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Judicial Mediation in the Cayman Islands: Some New Judicial Guidelines

Authors: Alex Potts, KC, Partner, Head of Cayman Islands Litigation & Restructuring

Alternative Dispute Resolution ('ADR'), both through private arbitration and private mediation, is increasing in popularity in the Cayman Islands, having regard to the time, costs, adverse costs risks, and uncertainties of litigation before the Courts, whether that litigation is local or cross-border in nature.

There are, however, still a large number of cases that come before the Cayman Islands Courts (including cases that have gone to substantial interlocutory hearings, and even to trial or to appeal) in which the parties, or their lawyers, have failed to take advantage of the available opportunities to explore all potential settlement solutions, whether by negotiation, by private mediation or by other appropriate methods of ADR.

This is despite the fact that, for some time now, the Cayman Islands procedural rules of Court (the Grand Court Rules 1995, as amended) have specifically required all parties, and the Court itself, to have regard to the 'Overriding Objective' of dealing with all cases in a "*just, expeditious and economical way*".

This obligation includes, on the part of the Court, the duty to further the 'Overriding Objective' by actively managing the proceedings before it, including encouraging the parties to co-operate with each other, and helping the parties to settle the whole, or part, of their disputes in the proceedings.

Chief Justice Sir Anthony Smellie KC has now published a Practice Direction (PD No. 3 of 2022), dated 15 August 2022, setting out new "*Judicial Mediation Guidelines*" ("the Judicial Mediation Guidelines"), with a view to encouraging the settlement of parties' legal disputes, in furtherance of the 'Overriding Objective'.

What is Judicial Mediation?

The concept of Judicial Mediation is not, in and of itself, a new one, although its use in the Cayman Islands, and jurisdictions such as England and Wales, has largely been confined to date to family disputes, or to employment disputes, rather than the entire spectrum of civil and commercial disputes.

Judicial Mediation, as the name suggests, is a mediation process conducted by a sitting Judge, but acting as a Judicial Mediator (and who has been trained and certified to act as a mediator). Sitting in that capacity, a Judicial Mediator will not have the power of a Judge to determine, on a binding basis, any issues in dispute between the parties in the proceedings, or to provide legal advice to either of the parties, or even to assist with the preparation of any terms of settlement.

Indeed, the Practice Direction makes it clear that no Judge will hear and determine an issue in any proceedings in which that person acted as Judicial Mediator, or in which the Judge has become acquainted with any confidential information relating to the mediation of the dispute. With the consent of the parties, however, the Judicial Mediator will have the power to execute and sign a Consent Order in a judicial capacity, if that Consent Order reflects a binding settlement agreement between the parties.

The Practice Direction also contemplates that, in the event that the proceedings fail to settle at mediation, the Judicial Mediator may have the 'case management' power to give certain directions for the further conduct of the proceedings, in their capacity as a Judge, pending the appointment of a new Judge.

While this 'case management' power may be pragmatic and sensible as regards the fixing of uncontroversial directions or a future timetable, it is unlikely to be appropriate for a Judicial Mediator to try to give directions on any controversial, or highly contested, procedural matters, which can only properly be dealt with by a different Judge (unaffected by any knowledge of the confidential mediation itself).

What cases might be suitable for Judicial Mediation?

The Judicial Mediation Guidelines apply, in principle, to all civil and commercial proceedings pending before the Cayman Islands Courts (including cases pending before the Financial Services Division), other than family cases (which already attract their own sets of mediation guidelines).

The purpose of the Practice Direction is to set out a principled and consistent set of discretionary guidelines for the referral of matters to Judicial Mediation, and the procedures for the conduct of any Judicial Mediation.

The Practice Direction indicates that a matter may be referred to Judicial Mediation at any stage of the proceedings, having regard to the Overriding Objective, and that such a matter will usually (but not necessarily) have one or more of the following features:

- There will have already been an earlier, but unsuccessful, private mediation;
- One or more of the parties has limited resources; or
- There is a substantial risk that the costs and time of a trial will be disproportionately high when compared to the sum in dispute, or the subject matter of the dispute.

The Practice Direction recognises that there will be some matters that might generally be unsuitable for Judicial Mediation (subject to the facts of any particular case), including:

- Cases involving matters of public importance, which ought to be heard in open Court, in the public interest;
- Cases in which the Court is to review the exercise of a statutory power or discretion;
- Cases in which the commission of a crime or serious misconduct is alleged in the context of a civil proceeding; or
- Cases in which there is an unrepresented, litigant in person.

The procedure for Judicial Mediation

The Practice Direction acknowledges that mediation styles and practices may differ between Judicial Mediators, and that the procedure needs to remain flexible, for obvious reasons. In general, however, directions for preparation for a Judicial Mediation will be made at a preliminary case conference, and the parties (and their representatives, subject to the direction and control of the Judicial Mediator) will be told when and where the mediation will take place, and who is to attend.

Parties will be informed prior to the commencement of a mediation of any other procedural expectations or requirements, including the requirement to provide mediation position papers, details of settlement offers or proposals, or specified documents. The expectation under the Practice Direction is that the mediation will be attended in person by parties or by representatives with full settlement authority, and that participation by telephone or by video-link will only be allowed in exceptional circumstances.

The Judicial Mediation process will attract both rights, and duties, of confidentiality, and the Practice Direction expressly provides that "parties and other participants are to protect the confidentiality of all that is said and done by any person in the course of the conduct of the mediation". The Practice Direction also contemplates that the Judicial Mediator and any Court officer providing administrative support will destroy all materials and documents following completion of the mediation, whether successful or not.

This clearly contemplates that any Judicial Mediation will be conducted on a confidential, and 'without prejudice' basis, and that no documents or information relating to the Judicial Mediation will be placed on the Court record, or admissible in evidence before the Court (save, perhaps, for the most exceptional of cases, or with the agreement of all parties and the Judicial Mediator).

What are the pros and cons of Judicial Mediation?

Although there are some lawyers and litigants for whom the idea of any potential settlement is still completely alien, it is well-recognised, on objective analysis, that a commercial settlement, by agreement, is almost always a better outcome for the parties than fully contested litigation. The public interest is also well served if fewer disputes actually need to be determined by Judges at a final trial, if the majority of disputes are capable of satisfactory resolution by settlement.

Judicial Mediation, therefore, if well managed and properly prepared, should offer the parties an additional, cost-effective method or opportunity to settle their differences, if other methods (including private mediation) have not yet worked. Even if a case does not settle at a Judicial Mediation (and even if both parties consider a settlement to be unlikely against the background of earlier negotiations or a private mediation), a Judicial Mediation can still be a useful exercise for the parties, and their lawyers, for a number of different reasons.

For example, a Judicial Mediation might be the first real opportunity for the parties to attend Court (or its vicinity) in person, and to assess a Judge's impressions of the dispute, and its likely future progress, if only wearing the hat of a Judicial Mediator.

Additionally, an unreasonable refusal to participate in a Judicial Mediation, in breach of the 'Overriding Objective', is likely to attract the disapproval of the Court, which might lead to an unfavourable costs order at the conclusion of proceedings.

Author:

Alex Potts, KC
Partner, Head of Cayman Islands Litigation & Restructuring
alex.potts@conyers.com
+1 345 814 7394

For further information please contact: media@conyers.com