Mediating trust disputes – practical guidance for trustees or personal representatives and beneficiaries

Disputes covered

This guidance is primarily concerned with disputes internal to the trust or estate, for example:

- questions of construction;
- challenges to the exercise or proposed exercise of the powers of trustees or personal representatives;
- disputes about the trusteeship or executorship; and
- claims for breach of trust.

Disputes external to the trust or estate, for example a claim against advisers or against a third party said to have damaged property of the trust or estate, are not covered.1

This guidance is based on English law but similar principles may apply in all the major trust jurisdictions.

In what follows, “trusts” includes estates and “trustees” includes personal representatives.

Considering mediation

The family context of many trust disputes makes them especially suited to mediation.

The court’s expectation that trustees will at least have considered mediation (or some other form of A.D.R.) applies, however, to external disputes, not internal disputes.2

Power of trustees to enter mediation agreement

An agreement to mediate does not commit anyone to settle the underlying dispute but it does involve contractual commitments, typically:3

- to stay, or not to commence, proceedings unless and until mediation has been attempted and has proved unsuccessful4;

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1 Practical points arising where trustees consider bringing or defending external proceedings:
- They have a power of compromise under section 15(f) of the Trustee Act 1925.
- They may wish to protect themselves by issuing a Beddoe application.
- If they do, they will be expected at least to have considered mediation or some other form of A.D.R. (see next footnote).
- Their power to spend trust money on A.D.R. is not beyond question and they may wish to seek a power to do so under section 57 of the Trustee Act 1925 in their Beddoe application.

2 Practice Direction – Applications to the Court for Directions by Trustees in Relation to the Administration of the Trust (supplementing C.P.R. Part 64), para. 7.5, as to the evidence on a Beddoe application. See too The Chancery Guide (2005 ed.), para. 26.13.

3 See the form of agreement on the resources page.

4 See the form of stay agreement on the resources page.
• to attempt to settle the dispute in good faith – probably meaningless as a matter of law, although possibly relevant to the question of costs;
• to warrant that each party has authority to settle, and to disclose any limits on that authority
• to exonerate the mediator for liability in the absence of fraud or wilful misconduct;
• to keep all negotiations confidential and not to use them in litigation; and
• to pay the fees and costs of the mediation.

We deal with paying for the mediation below. Where the trustees’ involvement is only personal, as with a claim for breach of trust, there seems nothing to stop trustees from agreeing the other terms. Where questions of construction are concerned, or the validity of the exercise of powers, their power to go to court should not be constrained and any provision about their authority to settle must make it clear that they cannot bind the trust.

**Parties concerned**

If the mediation is to end in a compromise of the dispute, all concerned parties will need to be present or represented. The facts of each case will determine who is a necessary party but trust disputes are especially likely to affect a large class.

If the necessary parties are few in number and are all of full age and capacity, they can all attend the mediation in the usual way. But in other circumstances special arrangements will be needed.

**Numerous beneficiaries**

There may be too many beneficiaries to make it practicable for all to attend a typical one-day mediation. If they are all of full age and capacity, they may appoint a spokesman (e.g. by power of attorney) to negotiate on their behalf or, where there is more than one class of beneficiaries, a spokesman for each class. The mediator may even mediate separate class meetings, with someone suitable being chosen to negotiate on behalf of each class. Where the beneficiaries are unable to appoint someone with authority to bind them, or where the class includes minors or unborns (see below), the court’s approval will usually be needed. So those initiating the mediation will have to choose someone suitable to negotiate for the class, with a view to his being appointed a representative party by the court afterwards. The court’s approval is required to a compromise where there is a representative.\(^5\)

Note, however, that it is not essential for a representative party to be a member of the class being represented.\(^6\) If no willing or appropriate beneficiary is available, it may be possible to rely on (e.g.) a suitable solicitor or local attorney.

**Unborn or unascertained beneficiaries**

The court’s approval will be needed if a compromise is to bind unborn or unascertained beneficiaries. Traditionally the trustees safeguard their interests in negotiation\(^7\) and where the

\(^5\) C.P.R. r. 19.7(5).
\(^7\) Re Druce’s Settlement Trusts [1962] 1 W.L.R. 363 at 370 (“watchdog for … unborn interests”).
trustees have no adverse interest of their own, and all the others can speak for themselves, there
is no need for a representation order: the court can simply approve the compromise on behalf of
unborn or minor beneficiaries. But a representation order will be wanted where the trustees are
disabled from looking after the unborn or unascertained beneficiaries or where they are part of a
class requiring such an order in any event.

