

Deal Or No Deal?

We have all experienced conflict in our professional or personal lives, the effects of which are well documented. Unresolved disputes can lead to protracted litigation. Casualties of the litigation game will tell you it is stressful, labour intensive and expensive. Mediation is an alternative to the bitter litigation pill. Contrary to popular belief, it is not the “soft option” nor does suggesting it to your adversary signal that your case is weaker than water. For those of you who have flirted with the idea, is it time to make a leap of faith?

Speed

Generally speaking, the life cycle of a mediation is much shorter than litigation or arbitration. Where the participants understand the process, are well prepared and are committed to finding a solution, even the most complex fact based construction dispute can be resolved in a day. Mediation is unlikely to be successful if the participants do not yet have a handle on the issues. However, that is not to say every issue requires to be deliberated ad nauseam before a dispute is ripe for mediation. A dispute can be referred to mediation both before and during the litigation process.

Cost effectiveness

The cost of mediation varies. Mediators typically charge each participant the same fee, which is usually payable in advance of the mediation. The level of fee tends to reflect the sum in dispute and the skills and experience of the appointed mediator. Some voluntary organisations offer a free mediation service and therefore it is worth exploring the available options. When you consider the financial and human costs involved in preparing a case for trial, mediation is by far the cheaper alternative.

Control over the process and outcome

Mediation’s unique selling point is that the participants control the entire process. They select and appoint the mediator. They choose a mutually convenient date and time to hold the mediation. Perhaps the most valuable element of the process is that the participants determine their own fate. A solution which the participants have agreed is likely to be more palatable and durable than one imposed by a judge, arbitrator or adjudicator. Mediation affords the participants an opportunity to customise their solution and offers the possibility of agreement on matters which could not be awarded by a court. For example, where there is an ongoing business relationship, future contractual arrangements can be factored into the deal, should the participants wish.

Confidentiality

Confidentiality is at the heart of the mediation process. It is necessary to facilitate frank settlement discussions without fear of reprisal. The participants sign a binding agreement whereby they agree not to disclose what is discussed during the mediation. The mediator will hold private and joint sessions with the participants. They act as a neutral conduit of information and will not disclose anything they are told by a participant without express permission.

Is mediation always successful?

The statistics are encouraging and suggest that more often than not, the mediation process leads to a negotiated settlement. It is a voluntary process and therefore

participants need to be committed to achieving a workable solution which will invariably involve some level of compromise. Participants need to be aware that unlike a judge, the mediator does not determine the issues. They are not there to advise on the law or likely prospects of success. Their role is to assist the participants work out their differences and find a durable solution.

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