HOW LONG IS A PIECE OF STRING?

The Duration of Mediation Sessions

The first question for examination here is, *"How long should a mediation session last, with reference to the objectives of the session and the modus operandii adopted by the mediator?"*

In as much as mediation is purported to provide a cost effective alternative to third party determination, be that arbitration or litigation, this is a serious matter, since mediation can be very expensive. Even a few hours of mediation may well cost more than fast track litigation.

Section 1 of the Civil Procedure Rules is based on the perception that ADR is a cost effective alternative to litigation that should be considered in order to fulfil the over-riding objectives established by the CPR. To what extent does mediation fulfil this expectation?

Once the filing fee is paid for fast track litigation, apart from legal fees there is nothing more to for the parties to pay. Why then might the parties choose to defer legal proceedings to mediation? Do the benefits outweigh the additional costs?

Where the mediation is a free service then it is possible to concentrate purely on the added value arising out of the informality of the mediation process, speed, party autonomy and the scope for brokering settlements on terms not available at law, ranging from spread payments to wider interests and mutual opportunities. However, given the uncertainty of the process, which cannot guarantee an outcome, where the mediation involves additional costs, the parties are likely to take some convincing that the other benefits are sufficient to justify that expenditure. The greater the costs, the harder it will be to justify deferring to mediation. Whilst time may well be of the essence, the District Courts can often turn around small claims in 9-13 weeks. Experience indicates that in some courts it can take as long if not longer to arrange for a mediation session, which makes it virtually impossible to justify the use of mediation.

Without wishing to detract from the enthusiasm and commitment of those engaged in free mediation services and the service that they provide to clients, it is not a model that is likely to attract sufficient qualified and experienced practitioners to extend coverage to all courts. Whilst most would be prepared to offer pro-bono services in case of need, the number who would be able and willing to provide blanket provision is likely to be very restricted.

The time allocated for free and low cost mediation tends to be quite restricted, with as little as half an hour face to face contact being allocated to some court schemes, particularly where subject to a fixed cost regime for small value disputes. In respect of moderate value disputes it is not uncommon for court mediation schemes to offer 2 to 3 hour mediation sessions, on graduated costs scales reflecting the value of the claim. It is only when the value of the claim rises above a quite generous threshold that the provision is extended to a full day.

Court mediation has a credible track record of success. Nonetheless many court based mediations fail to settle within the allocated time. Sometimes this meant that the mediation failed and the case went back into the court list. Other times it proved possible to keep going and extend the time. On other occasions the mediation has been moved to a different venue, or was continued on a virtual basis by phone or the mediation reconvened the next day. All of this indicates that the amount of time allocated to the mediation session may be crucial to the success of the process.

The question is, do the mediations that run out of time do so because the mediator's time management skills are in some way wanting, or is it simply because it is not possible to accurately prescribe the amount of time needed for a mediation session?

There is no doubt that it takes an experienced mediator to run a tight ship. Time is likely to become a major obstacle where a mediator loses control, but the unpredictable nature of clients is such that this may not be the mediator's fault.

A mediator has to expect the unexpected. Most mediators will have a range of game plans to chose from and will be able to switch seamlessly from one to another as the need arises as the process progresses.

Some measures can be taken to reduce the time needed for a mediation session. Advance preparation will remove elements of unpredictability, save the amount of time needed to establish a common understanding of the background, the issues and expectations of the parties. Any documentation produced for the first time during the mediation will take time for everyone to read and assimilate.

Despite the fact that pre-mediation documentation may encourage the exchange of documentation and even mandate it, providing pro-forma to assist the exchange, complete with strict schedules that the parties are expected to comply with, nonetheless it is not however uncommon for the mediator or go in cold, without any or very limited information. Either that or one party provides very complete documentation but the other does not. It is not unknown for a party to have complied with the exchange requirements, but for the documentation to have got lost in the system.

Where the mediator has the contract details of the parties in advance it may be possible for the mediator to contract each in turn and encourage exchanges of information. At the very least the mediator should be able to glean some additional information to held him prepare. Where documentation has got lost in the system this can give rise to client frustration and a loss of confidence in the process.

Following on from the initial opening session where the parties stake out their position there are three distinct stages to mediation, 1) information gathering 2) exploration and development of avenues for settlement and 3) the endgame leading to closure, drafting and signing the settlement.

Assuming that the time needed for the first stage can be kept to a minimum by prior exchanges of information, it is stage 2) that is likely to be the most time consuming. How much time is required depends partly on the degree of complexity of a dispute and the number of issues at stake. That apart much depends upon how the mediator perceives his role and accordingly the amount of control exercised by the mediator over the decision making process.

Whilst mediation is, by common agreement about party autonomy, putting the parties in control of their own destiny, the objective of mediation is to produce a settlement agreement which involves the parties compromising, to a greater or lesser extent, their initial expectations, until a stage is reached where the gap between them is closed. How can this be brought about? First the terms of the settlement have to be established, and much will depend on the how much movement each party concedes. Movement will not be equal. Otherwise mediation would simply amount to nothing more than dividing the cake.

