

DISPUTE RESOLUTION: OVERVIEW:
THE MEDIATOR

Choosing a mediator

The method of selection of a mediator can be determined by the mediation clause in the contract. The court can also help the parties to choose; the TCC, Commercial Court and Chancery Division all keep lists of potential mediators. Both CEDR Solve and the ADR Group maintain lists of mediators and can assist in the administration of the mediation. Points to bear in mind when choosing a mediator include: qualification, style, success rate, experience, references and personality.

Conduct of the mediator

Several of the mediation providers have developed Codes of Conducts for their mediators and there is a European Code of Conduct produced by the European Commission. The main ADR providers have asked their mediators to abide by the European Code. Key principles include:

- the mediator must ensure that his acting will not cause a conflict of interest.
- the mediator should engage with the parties prior to the mediation and read any documents it is agreed should be sent to him/her.
- during the mediation, the mediator will normally determine the way in which the mediation should be conducted. He or she must maintain impartiality throughout the process and respect the confidentiality of the information provided to him/her throughout the process.
- there are certain circumstances in which the mediator must withdraw, including if he/she is asked to do so by either of the parties.
- the mediator is generally under an obligation to keep confidential the fact of the mediation and any information arising out of it, subject to certain exceptions.

Liability of the mediator

The mediation agreement may include a clause excluding liability on behalf of the mediator in relation to the conduct of the mediation, although the validity of such clauses has not been tested in the English or Welsh courts.

Furthermore, there are no decided cases against mediators in England and Wales. It is theoretically possible that claims could be brought in:

- negligence
- breach of contract
- misrepresentation
- breach of fiduciary duty

but unless the mediator has clearly given advice or sought to coerce one of the parties into agreeing to a settlement, it is difficult to see how a claim under these heads could be successful. The absence of any cases on this issue suggests that any dissatisfaction that parties might feel with the mediation process is not the legal responsibility of the mediator.

DISPUTE RESOLUTION PRECEDENT:
WITNESS STATEMENT IN SUPPORT OF AN APPLICATION FOR SUMMARY
JUDGMENT

I, *[Insert full name of witness]* of *[insert address]* WILL SAY as follows:

- 1 I am *[set out position of witness and involvement in the proceedings]*. I am duly authorised to make this witness statement on behalf of the *[claimant/defendant]*.
- 2 I make this witness statement in support of the claimant's application for summary judgment of *[the whole of the claim]/ [for part of the claim]*.
- 3 The facts and matters set out in this witness statement are within my own knowledge, unless otherwise stated, and I believe them to be true.
- 4 Where I refer to information supplied by others, the source of the information is identified; facts and matters derived from other sources are true to the best of my knowledge and belief.
- 5 Attached to this witness statement is a paginated bundle of exhibits known as *[insert exhibit reference]* to which I will make reference.

Parties

- 6 The claimant is *[set out details about the claimant]*
- 7 The defendant is *[set out details about the defendant]*.

Background

- 8 *[Set out factual background to the application]*

[No real prospect of succeeding on the claim]/[No real prospect of successfully defending the claim]

- 9 *[Set out the reasons why you consider that [the claimant has no real prospect of succeeding on the claim] OR [the defendant has no real prospect of successfully defending the claim]*

No other compelling reason

- 10 There is no reason why this case should be disposed of at trial.

Summary judgment sought

- 11 *[Set out the claim made and any interest]*

12 [A spreadsheet setting out the interest calculations on which the claim for interest is determined is marked *[insert exhibit reference]*]

Order sought

13 I respectfully request that the order sought in the application notice for summary judgment of the [whole of the claim]/[specific parts of the claim] be granted.

Consequential directions

14 Consequential directions may be necessary having regard to the order made.

Statement of truth

I believe that the facts stated in this witness statement are true.

Signed.....

Dated

DISPUTE RESOLUTION: DRAFTING NOTE
WITNESS STATEMENT IN SUPPORT OF AN APPLICATION FOR SUMMARY JUDGMENT

General

This statement has been drafted on the basis that the applicant is the claimant. If you are acting for a defendant who wishes to make an application for summary judgment or you are dealing with summary judgment of a counterclaim then you will need to amend the precedent accordingly.

It is important to set out all of the evidence you want to rely on because a party cannot rely on oral evidence at the hearing unless the court grants permission to do so.