**Minor or incapable beneficiaries**

How will minor or incapable beneficiaries be bound by a compromise? They may be covered by
a representation order. Or it may be possible to frame the compromise so that their interests are
unaffected. Otherwise the following applies.

No one can contract for a minor, and the court’s approval will be needed, when the minor will
have to have a litigation friend. The simple course is to line up a suitable person as a potential
litigation friend, who can take part in the mediation on behalf of the minor (without any formal
role) and who can take office when the court gives approval. It will also be useful to have at the
mediation the counsel who will opine on any compromise to the court.

Incapable beneficiaries, by contrast, may have someone who can bind them without the approval
of the court, i.e. an attorney under a lasting power of attorney or a deputy appointed under the
Mental Capacity Act 2005. Otherwise the court’s approval will be needed and a litigation friend
will have to be appointed.

Where a litigation friend is needed, and the court’s approval is wanted quickly, it will usually be
sensible to prepare a certificate of suitability of the litigation friend before the mediation, so that
he can take office without court order. If the court is to be asked to make the appointment,
evidence is necessary.

**Personal representatives or trustees of another trust**

Where personal representatives or trustees of another trust are beneficiaries under the trust in
dispute, they will have the powers of compromise given by section 15(f) of the Trustee Act 1925.
In a difficult case, they may wish to have the protection of a court order, the court either
sanctioning the compromise under *Public Trustee v. Cooper* or, possibly, accepting a surrender of
the trustees’ discretion. In that case the compromise agreement will have to be conditional
upon the court’s approval.

**Charities**

Where a charity is a beneficiary, its trustees too will have the powers of compromise given by
section 15(f) of the Trustee Act 1925. In a difficult case, they may wish to have the protection of

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8 C.P.R. r. 21.10(2).
9 Ibid.
10 See C.P.R. r. 21.5.
11 C.P.R. r. 21.6(4).
13 As was done in *Re Ezekiel’s Settlement Trusts* [1942] Ch. 230 (C.A.); *Re Strafford* [1980] Ch. 28 (C.A.).
guidance from the Charity Commission under section 29 of the Charities Act 1993. But if there is to be an application to court in any event, it will be simpler to ask for the sanction of the court. Again, the compromise agreement will have to be conditional on the approval contemplated.

Terms of compromise

Using trustees’ powers

If the claim is for breach of trust, it is not open to the trustees to agree to exercise their powers in a given way as part of the consideration for the compromise. To do so would be a fraud on the power.

Otherwise it may well be one of the terms of a compromise that the trustees will exercise discretionary powers in a given way. There is nothing intrinsically improper in trustees’ exercising their powers to give effect to a compromise.

But practical points are:

- Trustees should beware of accepting too readily the demands of unreasonable and vociferous beneficiaries at the expense of the others. Given, however, the “reality testing” of all parties’ positions that is an inherent part of the mediation process, this is less of a problem in mediation than, say, in simple all-party negotiations.
- It may be undesirable for trustees to contract to exercise their powers in a given way, because in the absence of an express power to do so they are not entitled to fetter the future exercise of their other powers. It may be preferable for the compromise to be simply conditional on an exercise of the powers in the given way. But there would be nothing wrong in agreeing to exercise the powers in a given way conditional on the approval of the court. Absent a power to fetter, if a proposed compromise envisages binding the trustees to a particular exercise in the future (as distinct from a present exercise which is part and parcel of the compromise) they should not join in.
- The trustees may be well advised to consider obtaining the sanction of the court to the proposed exercise even if they have not contracted to exercise their powers in that way.

Conditions

The agreement may need to be conditional on one or more of the following:

- the appointment of a particular person as a representative party and the approval of the compromise on behalf of the class represented;
- the appointment of a particular person as litigation friend for a minor or patient and the approval of the compromise on behalf of the minor or patient;

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14 As substituted by section 24 of the Charities Act 2006.
• the sanction of the court or the Charity Commission where the beneficiaries include personal representatives or trustees of another trust or charity trustees; and
• the sanction of the court where the compromise involves the exercise of the trustees’ discretionary powers.

The compromise agreement should set out all the steps to be taken to satisfy the conditions, by whom and when. It should also provide for what happens if the conditions are not satisfied: have the parties agreed a fall-back plan or does the compromise simply become void?

**Going to court**

**Evidence**

When the court is being asked to approve a compromise on behalf of a class, or to sanction the exercise of a power, it will require evidence that the compromise is a beneficial one. It may be difficult to provide that evidence without disclosing some part of the negotiations. What may be disclosed will have to be set out in some detail in the compromise agreement, the confidentiality terms of which generally supersede those in the agreement to mediate.

