunity to challenge. There is no harm in suggesting a starting figure , such as 'I don't think this will settle for less than £250,000'. It is still open to one side to put a lower offer, and if this is rejected the mediator's advice will have been shown to be right. The third reason why a mediator should be cautious before proposing a particular settlement is that the mediator may inadvertently fail to take into account a whole range of legal points which the parties and their advisors should consider. These include the tax consequences of any settlement, and any formal steps that may need to be taken to make the settlement work. These include company resolutions and obtaining the consent of someone not present at the mediation. There should not be any question of the mediator being negligent in making a suggestion for settlement: *Bowman v Fells* [2005]1 WLR 3083 (a case concerning a mdiator's possible involvement in money laundering, but the principle is much wider). Nor is there a problem with a mediator drafting a straightforward settlement agreement, though complicated drafting should be left to the parties and their lawyers.

Authority to settle

A mediation contract usually provides that all parties present at the mediation come with authority to settle the dispute. In practice, authority in many cases is often limited, or the person present cannot in fact bind the party he represents. For example, the representative for an insurer usually only has authority up to a specific figure; and the representative for a local authority cannot legally make a decision for the authority.

Where an insurer is present, it may be useful for the mediator to have a word quietly with him to ask if there is a ceiling and if there is, who has authority to raise the ceiling; and to make sure that person is available on the telephone if necessary.

In the case of local authorities, the representative at the mediation can only agree to make a recommendation to the council, for it is the council who makes the decision.

In a case involving a charity, the approval of the ***Charity Commission*** may be needed. The Charity Commission may be unwilling to commit before the mediation to saying what position they might be prepared to accept. In these circumstances any agreement at the mediation has to be subject to the Charity Commission approval. This is not necessary if the issue is simply whether a charity is entitled to benefit under a will; but it is likely to be required if the dispute is about the internal governance of the charity.

In family situations, one party may be unduly influenced by another so that his decisions are not, in truth, his own. If the party who may be acting under the undue influence of another is not legally represented, any settlement may be vulnerable to being set aside. Any settlement should be made conditional upon the agreement of that party after receiving independent legal advice.

Indemnities to trustees

Trustees may seek a personal indemnity for agreeing to a settlement. Typically this arises where the settlement involves:

- A distribution of the whole or substantially the whole of the trust funds.
- A potential tax liability for which the trustees would be personally liable − for example, where there is a distribution of the trust funds.
- The replacement of one or more of the trustees.

Whether the trustees should have such an indemnity, and the extent of that indemnity, needs careful thought.

Risk analysis

Consider both the chance of winning and the chance of losing, and the consequences of each. A 50% chance of winning means a 50% chance of losing.

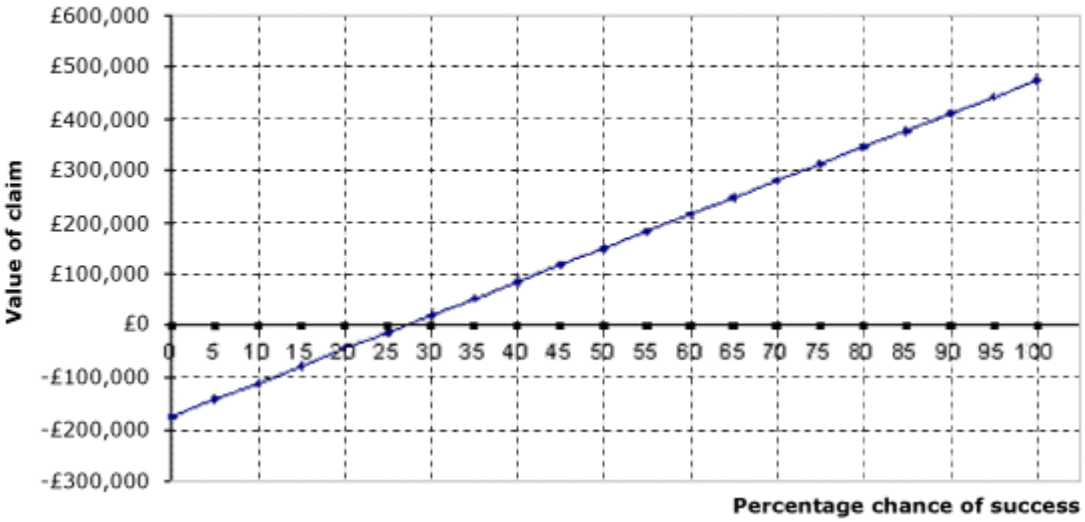
Take a simple example.

