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# The Mediation Day

## What To Expect

Alistair Pye - 27 April 2014

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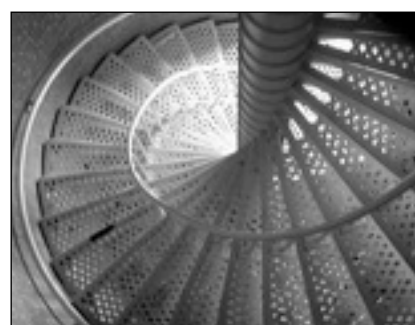
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## The Mediation Day - What To Expect

This is an explanation of the process of Mediation and the way I like to conduct them. It is intended for the Participants (the parties to the dispute) to read so that they have a understanding of what to expect. If anyone has any questions please feel free to email me at [mail@alistairpye.com](mailto:mail@alistairpye.com).

### My Role

My role as Mediator is not to decide the case or to offer legal advice; it is simply to use my skills and experience to assist the Participants in finding a mutually acceptable settlement



for their dispute. I will listen carefully to everything that is said and use the information to encourage the Participants to identify a permanent resolution.

The Participants need to look to persuade each other that a particular settlement is a better alternative than going to court or having a long-running dispute. How that process of persuasion is facilitated is one of my key roles as the Mediator.

### The Process of Mediation

A few words about how I like to conduct Mediations.

#### Initial private sessions

I begin by seeing each Participant and their lawyers and supporters (if any) in private for an introductory session where I will explain the process. I will summarise the Mediation Agreement and ensure that it has been signed, and remind you that the process is confidential and without prejudice – thus no lawyer or Participant (nor anyone else present) may refer to what is said during the Mediation at any time or in any other place.

I will remind you that I will not discuss the Mediation with anyone, and that no-one may call me as a witness before any court or tribunal to say what went on. I will be neutral and

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impartial and to do this I must be wholly outside any litigation. This safeguard in the Mediation Agreement and it is important because it reinforces my complete neutrality.

I will also ask the Participants to confirm that they have authority to settle the claim. I would be grateful if you could ensure that you will be in a position to answer that question positively. If there are any limits to your authority to settle (for example a financial limit which can only be changed by referring to someone not present) then I need to know that.

Finally, I will explore what each Participant seeks to achieve from the day and have an initial discussion about how that might be achieved. As I will have read all of the papers provided to me in advance I usually ask some questions about the issues in the case. One question that I generally ask is the amount of legal costs spend up to the Mediation and the estimate of costs to be spent to the end of a trial, if the Mediation is unsuccessful.

These initial sessions usually take about 20-30 minutes for each party.

### Joint session

Following the initial private sessions, unless anyone has any objections or it does not seem appropriate, I will invite everyone to the main room for a joint session (sometimes referred to as a plenary session). I usually ask those present to agree some ground rules. Usually those attending agree to use first names, to avoid personal accusations, and not to talk over each other.

I will invite each of you to summarise in turn what it is you hope to achieve from the Mediation. I will not ask you to state specific sums of money or remedies at this stage but ask you to talk in general terms. I am very flexible in my approach to joint sessions and I encourage the Participants to speak, as well as their lawyers, and to address each other directly, as this can often be very beneficial to the process. I may (if it seems appropriate) try to facilitate a discussion between you in open session. Initially I shall look to understand what if any common ground there may be and what alternatives are open to you all.

One issue that I may well touch on in joint session is the amount of legal costs that each side has spent and will spend if the case does not settle, and the potential liability for the opponent's costs following an unsuccessful outcome at trial. This is often helpful as it starts to focus minds clearly on what is potentially at stake in the dispute - a theme that I will explore further over the course of the Mediation.

People sometimes find that it is more helpful to move to private rooms quite quickly, and for me to shuttle between them for most of the Mediation. I shall make suggestions based upon what appears to me to be most helpful at the time.

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It is not possible for me to predict in advance how long a joint session may go on for; it entirely depends upon the dynamic that develops. However, I shall stop the session if at any point I consider that it is becoming detrimental to the process. Equally, if you are not comfortable with the joint session then you may terminate it at any time.

### **More about private sessions**

My practice is that anything said to me in private session will be confidential between myself and the people I am then with – unless they specifically authorise me to repeat what they have said in the other room. This is an important safeguard for you as it should enable you to be candid with me about your position, which greatly benefits the process.

In that context, if it is an offer, I may ask the person making it or their lawyer to write it down so there is no room for doubt about the terms.

If it is some other fact or statement, argument or other message, I may summarise it in my own words – but I will check with you that I have done so correctly before leaving the room.

You will appreciate that you should not ask me what I have been told in private session in the other room. I shall not disclose that information unless authorised to do so.

I prefer where possible to remain with the Participants as much as possible so that I can get a feel for how their thinking is developing. This includes when you are discussing the case with your legal team, when I will say nothing at all. I will therefore encourage you to let me stay with you as much as possible, but of course will not be offended if you ask me to leave.

### **General points about the process**

I am happy to listen to as much detail or history as you think will assist the process but you may take it that I have read and understood any papers sent to me in advance. You should also understand that it is not me that you need to persuade, it is your opponent, so there is limited benefit in providing me with long accounts of the history of the dispute.

