

## PREPARING FOR MEDIATION

Mediation between [ ] of [ ] (“[ ]”) (“[ ]”) and [ ] (“[ ]”) (“[ ]”) (“The Participants”) in relation to [ ] (“the Property”) (“The Dispute”)

Mediation Meeting to take place on [ ] 2021

Arranged for – [ ]am – [ ]pm on a Private and Confidential & Without Prejudice basis.

Mediation Venue- Online by Zoom/ /at the offices of[ ] )

Pre Mediation meetings – Online by Zoom to be arranged by separate emails. [If circumstances allow I’ll arrange a pre mediation site visit with you so you can show me all the features of the Dispute on the ground and we can walk the boundaries, a crucial part of understanding the Dispute]

Attendees[ ]

On behalf of [ ]– [ ] of [ ]

[please insert any other attendees their role/ authority and email address]

On behalf of [ ]

[ ]

[ ] of [ ]

[please insert any other attendees their role/ authority and email address]

[ Dated ]for[ ] 2021 By email

Dear [ ] & [ ]

Thank you for choosing me as the Mediator and congratulations on deciding to mediate. I am confident that an agreed way forward and a settlement can be found with the right will and flexibility on all sides.

Introduction – I’ll call you each [later today or on [ ]], for a preliminary conversation. I’m writing to set out a general introduction and explanation of the procedure, so you and the Participants know what to expect.

I appreciate that if you are a legal advisor you will be familiar with the normal mediation process, but online mediation is different and the process is also designed to work in a very cost-effective and timely way. I hope this will help your clients understand how this will work, and how to prepare to get the most out of it. I believe this is a collaborative process – so in my experience, setting out the procedure in this detail helps the meeting run smoothly, and it can then be a more productive, positive exercise and we can “hit the ground running” at the meeting.

As you’ll appreciate the meeting time will fly by, [particularly as this is scheduled for half a day]. So please ask your clients to go through this note carefully and raise any questions with me when we speak, [or meet in a pre-mediation [Zoom] meeting or beforehand by email if you or they wish. I have found that full preparation beforehand by all concerned considerably increases the likelihood of settlement on the day.

[Online Mediation Guide – Here is a link to my online mediation guide on my website.

<https://rogerlevittmediation.co.uk/online-mediation/> Please let me know if you have any comments or questions]

Pre -Mediation Meetings / Conversations –I always find it extremely helpful to have an initial separate meeting with each of you / your clients so I can understand the issues face to face and the options going forward. I suggest separate Zoom meetings with you me and your clients. I'm emailing separately to arrange this. [Conversation(s) or a Zoom / call will do if a meeting isn't possible – especially in these unusual times]. I find that a meeting also helps to put your clients minds at rest and answer any questions they / you may have. , [I look forward to seeing you at [the Property]. We can meet separately or together as you prefer.] I'll send you a Zoom invite separately. Please don't pass this on to anyone. It is important that I send this so I can control the entry to the meeting via the Zoom Waiting Room facility.

#### Mediation Brief and Documentation for the Mediation

I have already been provided with a bundle of relevant documents, which includes:-[A. The lease [and title entries] for the Property.

B. Any documents recording [variations to the terms of the lease.]

C. The most pertinent letters, emails and agreed notes of discussions regarding the Dispute.

D. Any proceedings.

Thank you for co-operating with each other to collate that bundle, it is extremely helpful.

#### Further Documentation for the Mediation

I now look forward to receiving by email as soon as possible [a mediation bundle containing all the relevant documents] from each Participant your Position Statement, to include:-

A. A brief outline of the facts giving rise to the Dispute

B. Your summary view of the Dispute to be mediated, and any common ground;

C. Any further relevant correspondence which you particularly wish me to see or to refer to at the mediation; and

D Any proceedings issued

E All evidence to back up your case and if you don't yet have that evidence, when it could be obtained

F What do you see are the strengths and weaknesses of your case.

G What do you see are the strengths and weaknesses of the other side's case.

H Do you see any 'red herrings' or 'elephants in the room'?

I. Suggestions already made or now proposed for how the Dispute could be resolved including details of any without prejudice offers made and/or rejected.

