

COLLAS DAY | DISPUTE RESOLUTION

Mediation in Trust Disputes

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Much has been made in recent years of the desirability of mediation as a means of resolving disputes without resorting to litigation.

Indeed, the requirement for parties to consider alternative dispute resolution has now been enshrined within the Guernsey Royal Court Civil Rules, 2007. It is clear that mediation can be a useful and cost-effective alternative to litigation, but how useful might it be as a means of resolving trust disputes? Should it be the obvious choice of alternative dispute resolution procedure when dealing with trusts?

In general terms, mediation has many advantages: it is quick to arrange, confidential, without prejudice and can be completely private should the parties wish it to be. This provides an opportunity for creative and flexible ideas to be tabled in the hope of resolving disputes, which might otherwise be unavailable in a formal court setting, without needing to commit to such ideas unless mutual agreement is reached. It is also generally less expensive than litigation, though it cannot be said to be the “cheap” option as the parties will generally be required to pay for a venue for the mediation, their own expenses (including legal fees if represented) and of course the mediator.

The mediator is the neutral party, able to facilitate the discussion and provide expertise, as well as assisting the parties in their negotiations. The key advantage that mediation has over litigation in a dispute is that ultimately the parties are in control of the negotiation, the settlement and any binding agreed terms.

Either party can walk away at any time, safe in the knowledge that litigation is still an exercisable option. Conversely, choosing litigation at the outset of a dispute can mean submitting to a result which is more likely to be imposed than agreed. Litigation is expensive, slow and out of the control of the parties.

Looking at trust disputes more specifically, it is the family context of trusts that makes them especially suited to mediation; personal feelings of wrongdoing are often responsible for trust disputes at the outset. The family context of trust disputes can often also mean that the dispute or grievance has no legal basis, making it difficult for the courts to provide an effective remedy.

Mediation provides an open forum for those involved in which the grounds for the dispute, both legal and otherwise, can be discussed and resolved in an open manner, under the watchful eye of the mediator. In this way it is less confrontational than litigation but it can still provide injured parties the feeling that they are justly getting an opportunity to air their grievances and offer explanations without being subjected to cross-examination.

In the family trust context, litigation can cause rifts not easily mended. By having a solution imposed upon the parties by a court, one side is invariably going to feel that justice has not been done. This can cause irreparable damage, not just by the outcome, but also by what ‘skeletons’ may be disclosed about a party during the course of the proceedings.

This is not to say that mediation will always be the dispute resolution tool of choice; it does have its disadvantages. For one thing, it is never a forgone conclusion that mediation will even solve the dispute in question. Further, given the open nature of mediation, either party may walk away at any time, even before any progress is made. Finally, some disputes are simply not suitable for mediation, such as when a point of law cannot be resolved without the decision of a court or when the structure of the trust itself is being questioned. One should also consider whether mediation will be in the best interests where minors, vulnerable or unascertained beneficiaries are involved - will the mediator be able to see where they are being forced into a disadvantageous compromise? In such situations, the court has the power to appoint personal representatives to look after the interests of those beneficiaries.

When considering whether or not to utilise mediation, the trustees themselves will need to consider whether mediation will be in the best interests of the beneficiaries, whether they have an obligation to pursue alternative dispute resolution in the first instance (in relation to external disputes, the answer will invariably be “yes”, but not necessarily with regard to internal disputes), and whether they have the power as trustees to spend the money of the trust on alternative dispute resolution. In this regard, it may be advisable for the trustees to carefully review the trust deed and further potentially to seek Beddoe relief from the court to avoid the possibility of personal liability for costs.

However, it is important to note that section 31(2) of the Trusts (Guernsey) Law, 2007 (the “Trusts Law”) gives trustees the power to settle or compromise any claim in relation to themselves or in any way related to trust property. Following on from this, section 32 of the Trusts Law permits a trustee to use trust assets to consult professional persons in relation to the affairs of the trust. These two sections together could operate to allow trustees to first pursue mediation and second to use trust assets to employ a mediator, but not to engage in litigation (see reference to Beddoes relief above).

Whether or not mediation is the appropriate forum for resolving a dispute related to trusts, will largely depend upon the situation in which the dispute has arisen. It is clear that mediation will not resolve all trust disputes, and going down such a road will need to be carefully considered by the trustees and their advisers.

For more information relating to Alternative Dispute Resolution (ADR) generally, or for advice on how ADR could be applied to a particular dispute, contact:

Christian Hay
Head of Dispute Resolution
t: +44 (0)1481 734275
e: christian.hay@collasday.com



► **collas day** PO Box 140, Manor Place,
St Peter Port, Guernsey GY1 4EW

► **t:** +44 (0)1481 723191 **f:** +44 (0)1481 711880

e: inbox@collasday.com ► **w:** collasday.com

▶ **collas day** PO Box 140, Manor Place, St Peter Port, Guernsey GY1 4EW
▶ **t:** +44 (0)1481 723191 **f:** +44 (0)1481 711880 **e:** inbox@collasday.com ▶ **w:** collasday.com