I have no objection, however, to having my attention drawn to particular points, legal principles or documents although you should bear in mind that seeking to persuade me on any particular point will serve no useful purpose.

In either private or open sessions I will probably ask some challenging questions, adopting a devil's advocate role. Please remember that nobody has to answer my questions – I am not a judge. The questions I ask will be intended to clarify my understanding and to reality test the arguments, to see how you think they might stack up against objective criteria, and to look at options and alternatives that may be open.

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I may ask about the substantive issues, about costs, or evidence. Or there may be wholly different questions that seem or become relevant. I shall not seek to embarrass you or your legal team and shall deal sensitively with particular points.

Frequently I will explore with you your options and how matters might proceed if no settlement is reached. In this context it is important that you are able to provide information regarding your legal costs to date, and your expected costs to a trial or arbitration. I will also ask you about your funding arrangements, for example whether you are proceeding under a Conditional Fee Agreement, and whether any before or after the event legal expenses insurance policy is in place.

## Settlement

It is very important to consider how any settlement might be framed in a written agreement prior to the Mediation. Drafting a Settlement Agreement from scratch at the end of an exhausting day can be extremely hard work. I therefore encourage the lawyers to come to the Mediation armed with a skeleton agreement or consent order which addresses the drafting points that they consider to be important or desirable (for example, confidentiality, non-admission of liability, methods of payment, bank details etc). They should also ensure so far as possible that they have a notebook computer and access to printing facilities.

Once we have reached a position where we have a settlement, then I will ask the lawyers present to draw up a draft agreement or order, and all of you to sign it if you are sure that you wish to do so and understand the terms of the settlement.

It is not for me to protect the Participants from entering into an agreement or settlement which is disadvantageous to them – if you are not confident about the offer or agreement then you should take such advice as you consider appropriate.

I generally prefer to stay until the Settlement Agreement has been signed. However in straightforward cases where there is very limited scope for arguing about the content of the Agreement I shall leave the Mediation at that point providing that all are happy for me to do so. This is sometimes important to the parties where settlement occurs at the end of the scheduled Mediation day so that if I remain during the drawing up of the Agreement then additional costs for my time will be incurred.

## Leaving the Mediation

Mediation is an entirely voluntary process. If there comes a time when you feel that you wish to leave the Mediation then I would ask you to agree to give me ten minutes to discuss the reasons with you. Sometimes it is difficult for anyone other than the Mediator to see that a breakthrough may be close. I will ask you to agree to that rule.

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## No Settlement on the Day

In the unlikely event that the Mediation does not lead to a settlement on the day, experience shows that most then reach settlement within a few days thereafter. However, any offers made during the Mediation will lapse at the end of the Mediation. If you wish an offer to remain open until some later time after the Mediation then many people say that it is helpful to write it down and express it in such terms at the end of the Mediation session. It is sometimes said this avoids ambiguity and confusion but it is a matter for you.

In appropriate cases I am very happy to continue to assist in any way I can after the Mediation day has ended, by telephone. However, I do so on the strict understanding that any such assistance is subject to the terms of the Mediation Agreement and as though the Mediation process is continuing until I conclude that my continuing involvement can serve no useful purpose.

## Time Available

I am available for the period of time that the Participants have chosen when appointing me (either no time limit, 8 hours or 4 hours). Providing that an appropriate period for the size and nature of the dispute has been selected, then experience shows that most Mediations are capable of settlement within that time frame. If, however, we are still making progress then I will be happy to discuss with you allowing more time. I would remind you, however, that a Mediation can be quite exhausting for the Participants and people do become tired.

## Questions and Communications

I am happy to discuss administration before the Mediation. I am happy to answer questions about process. If you are legally represented please ask your lawyer to call me on 07766607779, or email me at [mail@alistairpye.com](mailto:mail@alistairpye.com). If you are not legally represented you should not hesitate to contact me yourself.

In most cases, where I have time, I contact each party's lawyer before the Mediation for a preliminary discussion, which is an opportunity for me to learn about any specific points you or your lawyer consider to be relevant but which are not obvious from the documents supplied to me.

It is my policy to acknowledge pre-Mediation emails and phone calls by telling all those involved that I have had some communication and the sort of contact it was – but not the content.

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## Confidential Notes to me before the Mediation

I am happy to receive before the Mediation confidential communications setting out (in as much detail as you wish) how a Participant or their lawyer thinks the Mediation should resolve, what they may be prepared to offer or accept, or what they are looking for at the Mediation. If you choose to send me such a confidential note I will acknowledge receipt to all parties but I shall not, of course, disclose its contents at any stage. I will not bring any confidential communication to the joint session and will shred it once the Mediation is over.

I am happy to receive such information on the day of the Mediation if you prefer.

## Costs

Please would you come to the Mediation prepared to tell me (confidentially if you wish, but I will ask you to share it with the other side) your costs to date and estimated future costs to the conclusion of a trial.

I hope this is a useful introduction and I look forward to seeing you at the Mediation.

**Alistair Pye**