Please also let me have a confidential note which summarises your thinking behind the Position Statement. Guidance about this is in the Schedule attached to this Briefing Note.

I've found from experience that this detailed preparation helps all of us save time at the mediation meeting and focuses attention on achieving a resolution. I appreciate there is a fine balance between preparing in detail for the mediation meeting and coming to it with an open mind. However my aim is to move forward to help the Participants find a solution rather than look back over the history - which will be clear from the papers provided. This preparation is always important and the more time I have to consider all the documents and speak to all concerned, the better: the more I can help the Participants move towards a solution. The aim, is that we're all looking forward towards settlement. This isn't a mini trial, or a preparation for one.

Mediation Agreement / Confidentiality / Without Prejudice – Please sign and return to me before the meeting the Mediation Agreement I'll send to you separately, signed by me electronically.

Separate parts signed by each of you electronically is fine, which can be emailed to me and they can then be exchanged. If you haven't been able to sign the Mediation Agreement before the meeting, we'll proceed on the basis of the agreement anyway. Remember the process is confidential and without prejudice: So no one present at the mediation can refer to what is said at the mediation, at any other time or place. No one can call me as a witness or have me summonsed to court to say what happened. I will be neutral and impartial and to do this I must be wholly outside any litigation. You'll see you agree to this in the mediation agreement. This is very important because it gives us all the space and the confidence to work freely to reach a settlement.

Other formal matters and useful preparation

Conflict Check - I don't know either of the Participants and I don't believe I am conflicted in any way

My Role – I will not decide the case and I will not act as a judge, arbitrator, adjudicator or any form of decision maker, nor will I offer legal advice. I won't give a view on the merits of each of your cases, or the strength of your arguments or the likelihood of success at trial. My role is to help facilitate a settlement of the Dispute between the Participants which they can live with and own. I will listen carefully to everything that is said and use the information to assist you to help you build a solution.

Comments on the Issues - once I've received and considered the above, if there's time, I may circulate a neutral note of issues for agreement, to focus our discussions at the meeting. The note will include any issues and comments agreed by you for disclosure.

Expectations for the Meeting - sometimes I find the differences between the Participants are so great that it's unrealistic to expect a full resolution in the time allotted (hopefully that won't apply here!). This is one of the reasons why I like to spend time engaging with you in detail in the lead up to the Mediation Meeting.

Proposals for the Meeting - I usually find it helps greatly if each of you / your legal advisors come to the meeting with a written without prejudice confidential proposal which I can then discuss with each of you privately at the start of the meeting. I find that by preparing this before the meeting it helps you focus on moving forward and thinking about settlement. I think it would be extremely helpful here, if you could each confidentially email me before the Meeting a proposal you might find acceptable to start negotiations. This will be for my eyes only.

Draft Tomlin Order / Settlement Agreement - I find it is helpful for Solicitors to bring a draft [side letter/ Deed of Variation/]Tomlin Order/Settlement Agreement to the Meeting.

Authority to Settle the Dispute - It is essential that you and / or the Participants have full authority to settle the Dispute at the meeting, rather than having to refer elsewhere. If you need to refer to anyone else for a decision of whatever nature, please make sure they are available throughout the Mediation Meeting and please let me know their name and status and the extent to which their authority is needed, in good time before the meeting. This is a key element of the success of the meeting. I've found on occasions that time is wasted during the meeting because this has not been made clear when a decision is needed (sometimes for tactical reasons). If there are any limits to anyone's authority, please let me know the level / amount in good time before the meeting.

My Costs – have been agreed by you at £[ ] + vat, per party (this includes the pre mediation meeting, the main meeting, prep and staying in touch for 7 days after the meeting if it doesn't settle on the day) to be paid in cleared funds as follows [: the first half before the pre mediation meeting and the

second half before the mediation meeting]. My overtime rate, beyond [ ]pm on the meeting day is £125.00 + vat per hour per party. If there is any overtime I'll invoice you direct, immediately following the meeting, for payment within 2 days.

Attendees at the Mediation – if you would like any additional attendees to those listed at the start of this Briefing Note, please email me names, capacity & email address in good time before the meeting so I can send them the Zoom Invite before the Meeting . Please don't send them the Zoom Invite direct.