When drafting the witness statement, consideration should be given to the principles the court will apply when determining whether to grant summary judgment. These principles were laid down in the *Three Rivers* and *Chan U Seek* cases and were reiterated in 2008 in the *Landfast* case.

Landfast (Anglia) v Cameron Taylor One [2008] All ER (D) 373 (Feb)

Consider whether it is appropriate for a strike out application to be heard at the same time as a summary judgment application.

Title

The witness statement should contain the title of the court proceedings.

[Insert between tramlines 'Witness statement of [insert full name of witness]'

CPR PD 32, para 17.2

The following should appear in the top right hand corner of the front page of the statement:

1. the party on whose behalf the statement is made eg *Claimant/Defendant*
2. the initials and surname of the witness eg *J.M. Smith*
3. the number of the statement in relation to that witness eg *1st*
4. the identifying initials and number of each exhibit referred to eg *JMS 1, JMS 2*
5. the date the statement was made eg *21st October 2008*

Precedents

For strike out precedents, see:

Application notice for strike out on the basis of no reasonable grounds

Application notice for strike out on basis of abuse of process

Application notice for strike out on basis of failure to comply

Exhibits

In the body of the witness statement, any exhibits should be referenced as follows: 'I refer to *[description of exhibit]* marked '*[insert exhibit reference]*'.

CPR PD 32, para 18.4

Parties

You should set out some background giving details of the claimant and the defendant and their relationship to each other.

Background

This section of the witness statement should provide the court with details of the proceedings to date and the stage at which the application is being made. You should ensure that:

- the information is provided in chronological order
- where the application is being made before the defendant has submitted an acknowledgment of service or a defence, you should state this in the witness statement. You also need to state that the claimant is entitled to make the application either because the court has granted permission to do so or due to the provisions of a practice direction. A copy of the permission or the relevant practice direction should be exhibited to the witness statement

CPR 24.4(1)

[No real prospect of succeeding on the claim]/[No real prospect of successfully defending the claim]

When drafting this part of the witness statement you need to:

- state whether the application relates to the whole or part of the claim [or defence]
- provide a very clear explanation as to why the case is appropriate for a summary judgment application. Summary judgment will only be granted in a plain and obvious case
- if there is a preliminary issue as to the construction of the contract, the court should decide this at the hearing of the application from summary judgment if:
 - the judge has all the relevant information before him
 - the parties can argue the point fully
 - emphasise that all of the information that would be available to the court at trial is already available and that any fuller investigation into the facts of the case would not add or alter the evidence that would be before the trial judge

This section of the statement will be more detailed if the application is for summary judgment of particular parts of the claim as these must be individually explained in the statement.

No other compelling reason

If you consider that there are arguments that the other side may raise, you may wish to address them here. However, you do have the ability to reply to any opposition statement and you may wish to deal with such issues in reply rather than highlighting issues now that the [claimant/defendant] may not have considered. This is a tactical decision which will depend on the circumstances of the case. You should bear in mind that being as open as possible may save your client costs later in the proceedings.

Para 10

You must state that there is no other compelling reason why this matter should be dealt with by way of a trial.

Summary judgment sought

You should clearly set out what the applicant seeks in its summary judgment. This is particularly important if claiming summary judgment for part of a claim.

If acting for the claimant, you should clearly set out any interest being claimed. You will generally get interest up to the date of the judgment provided that this was set out in the particulars of claim and the calculation is updated for the hearing. If this is not done, the court might adjourn the issue of interest to a separate hearing and there is a risk of an adverse costs order being made against the claimant. You should provide a spreadsheet with the interest calculations in the exhibit with the calculations on a daily basis so that on the date of the hearing the interest can be easily determined.

Order sought

You will need to request that court grants the order sought. You do not need to set out the wording of the order itself. This will be in the application notice and also in the draft order which should be annexed to the application notice.

For precedents see:

Application notice for summary judgment (whole claim)

Application notice for summary judgment (part claim)

Order for summary judgment

Consequential directions

This leaves it open to the court to provide directions. For example, the court may make a conditional order.

Statement of truth

Witness statements must be verified by a statement of truth

CPR PD 22, para 1.1

The CPR sets out the wording for a statement of truth in a witness statement.

CPR PD 22, para 2.2