You have a claim for £500,000. Your costs to date are £30,000. The costs of taking the case to trial will be a further £70,000, making £100,000 total. The other side's costs are about the same. If you win, you expect to recover, say, 75% of your costs. If you lose, you expect to have to pay, say, 75% of the other side's costs as well as your own.

If you win, your gain will be:	
Claim	£500,000
Less: 25% costs not recovered from the other side	−£25,000
Net gain	**£475,000**
If you lose, your loss will be:	
Your own costs	−£100,000
75% of the other side's costs	−£75,000
Net loss	**−£175,000**

The risk analysis graph is a straight line graph from −£175,000 to +£475,000.

Risk analysis graph



So if you think you have a 50% chance of success, the commercial figure for settling is not 50% of £500,000, that is, £250,000, plus costs to date, but £150,000 plus costs to date. The commercial figure for settling the claim is thus £180,000.

Expressed as an equation, the net settlement figure is shown by the formula:

(P x W) + ((1 − P) x L) + C

where P is the probability of success, W is the net gain if you win, L is the net loss if you lose, and C is your costs to date.

Tax

The parties need to be alive to tax issues. Tax can offer both an opportunity - by increasing the pot − or a threat − by imposing some indeterminate liability in the future − which may either assist or lessen the chances of a successful mediation.

Failing to consider tax may cause trouble when the parties are near settlement, or indeed after settlement. A last-minute panic about tax can put an end to negotiations, and all the mediator's efforts will have been in vain. Even worse, to find out about the tax consequences of a settlement only after a party has signed up to it opens up the possibility of an attempt to set aside the settlement under the Hastings-Bass principle . Alternatively, belated discovery of the adverse tax consequences of a settlement may lead to a claim in professional negligence against the party's advisers.

There is no certainty in trying to predict tax computations for the future. For example, consider the changes in the ***inheritance tax*** regime for trusts made in 2006, and the changes to ***capital gains tax*** made in 2007. But failing to consider tax may lead people to have a totally misleading and unrealistic view of the worth of the pot about which they are arguing, and the shares which they might try to take out of the pot.

Some ways of dividing the pot may lead to far better results than others from a tax perspective.

These are essential points about tax and mediation:

- Get tax onto the agenda at the beginning of the process. Consider in particular inheritance tax, capital gains tax and ***stamp duty***.
- Make sure your accountant or tax adviser is available on the telephone if needed during the mediation.
- Any settlement in principle may need to be re-structured with the benefit of tax advice. It may be appropriate to adjourn the mediation for tax advice, or to sign off based on joint instructions to tax counsel.
- Remember sections 142 to 144 of the Inheritance Tax Act 1984 (alterations of dispositions taking effect on death within two years). Don't miss the deadline.
- Remember section 145 of the Inheritance Tax Act 1984: the 1975 Act can be used to save tax.

(For information about inheritance tax, see *Practice note, Inheritance tax: overview*.)

Drafting the settlement agreement

If litigation has been started, it is often convenient to set out the terms of the settlement as a schedule to what is known as a Tomlin Order.

Outline Tomlin Order

Upon the parties having agreed the terms set out in the schedule hereto, it is ordered by consent

1. that all further proceedings in the action be stayed
2. no order as to costs [*or some other order for costs*]
3. Liberty to apply for the purpose only of enforcing the terms in the schedule

SCHEDULE

1. …
2. …
3. …
4. …

Etc

Only the first part is the actual order of the court: the schedule is not strictly part of the court order. If the court is being asked to approve the settlement on behalf of persons who lack capacity, or the court is being asked to make an order under the 1975 Act, this approval, or the order under the 1975 Act, needs to be set out in the first part of the document (not in the schedule).

Other points relating to the drafting of the settlement agreement are:

- If the settlement involves the payment of money, consider: how much? by whom? to whom? by when? in what instalments? what about interest?
- If the settlement includes terms other than paying money, are these clearly set out? Is there a timetable for them to be carried out?