The Procedure at the Mediation Meeting - This is how I usually conduct the mediation, although we can adapt this if you wish as it is your process, not mine. Feel free to raise questions now or as we proceed.

Introductions / Open Meeting - If we start with an open [Zoom] meeting, and we'll discuss at the Pre- Mediation Meetings if this will be ok with you, I usually start by inviting everyone into a main room for an initial open meeting where we introduce ourselves, explain our role in the mediation and agree these ground rules. I prefer to use first names, and for one person at a time to speak so we can all listen carefully to what everyone says. [As you know each other well we won't need to be 'formal'] Sometimes people prefer not to sit in the same room (even for an opening meeting [or an opening Zoom meeting]) and for me to shuttle between them for all of the mediation. That's fine if it is the most productive way of proceeding. If that's the case, please let me know at the Pre-Mediation Meeting or when we speak on the phone, to avoid any embarrassment on the day. However as a Zoom meeting doesn't require you to sit in the same room physically, only virtually, I'd encourage you to start with an open session if we're meeting on Zoom.

Opening Statements – If we start with an open meeting I'll invite each of you and the Participants to summarise what you hope to achieve from the mediation (not by giving specific sums or outcomes at this stage, but in general terms) This gives you the opportunity to say exactly what you wish to say: Your own words and intonation can never be accurately portrayed in writing or by someone else. If we don't start with an open meeting I'll invite you to summarise your aims before the meeting.

Discussions in Open Session / Looking for Common Ground - If we start with an open session I may then facilitate an open discussion between you, perhaps using a circulating document which may contain proposals you wish to make. My aim at this stage is to understand what if any common ground there may be and what alternatives are open to you all.

Caucuses / Private Sessions /Confidentiality - I'll then speak to each of you privately, in what we call a caucus. You will each have private [ virtual ] rooms set aside for you. I'll go back to each of you in turn, clarifying points and exploring possibilities until I think you have the basis for an agreement. In these discussions it is essential that you speak frankly to me. Anything that is said to me in private session will be confidential between me and the people I am then with, unless they specifically authorise me to repeat what has been said. Please remember that you should not ask me about conversations in the other [virtual] room.

Brainstorming / Shuttling - Sometimes I invite you to brainstorm: to come up with without prejudice suggestions that might help resolve outstanding issues, even if they might not be your preferred solutions. I may do this in open session or privately. Use me as a sounding board in private sessions to talk through ideas and bear with me if I ask challenging questions. I may appear to be the devil's advocate, but please remember you don't have to answer my questions. I'm not a judge. The questions I ask will be intended to clarify my or your understanding of the issues and to test the

arguments, to see how you think they may stand up against objective criteria, and to examine all the options, even if you initially think they may not work.

I may ask about the substantive issues, about costs or evidence, about the legal advice or the risk assessments that have been conducted, or the percentage chances of success that you or the Participants are expecting. There may be different questions that arise as we go through the mediation. I will not seek to embarrass you and I will deal sensitively with particular points as necessary.

Please note that although I may shuttle between you, I will not simply be a messenger. I do not believe that is an effective way to help you. I will try and add value wherever possible, although I'm sure there will be times when you will feel little progress is being made. This is normal, so please don't be put off by this, as often I can see progress when the participants cannot! If a solution is to be reached it will require hard work, patience and compromise from all sides. Often I can see progress when you don't think there is any!

Offers - If an offer is proposed in a private session I'll ask you or the Participants to write it down so they own it and so there is no doubt, and either I will deliver it to the other Participants [or it can be passed across the table by you in open session, whichever you or the Participants prefer]. Please make credible offers that will have traction. They're more likely to be reciprocated.

If it is a fact or statement I may note it, and then check with you before leaving the room.

Time with each Participant - I prefer to remain with you as much as possible so I understand how your thinking is developing. (This might include when you are taking instructions, if you wish me to - or if you wish to talk privately that's fine,) Sometimes I might simply be like a ghost in the [virtual] room. I'll say nothing to the Participants in the other room, about what I hear so the benefits are entirely with the Participants I am then with. All this speeds up my understanding and therefore my ability to help you resolve matters. I will therefore encourage you to let me stay as much as possible, but I won't be offended if you ask me to leave.

