

Mediation: a quick guide

What is mediation?

A form of alternative dispute resolution which is:

- voluntary;
- confidential; and
- very flexible (this is a key benefit – the parties can choose the approach, timescales etc).

A neutral third party (a mediator) works to facilitate an agreement between the parties to settle their dispute. The parties retain control of the process and decide whether or not to settle and on what terms.

Preparing for mediation

Step 1: Start a mediation

- The parties can agree to mediate;
- The parties' contract may include a mediation clause; or
- Section 7 of the Technology & Construction Court Guide encourages parties to consider types of alternative dispute resolution and in particular mediation.
- An unreasonable refusal to mediate may give rise to cost sanctions – see *Halsey v Milton Keynes General NHS Trust*.

PARTIES
MEDIATE

Step 2: Select a mediator

This can be:

- By agreement;
- Set out in the contract; or
- By asking a third party (eg a mediation service provider) to nominate.

Parties will then need to agree the mediator's terms and conditions.

Step 4: Plan for mediation

- Prepare case summary / position statement along with any key supporting documents. Exchanged by the parties and sent to the mediator;
- Contact with the mediator, usually by way of a brief (scheduled) telephone call for each party, to identify key issues;
- Select mediation team, to include a representative from each party with the authority to agree a settlement;
- Prepare strategy, including settlement parameters and any opening presentation; and
- Prepare a draft settlement agreement to take to the mediation.

Step 3: Sign a mediation agreement

- Usually provided by the mediator;
- Contains confidentiality provisions;
- Apportions the mediator's fees (usually equally between the parties but parties are free to agree otherwise); and
- Usually circulated in draft in advance and signed on the day of mediation.

Attending mediation

Step 5: Mediation session

- The format the session can take is entirely flexible and many different approaches can be employed depending on the circumstances and the parties' wishes;
- Each party will usually have its own breakout room;
- The mediator will typically formally open the mediation with a joint session, at which the parties may give opening statements, setting out their positions;
- Thereafter, the mediator may have private discussions with each party to facilitate negotiations and to try to assist the parties to reach a settlement;
- As well as private sessions with the mediator, there may also be sessions between the parties' key decision makers or sessions just between the parties' lawyers or experts, to try to agree certain points; and
- A mediation could last anything from a matter of hours to a matter of days.

Flexibility - The parties can decide on the format and structure of the mediation session.

Exploration

Discussion

Negotiation

Mediation outcome

Step 6: Settlement

- If the parties reach a settlement, it is advisable to sign a settlement agreement (to include all terms agreed between the parties, not just the settlement sum value), if possible, at the mediation to bind the parties.

OR

Step 6: No settlement: some options

- Sometimes a mediation will result in agreement on certain points only, not the whole of the claim eg liability may be agreed but not quantum.
- The parties may agree to a further mediation or use the progress made at mediation to continue settlement discussions, either through the mediator or directly.
- A different form of alternative dispute resolution proceedings could be considered.
- If the mediation was a pre-trial effort to avoid a full hearing (and the related costs exposure), the existing proceedings may have to continue.