The mediator can get each of the parties in turn to reconsider their positions, to re-examine what it is they want and whether or not it is reasonable or practicable to maintain their current stance. Often parties will be invited to view the situation from the perspective of the other side and to consider the extent to which they may have contributed to the situation. The parties may be asked to re-examine whether or not a court is likely to agree with them and to scale down inflated expectations. The mediator may encourage them to look beyond the current dispute to future relations. As progress is made, the mediator will move between the parties gradually closing the gap between them. Whilst all of this ensures that it is the parties that are making the decisions, albeit with a degree of manipulation by the mediator, none-the-less it all takes time.

There comes a time when the mediator has to close the deal. If a party makes it clear that they have reached their bottom line this must be conveyed to the other side, but the mediator does not have to endorse it. If it is not accepted the session ends. That surely must be the choice of the parties if party autonomy is the order of the day.

The alternative is for the mediator to take greater control over the decision making, to devise a solution and to persuade, bully and cajole the parties into accepting it. It might be what it takes to reach closure and the parties may welcome the intervention. However, how much party autonomy exists in such situations is questionable and is no doubt a matter of degree. It is true that a party has the right and power to decline but a forceful mediator could suborn the will of one or more parties. The greater the standing of the mediator the greater the likelihood is of this happening.

Does it really matter, providing there is an outcome, particularly where the mediator is of the view that it is fair and in the best interests of both parties? Perhaps not, but one must ask why the view of a mediator is to be preferred to that of a judge?

What will shape the deal sold by the mediator? For the judge it would be a judgement arising out of fact and law. The mediator is not constrained by either. The danger is that the mediator may shape a settlement that is in direct proportion to what he feels each of the parties would be able or willing to comply with. Thus the settlement would favour the most outspoken and obdurate of the two. The hardball negotiator would have the upper hand.

The duration of adjudicatory processes

The second question for is examination is *"How much time it is appropriate to accord to the adjudicatory process?"*

The statutory process established by the Housing Grants, Construction and Regeneration Act 1996 is subject to very restricted time limits. s108(2) provides that "*the contract shall-*

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;"

There were howls of protest at the idea that a construction dispute could be adjudicated upon within such a short period of time, particularly from the legal profession when the measure was enacted. The primary objection was that it allowed insufficient time for the parties to air their views and canvass the issues or for the adjudicator to reach a considered decision. Supporters of the proposals on the other hand tended to dismiss the objections as so much gate keeping of vested interests, in particular from those who made a living from arbitration and litigation.

The default position of supporters was that in the process has a built in safeguard. The outcome is not final. A party dissatisfied with the decision can always proceed to a *"de nouvo"* hearing of the case, with all the time safeguards of a full trial or arbitral hearing as the case may be.

This would not do for the detractors, since it had immediate cash flow implications for the loser, a *"de nouvo"* trial involved additional expense for the loser which might not be affordable and there was always the risk that at the end of the day the monies might not be recoverable. An addition perceived danger is that many might simply give up on chasing their entitlement, having been worn down by the process.

With the best part of eight years practical experience behind us, many of those who were initially opposed to construction adjudication have been won around by the apparent success of the process. Nonetheless there are others who remain adamant that whatever else adjudication achieves, it is not justice. The case for the detractors is reinforced by the fact that the adjudication process has often been shown to be a lot more expensive than originally imagines, with some of the most highly rated adjudicators commanding very high fees. With the consent of both parties it is not uncommon for the adjudication process to be extended considerably with consequent cost implication, only for the decision to be successfully challenged during enforcement proceedings, followed on times by an appeal, and/or by a de nouvo trial or hearing as well. The process is not necessarily as speedy as anticipated and expensive to boot.

At first sight the critics seem to have it, but if one looks a little closer, there is a flaw in the argument which couples inadequate decision due to insufficient time with the cost argument arising out of extensions of time.

The issue therefore remains, are the time frames for adjudication inimical to fair judgement? The question as to whether or not the adjudication procedure by its nature is one capable of producing fair judgements is a separate issue. Thus whether or not what are essentially paper only dispute resolution procedures are appropriate should not be bundled up with the time constraint issue. The policy of imposing an intermediate mini-justice process, which by its very nature is likely to be somewhat rough and ready, between the party negotiation stage and the Rolls Royce arbitration/litigation stage is either right or wrong, depending upon one's view point. For some the compromise is justifiable in terms of cost and time savings and preserving cash flow within the industry. For others it is not. What it cannot do is provide the full R&R experience and cost and time benefits at the same time.

Over time the courts have defined and refined the parameters of a just adjudication procedure. A clear picture has emerged of what is and what is not acceptable and of what is expected by the court of the construction adjudicator. The adjudication dispute should have crystallised prior to issue of the notice and reference. These will establish the scope of the dispute before the adjudicator. Ambush should not be allowed to cast its shadow over the proceedings. No new issues should be permitted without consent. Nor is it is for the adjudicator to investigate new causes. He is limited to the pleadings. The parties should present their case in a succinct manner, with clarity, directing the adjudicator to relevant evidence. The claimant should make out his case or fail and likewise the defence. If all that is done it should be possible for the adjudicator to reach a balanced view within the allotted time. If not, he should request additional time. If not acceded to he should resign.

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