Notes - I'll make notes during the mediation, in a face to face mediation, and I may ask you to write on my notes the terms of any offer you wish to make. When the mediation is finished I will destroy my notes. I will also return any papers except the signed mediation agreement.

Points on the Documents - Please assume I've read and understood the papers sent to me but feel free to draw to my attention any particular points. My aim is not to re consider the documents or the legal arguments at the meeting, as this would take up valuable negotiation time. The plan is to start moving forwards and keep moving forward towards settlement as soon as possible.

Settlement – If / when we've reached a point where it appears there's a settlement I'll ask one of you to draw up a draft agreement or order, and invite the Participants to sign it if it's fully understood and if it reflects what you have agreed. I'm happy to comment on any draft prepared, but this won't involve giving legal advice. As I mentioned earlier, it would be good if either of you could prepare a skeleton settlement agreement which could then be adapted as necessary at the mediation meeting.

Legal / Financial Advice – It's not my role to protect the Participants from entering into an agreement or settlement that might not work for either of them. The Participants should take separate legal, financial or other advice as appropriate. I'll allow time for this advice so if there is

anyone you wish to refer to during the mediation, please make sure they are available throughout the meeting and let me know their name and status in good time beforehand.

Leaving the mediation – As this is a voluntary process anyone can leave at any time. However if someone does wish to leave I'd ask that you let me speak to you privately for 5 mins so we can confidentially discuss the reasons. Sometimes, just like the darkest, coldest part of the night just before dawn, there's sunlight moments away, and it's difficult for anyone other than the mediator to see it. So please respect this rule: it is very helpful.

Time Available / Overtime - On the Mediation Day I'll be available from an hour before the meeting on my mobile (07776 141 717) and I'll aim to arrive at the [Zoom] meeting [10 ] minutes before the start. My experience is that most mediations settle in the time allowed, if sufficient preparation has been done beforehand and if we start negotiating early. As I've mentioned earlier, I think this preparation is crucial to the chances of success of the Mediation on the day. If we're making good progress by the time the meeting is due to end, I'm happy to discuss extending the time. Please bear in mind that the time at the mediation meeting passes very quickly and it's important that we all keep focussed on the aim of reaching a settlement the Participants can live with. It's also important that we have regular breaks during the meeting.

Observer – It would be normal for a newly qualified / trainee mediator/peer reviewer to attend the mediation as an observer. I trust this is ok with you. They will of course sign the mediation agreement.

Feedback – I value your comments and feedback - an emailed 2 minute electronic form will be sent to you after the meeting and I'd be grateful if you could complete this promptly (otherwise it rarely gets done!) Thanks in advance.

Post Mediation- if there is no settlement – if the matter doesn't settle on the day, as mentioned above, I stay in contact with you for 7 days without further charge for calls and emails, to try and help you reach a settlement. After 7 days I'm happy to continue to help if you wish, at an hourly rate of £125 + vat per party

I look forward to seeing you [online] on the Mediation Date, and speaking/ [online] meeting beforehand.

Kind Regards

Roger Levitt

Schedule

Successful mediation requires good thinking and good preparation.

Some points you may wish to consider before the mediation meeting are set out below. Not all of these will be relevant to the Dispute but you may be surprised by how many of them will be.

I find it greatly helps me to think around possible solutions in advance if I am well briefed.

That said, you need to persuade each other (not me), with your Solicitors assistance and my facilitation, that a particular settlement is better than going to court, or prolonging existing proceedings. How that process of persuasion is facilitated is one of my key tasks as the Mediator.

While I'm confident a solution can be reached at the mediation meeting, with my assistance, it will be your solution that you discover and own, not mine

So, I would be grateful if you could each email me a confidential note (or if you prefer you can speak to me, as far before the meeting as soon as possible), setting out your thoughts on all or any of the matters below which are relevant for you and discussion of the Disputed Commercial Issues.

