

MEDIATION

WHAT IS MEDIATION

Mediation is a form of dispute resolution. It is used when parties have a dispute with one another, often as part of more formal court proceedings.

A mediation may be in person or may be virtual. In both cases the parties are separated from each other and in either format the mediator speaks with each party in turn, helping each party to understand their own position in the pursuit of trying to reach a compromise.

Mediation is a voluntary process. You are free to leave a mediation at any time, although it is hoped that a discussion would be had with the mediator first.

It is important to understand that the mediation belongs to the parties, not the mediator. The mediator runs the mediation but it is the parties which set the agenda.

Mediation is also confidential and without prejudice.

WHAT IS A MEDIATOR

The mediator is a neutral third party who has undergone training to assist parties with mediation of their disputes.

It is important to understand that there is no property in the mediator; that is the mediator owes no duty to either party and neither party can instruct or give the mediator an order.

The mediator is not there to give any advice nor to tell the parties what to do nor give any form of opinion on the dispute between the parties. The mediator is there to assist each party in turn to understand their own position which in turn will promote a commercial resolution to the dispute.

To do this the mediator will spend time speaking with each party, by convention often starting with the claimant. It is always tempting to read something into how long the mediator spends with one party or another. In reality the length of time spent by the mediator with a party is no indication of anything other than the mediator considers that there is a need to spend time asking questions in order for understanding to be found.

WHY MEDIATION

Where a dispute is being dealt with by a court, the judge will be very restricted in most cases as to what can be ordered as a remedy at law. Often the remedy is a financial sum.

Mediation on the other hand is a consensual process between parties allowing them to come to any agreement they wish (as long as it is legal) in order to resolve their differences. This is often to be preferred simply because an agreement made consensually is, more often than not, complied with voluntarily. Where a court orders a remedy there is often a need thereafter to spend more time and money taking enforcement action.

Court proceedings are a matter of the public record. What the court orders will be available publicly. Mediation on the other hand is private, confidential and without prejudice.

CONFIDENTIALITY

Mediation is a confidential process. This means that whatever you say to the mediator is confidential between you and the mediator; likewise for the other party. Confidentiality is assumed. If you want the mediator to convey a piece of information or say something in particular to the other party you must ask them to do so.

Sometimes the mediator may feel that the sharing of a piece of information would be beneficial to the mediation as a whole and will ask for consent to convey that information across. It is entirely up to you whether you agree with that or not.

The mediation as a whole is also confidential. That is, you should not to make public anything that is said or discussed during the mediation. However, the existence of the mediation is not confidential. This can be important if a matter fails to settle at mediation and proceeds to be adjudged by the court. The fact a mediation occurred (but not what was said) may then be put before the court on the matter of costs.

WITHOUT PREJUDICE

A mediation is said to be “without prejudice”. This means that anything stated in the mediation cannot be used in open court. This is to allow parties to speak freely and promote compromise, rather than have parties worry about the implications of releasing a piece of information in case it is used against them later in the court proceedings and to guard against one party using the mediation as a fishing trip for information.

WHAT TO EXPECT

You may not have been involved in a dispute before and may not have ever heard of mediation.

Mediation can be as formal or as relaxed as each party wants it to be. The parties are in separate rooms (either physically or virtually depending on the type of mediation) and do not have to see one another. It is also the case that the parties can ask to meet, that is the flexibility of the mediation process.

However the mediation is to take place, you should ensure that you are dressed comfortably, and if the mediation is virtual, that you are somewhere where you are set up appropriately to be able to engage and take part in the mediation and have any refreshments available to you. If it is of benefit then you can ask the mediator to test any virtual meeting app (such as Zoom or Teams) before the mediation proper to ensure that the systems work properly.

Once the mediation starts then the parties will continue until agreement is reached or time runs out. If time runs out but the parties feel they are close to a resolution then they may discuss with the mediator carrying on to see if agreement can be concluded.

If you are in any doubt about anything, just ask.