



PROPOSED MEDIATION

Between:

[Party 1]

AND

[Party 2]

MEDIATION PACK

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WHAT IS MEDIATION?

Mediation is a flexible process conducted confidentially in which a neutral person (the Mediator) actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- a) Involves a neutral third party to facilitate negotiations;
- b) Is quick to set up, is inexpensive, is without prejudice and confidential;
- c) Involves party representatives with sufficient authority to settle;
- d) Is flexible, enabling the process to be designed and managed by the mediator to suit the parties, in consultation with them;
- e) Puts the parties in control (unlike litigation/adjudication);
- f) Enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration and, which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- g) can be used in both domestic and cross-border disputes, two-party and multi-party disputes and, whether or not litigation or arbitration has been commenced.

Any contemplated or existing litigation or arbitration in relation to the dispute may be started or continued despite the mediation, unless the parties agree or a court orders otherwise. If settlement terms cannot be agreed through mediation the parties can revert to litigation or arbitration.

THE MEDIATION PROCESS

Pre-mediation

Upon being instructed to act, the mediator will:

- 1) Send each representative (or the party direct if representing themselves):
 - a. An engagement letter;
 - b. A draft contract for the parties to agree. This contract forms the opening basis for the mediation process.
- 2) Telephone each party to confirm:
 - a. They are okay with the papers provided.
 - b. Who are the likely attendees for the mediation.
 - c. Those attendees have full authority to settle or, if not, confirmation those that do hold the appropriate authority are in immediate contact.

- d. If considered appropriate, who will be presenting the opening statement.
 - e. The principle order of proceedings at the mediation.
 - f. Whether there are any specific issues the mediator needs to be aware of, such as highly emotive parties or suffering from an illness such as terrets.
- 3) Agree the venue, time and date for the mediation. If required by the parties, the mediator shall book an appropriate venue.
 - 4) The business day immediately prior to mediation the mediator shall telephone the parties to:
 - a. Ensure the parties are still wishing to proceed with mediation.
 - b. Confirm the attendees remain the same as previously cited.
 - c. To clarify the plan for the mediation.

PRE-MEDIATION SUBMISIONS

The parties will be required to submit a position statement to the mediator, which should include:

- Include a factual summary of events leading to the dispute and matters arising thereafter.
- If the sequence of events is essential include a chronology of events.
- What are the legal issues in dispute?
- What are the factual issues in dispute?

Parties should remember, the position statement is shared with the other party so must avoid any confidential information or details of a sensitive nature.

THE OPENING STATEMENT

Should the parties determine an opening, joint meeting is preferred then a designated representative for each party shall present an opening statement.

There are strict conditions that all attendees shall abide with when opening statements are presented, namely:

1. The person presented shall not be interrupted by any other attendee.

2. Non-interruption includes no disruptive behaviour such as “Tutting” or gestures or emotive body language.

The opening statement should:

- a) Be no longer than 5 minutes in duration.
- b) Be a summary of your position.
- c) Confirm your willingness to listen to the views of the other party.
- d) Emphasise the desire to resolve the dispute where possible.

What should be avoided in the opening statement includes:

- A. The use of absolute terminology such as, “Under no circumstances,” or “never” where possible.
- B. Using inflammatory terminology such as, “Crook,” or “Dodgy” etc.
- C. Threatening “Sales pitching” such as, “We are multi-million pound litigation experts and have the experience to win this in court if necessary.”
- D. Ridiculing the other party.
- E. Inciting anger and/or frustration from the other party.
- F. Questioning the integrity of the other party.

THE MEDIATION

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The likely procedure will comprise:

- Preliminary meetings with each of the parties when they arrive at the venue;
- If agreed, a joint meeting of all attending the mediation at which each of the parties will normally be invited to make an oral presentation;
- A mix of further private meetings and joint meetings (which may involve all or some of each party’s team) as proposed by the mediator and agreed by the parties.

Professional advisors, particularly solicitors, can and usually do attend the mediation. Such advisors play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations, in advising clients on the implications of settlement and in drawing up the settlement agreement and any consent order.

No verbatim recording or transcript should be made of the mediation by the parties or the mediator in any form, but participants can make their own private notes, which will not be disclosable to anyone else, including in any subsequent litigation or arbitration.

Mediations can last beyond a normal working day and it is important that the key people attending for each of the parties remain present or, at worst, available by telephone or video conference for so long as the mediation continues. Any time constraints should be reported to the mediator as soon as known as an unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

Confidentiality

Mediation is to be treated as confidential by the parties and the mediator, including the terms of settlement, unless otherwise agreed by the parties in writing. However, the fact that the mediation is to take place or has taken place is not normally made confidential as one or other of the parties may wish to claim credit for agreeing to engage in the process or it may have been directed from a public court.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- The mediator or any party or their representative is required by law to make disclosure;
- The mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- The mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

Conclusion of a mediation

The mediation may end in a number of ways:

- 1) By settlement of the dispute in whole or in part, when all agreed matters must be written down and signed by the parties to be binding;
- 2) By an "In principle settlement" of the dispute with an agreement to draft binding terms after the mediation day;
- 3) By the mediator advising the parties that a settlement, for the time being, at least, cannot be reached;
- 4) By one or more parties leaving the mediation before settlement is achieved;

- 5) By an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- 6) By withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the code;
- 7) By production of a document of summary or recommendations from a mediator, if requested by all parties and agreed by the mediator.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting is normally done by the solicitors representing each of the parties. Where proceedings have not been started in respect of the dispute, the settlement will (if so intended and drafted) be a contract enforceable by legal action. Where proceedings have been issued in relation to the dispute, it is normal for a consent order to be agreed either at or after the mediation and later lodged with the relevant tribunal to end the proceedings on the terms agreed. Parties should agree who will be responsible for lodging the consent order.

Where the mediation does not end in complete settlement, the mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation. Where the mediator agrees to stay in contact with the parties after the mediation the provisions of the mediation agreement should be taken to continue to apply to those communications with and/or including the mediator.

In the event that a settlement is not reached, the mediator if requested and if agreed by each of the parties and the mediator, may produce a non-binding opinion or recommendation in an effort to take the mediation forward.

FINAL CHECKLIST

To ensure the mediation operates as envisaged, have you:

Signed/returned the engagement letter?

Agreed/paid your share of the mediation costs?

Made appropriate arrangements for attendance of all to attend at the mediation?

Submitted your position statement to the mediator and other party?

Prepared your opening statement (if applicable)?