- Is the settlement intended to take effect now, or is it subject to matters such as tax advice, trustees' approval, Charity Commission approval, ***HMRC*** approval, or a party taking independent advice? If the Tomlin form is used it will implicitly be subject to the court's approval.
- What agreement have the parties reached about the costs of the litigation and the mediation? Is either party in receipt of Community Legal Service Funding? If so, are they aware of the implications of that on any settlement money received?
- Is this settlement intended to bring to an end all relevant disputes between the parties? If so, does the settlement expressly state this?

Drafting a settlement following a mediation can take literally hours. It is helpful if all parties have done some preliminary work before the mediation in drafting what may be the framework for a settlement.

Nothing is final until the settlement is signed. Until then the parties are entirely free to change their minds and renegotiate the issues − however annoying or embarrassing this may be.

Confidentiality of the settlement agreement

Frequently one or more parties to a mediation may want the settlement terms to be kept confidential. One way to achieve this is to include the following confidentiality clause in the settlement agreement.

The parties agree to make the following joint statement concerning this settlement and not to comment otherwise about the case other than to their own solicitors or (in the case of Mr Brown) his immediate family without the consent of the other party or an order of the court.

Another way to achieve confidentiality is to adapt the following form of Tomlin order:

UPON the parties having agreed to the terms set out in a confidential Settlement Agreement dated … signed on behalf of the parties and placed on the Court file in an envelope marked "Confidential Settlement Agreement. Not to be opened without prior permission of this Court" (and dated and signed by the judge for identification).

It is by consent ordered that

All further proceedings in this claim and counterclaim be stayed upon the terms set out in the confidential Settlement Agreement

The terms set out in the confidential Settlement Agreement shall be confidential unless the Court gives permission for the envelope to be opened.

The parties have permission to apply to enforce the terms of the confidential Settlement Agreement without the need to bring a new claim.

No order as to costs.

If later someone who is not a party wishes to obtain sight of the confidential settlement agreement they should make an application to the court under CPR 5.4C (2).

When do you need the court's approval of a settlement?

The approval of the court is required on behalf of any persons affected who cannot give their own consent to the settlement, in particular, minors, and potential beneficiaries who have not yet been born. As to how to get the court approval, see *Who should attend the mediation?*

Costs

It is a common misconception that the costs of all parties to trust or estate litigation come out of the trust fund or the estate. They do not. The main principles relating to costs in trusts and estates litigation are as follows:

- The overriding principle is that costs are in the discretion of the court.
- Subject to this, the normal order is that costs follow the event. The losing party is ordered to pay the costs of the successful party.
- Two well-established exceptions apply in the case of probate claims. First, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs of all parties may properly be paid out of the estate. Second, if there is sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. In such a case, each side is ordered to bear their own costs. For the application of these two principles, see *Kostic v Chaplin [2007] EWHC 2909 (Ch)*.
- Trustees acting as such are entitled to an indemnity out of the estate or trust fund in respect of their costs.
- The court can make a prospective costs order in favour of trustees or beneficiaries under CPR 64 (see paragraph 6 of the Practice Direction made under CPR 64).

Often each side agrees to pay its own costs as part of the overall settlement. This is easier to swallow if the costs do not amount to a significant proportion of the sum in dispute. Where the costs incurred are high in relation to the sum in dispute, costs may be the stumbling block which causes the mediation to fail.

What happens when a mediation fails?

First, ask yourself has it really failed? A number of mediations do not reach a settlement on the day, but do so shortly afterwards − within a couple of weeks or so. Many people come with unrealistic expectations, or with some emotional baggage, and it may take longer than a day for

them to alter their position significantly, despite the best efforts of the mediator. So the important thing is to keep the channels of communication open for further negotiation.

However, unfortunately in some cases no settlement is achieved either on the day or shortly afterwards. In these cases three principles apply as regards the continuing litigation.

- Confidentiality. The court may be told the fact that there has been a mediation, but not any details of what was said at the mediation or either side's perception of why the mediation failed unless all parties consent. In practice, however, once information is disclosed in a mediation, it cannot thereafter be taken back again. If a party seeks to elicit the same information through an application for specific disclosure or by cross-examination, the court may well learn about it.
- The mediator cannot be called as a witness in the action unless all parties consent.
- The expense of the mediation is not treated as costs in the action (*Lobster Group Ltd v Heidelberg Graphic Equipment Ltd [2008] EWHC 413 (TCC)*).

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