1. What you wish to get out of the meeting (e.g a settlement at all costs on the day, to isolate the main issues for a settlement to be achieved in the coming days, or possibly to isolate issues for continued litigation)
2. If you achieved that what would it mean for you?
3. What do you need to do a. before and b. at the meeting, to achieve this?
4. What if anything do you need to say to the other party to help achieve this?
5. What if anything do you need to hear from the other party which would help you achieve this?
6. What if anything do you think the other party needs to hear from you which would help them and you achieve a realistic outcome for all?
7. What are your main concerns at this stage?
8. What do you think are the other party's main concerns at this stage?
9. Issues on which you believe there is common ground, or could be with a small movement from either side.
10. What you think are the issues and interests which need to be met (rather than what you want)
11. What do you think are the realistic options for resolving the outstanding issues
12. If the relationship is to be repaired, or that process started, what needs to be done?
13. If the relationship is not to be repaired what needs to be done?
14. If you can't find a mutually acceptable solution what will happen to you? i.e what is your BATNA (Best Alternative to a Negotiated Agreement)
15. What is your WATNA (Worst Alternative to a Negotiated Agreement)
16. What do you think will be the consequences for the other party if this isn't resolved?
17. Reflecting on these questions:-
  - 17.1. What might you be prepared to offer or accept in order to settle this at the meeting
  - 17.2 What would be an outcome with which you can live? (we can discuss this as I understand this information goes to the core of the Dispute and participants are often unlikely to "disclose their bottom line" to me at an early stage – even if on a confidential basis- but the more we can talk, the more I hope you and they can share with me confidentially so the greater my understanding can be of "where each party is coming from").
  - 17.3. In what circumstances, if any, might you go further than that to achieve a settlement?
  - 17.4. What, if anything, if offered (or not offered) by the other Participant, would make you think the meeting is not worth continuing, or even make you walk away.
18. How much time and money:
  - 18.1 Have you spent so far on the Dispute?
  - 18.2 Do you believe you would need to spend to take this to trial ?
  - 18.3 Please have a schedule ready for the pre mediation meeting
19. To what extent have you carried out a risk assessment of the strengths and weaknesses of your case (and the other Participant's)
20. If you have Counsel's advice, what percentage chance of success have you been given?
21. Is there anything else you'd like to tell me about the dispute and how it might be settled? For example matters of ego, pride, principle or emotion involving the Participants or someone else not directly involved in the dispute.

I appreciate these aren't easy questions to answer! (some if at all!) and I often find that people don't get round to considering them before the Meeting as they take the view 'we can resolve it all on the

day' I would encourage you to think about these questions as soon as possible and then either send me your thoughts in a note or speak to me before the Meeting day. The more information and input you can give me the greater help I can give, and the more productive the meeting will be. The more it will help you resolve the Dispute.

I'll acknowledge receipt of any confidential note so each participant knows, but I will of course not disclose its contents. I won't bring any confidential notes to the open meeting and I'll shred them following the mediation.

Successful mediation also requires the right approach/ mindset.

Some thoughts on this are set out below and I recommend participants reflect on these before meeting.

The importance of emotional intelligence / having the right mindset

Please come prepared to make peace, not war. Consider the importance of understanding any emotional drivers in the dispute – not just the legal, evidential and factual issues. If you come to the meeting in the right mindset, the chances of settlement will be so much greater.

Emotions – the Dispute may well have generated high emotions. As far as you can, try to put emotions to one side for the duration of the mediation. Each Participant has an important part to play in trying to resolve the Dispute. If you can do this collaboratively it will have a greater chance of reaching a settlement, than if you work against each other

Invest in the process – it is tried and tested so go with it. This is your best opportunity to reach a settlement before litigation escalates

Accepting Responsibility / Going the extra mile / Suspending Disbelief - I've found it's crucial for any settlement that each Participant accepts responsibility for their own actions leading to the Dispute – and their share of responsibility for finding a settlement. Please remember that I don't have a "magic wand" but I can help you find a solution if you are willing to "go the extra mile". This means you should be prepared to go beyond your comfort zone: Try and "suspend disbelief" for the day: This is not easy. You should think very carefully before coming to the meeting if you are only prepared to negotiate / settle "on your own terms", as you will inevitably find it is much less productive. In other words if either of you do that, the process won't work.

If you have any further questions about preparing for mediation please do not hesitate to contact Roger Levitt