**Listing**

Approval of a compromise may be urgent. It is likely to be simpler to arrange a short hearing before a judge than before a Master. The matter can be listed informally by counsels’ clerks through the Clerk of the Lists or else there can be an attendance in the Applications Court in the Chancery Division. (All parties would waive short notice.) There is no system for arranging urgent hearings before a Master through the Masters’ Secretaries and it is necessary instead to attend on a Master dealing with *ex parte* applications at 2.15 p.m. merely to fix a hearing.

When no proceedings are already on foot, it will usually be possible to issue a claim form before the hearing and if not an undertaking to issue can be given. The costs of such steps should be provided for in the compromise agreement.

**Paying for mediation**

Can the trustees use the trust fund to pay their own costs of a mediation or the costs of anyone else? The question is a difficult one and advice should be taken early on.

**Trustees’ own costs**

If the claim to be compromised is one for breach of trust, the trustees cannot pay their own costs of a mediation out of the trust fund (except as part of the compromise itself). That must follow from the rule that they cannot use the trust fund to pay their costs of defending litigation for breach of trust until, at the earliest, the claim has been dismissed or discontinued.17 The same presumably applies if the claim is a hostile claim to remove them, even if no breach of trust is alleged.

Where the trustees are neutral and the dispute is between beneficiaries, their costs of representation at a mediation should be recoverable from the trust fund, in the same way as their

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costs of legal advice and representation is ordinarily recoverable. It is not clear that that extends to contributing to the mediator’s fees, since their entitlement to use lawyers is a branch of the exception to the rule that they have to do everything personally; and the mediator will not be doing anything which the trustees would otherwise have to do.18

**Other parties’ costs**

There seems no basis for saying that the trustees have any power to fund the whole mediation out of the trust fund, whether by meeting the costs of the other parties or by paying the mediator.

That creates a serious difficulty where it is necessary to find someone to act on behalf of a minor or a patient and then to become his litigation friend. That person, if not a lawyer, will need to instruct a lawyer and there is no fund for the purpose. The same applies to a potential representative of a class of beneficiaries.

A solution available in some cases will be for the trustee to exercise a discretionary power (of appointment or advancement) to apply trust property for the benefit of one or more beneficiaries by paying for all or part of the mediation out of it. Some care will be needed: if there is only one person in whose favour the power can be exercised (e.g. under section 32 of the Trustee Act 1925), it may not be reasonable to expect him to pick up the whole bill. But where the warring beneficiaries are all objects of the power, it may well be easy to justify paying for a mediation out of the trust fund. Where the objects of the power are adults, the trustees will have the protection of their consent, since if they disapprove of using the trust fund they can withdraw from the proposed mediation altogether. The payment of costs from trust funds could have tax consequences, but this is outside the scope of this guidance.

When that solution is not available, asking the court to confer a suitable power under section 57 of the Trustee Act 1925 may be worth while in a heavy case – especially if litigation has already begun.

Otherwise, it seems that the parties to the proposed mediation who are *sui juris* will have to pay or guarantee the costs of a proposed litigation friend or representative before the mediation can take place. It is not clear that the court, when later asked to approve a compromise, can direct payment of those costs out of the trust fund: they are not costs of the only application before it, which will be ones for approval.

**Express power**

The following is proposed as a suitable express power:

“*If any dispute relating to the Trust arises the Trustee may [with the written consent of the Protector]:*

1. enter into an agreement for a mediation of the dispute or any other process of dispute resolution (together “A.D.R.”) to avoid contested proceedings or to avoid their being tried on such terms as it thinks fit (including a term that the Trustee will not take proceedings unless and until the A.D.R. has proved unsuccessful);”

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18 Although the trustees’ power of compromise under section 15(f) of the Trustee Act 1925 necessarily carries with it the power to incur reasonable costs in compromising, the power appears to be confined to external disputes: that is implied in *Re Strafford* [1980] Ch. 28 (C.A.).
(2) on such terms as it thinks fit pay out of the Trust Fund or reimburse itself from the Trust Fund part or all of the costs of the A.D.R. of any party thereto including its own costs thereof save (as to its own costs) to the extent that the dispute concerns an allegation of breach of trust on the part of the Trustee”.

Some thought needs to be given before making a protector’s consent necessary: if the protector is a beneficiary, or someone close to a particular party to the dispute, the requirement for his consent is likely to cause the other parties to view the whole mediation process with suspicion, and so may prove counterproductive.