

# trustmediation

~ not-for-profit dispute resolution ~

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## mTD RULES – March 2010

*These are the Rules referred to in the mTD Agreement. The Rules also deal with the Participant's responsibility for fees and conduct after the mTD, and all Participants are recommended to take legal advice as to their meaning and effect before signing an mTD Agreement.*

### 1. INTERPRETATION

#### 1(1) Definitions

In these Rules, the following terms shall have the following meanings:

- (a) "Trust Mediation" means Trust Mediation Limited.
- (b) "Director" means the designated voluntary director of Trust Mediation Limited responsible for the overall administration of the corporation.
- (c) "*mediated Telephone Discussion*" means "*mTD*" and both phrases mean a telephone discussion scheduled by the Participants and the Mediator on a specific date and time pursuant to the *mTD Agreement* and conducted by the Mediator as mediation in so far as that is possible by telephone.
- (e) "Registrar" means the designated individual at Trust Mediation, in charge of booking *mTDs* and mediations, of dealing with fees, and all administration.
- (f) "Mediator" means a member of Trust Mediation's panel of mediators, appointed by Trust Mediation's as a neutral to conduct the *mTD*. The Mediator is an independent contractor chosen by or agreed to by the Participants with whom or with whose firm or company they contract for services rendered; further details appear in the Schedule to the *mTD Agreement*. The Mediator is not an employee of Trust Mediation.
- (g) "*mTD Agreement*" means a contract for a *mediated Telephone Discussion*.
- (h) "Participant" means a Participant or party to a dispute, claim, or action.

- (i) "Representative" means the Solicitor, or Counsel, or an authorised representative of the Participant.
- (j) "Settlement Agreement" means a document signed by the Participants or their Representatives at the conclusion of the *mTD*, setting out agreed terms of settlement which are legally binding.

## 2. AGREEMENT OF PARTICIPANTS

- 2(1) These Rules, and all amendments to them, shall be deemed to have been made a part of the *mTD* Agreement.
- 2(2) Subject to approval by the Director, these may be varied at any time by a written agreement signed by the Participants and the Mediator.

## 3. FUNDAMENTAL PRINCIPLES OF THE *mTD*

3(1) The *mTD* will be **strictly private and confidential**<sup>1</sup>;

3(2) Any and all concessions, offers, discussions, comments, words, proposals, or other matters written or said at or during the *mTD* shall be **without prejudice**;

3(3) **Nothing said or done at or during the *mTD* will be referred to**, described, mentioned, or relied upon outside the *mTD* by anyone participating in the *mTD* including the Mediator unless (a) it is embodied in the terms of a Settlement Agreement which is written and signed as part of the *mTD* or, (b) quite exceptionally, the High Court or Crown Court orders disclosure to investigate criminal or other serious misconduct;

3(4) **The *mTD* will terminate after the agreed time window** unless the Participants and the Mediator agree to extend it or the Mediator decides to terminate it at any other time in the Mediator's absolute discretion;

3(5) **The Participants (jointly or severally) shall not call, or seek to have called, the Mediator** to be a witness in any proceedings relating to the *mTD* or any Settlement Agreement reached at or following the *mTD* nor shall the Participants (jointly or severally) sue the Mediator or ask the Mediator to disclose or to attempt to recall anything said or done at the *mTD*;

3(6) If, exceptionally or contrary to (e) the Mediator receives a summons or is in some way ordered by a Court or Tribunal to deal with any matter, **the Participants agree that they shall jointly and severally wholly indemnify the Mediator** in respect of any and all costs, fees, expenses, and disbursements reasonably incurred by the Mediator in so acting, and the Participants shall further jointly and severally be liable promptly to pay on presentation of a fee note for the Mediator's time reasonably engaged on the matter, in any event, regardless of the outcome; and

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<sup>1</sup> Further provisions on confidentiality are to be found in paragraph 6(4) and Section 7.

3(7) **The Mediator will conduct the mTD as Facilitative Mediation:** the mediator will not advise the Participants and the Participants acknowledge and agree that nothing said or done, mentioned or asked, by the Mediator shall be taken to be, relied upon or construed as legal or other advice of any sort. Participants agree that in either signing a Settlement Agreement at the end of the mTD, or in declining to settle, they will be taken to have wholly and exclusively on their own judgment and/or the advice of their chosen advisers or representatives.

#### 4. CASE SUMMARIES

4(1) Each Participant shall normally send to Trust Mediation's Registrar a Claimant's Case Summary Form or Defendant's Case Summary Form, with key documents prior to the mTD

4(2) Each Participant may also prepare a confidential summary to be supplied to the Mediator which will not be disclosed to the other Participant.

#### 5. AUTHORITY

5(1) Unless otherwise agreed, the Participants and/or their Representatives shall participate in the mTD with authority to settle.

5(2) If a Participant has authority to settle but only up to a certain level the Participant shall disclose the existence of this restriction (but not what that level is) to the Mediator before the mTD begins.

5(3) If a Participant requires the approval of some other person not present, whether for any settlement or simply above a certain level, then that Participant shall tell the Mediator before the mTD begins whether the person with authority who is not present can be contacted during the time available for the mTD.

5(4) In the event that the person not present with unrestricted authority is not likely to be available during the time available for the mTD then the restricted Participant shall disclose this restriction (but not the level) to the other Participant and offer them the option as to whether they wish to proceed with the mTD.

#### 6. THE CONDUCT OF THE mTD

6(1) The mTD comprises a series of telephone conversations, as the Mediator calls one party, then the next and so on. By prior arrangement with the Mediator the Mediator's first telephone call to the Claimant's solicitor can be by conference call to the solicitor and the client.

- 6(2) During the *mTD* the Mediator will endeavour to engage the Participants/their Representatives in structured negotiations and the Participants/their Representatives shall participate in such negotiations.
- 6(3) Each Participant shall co-operate and negotiate in good faith with the Mediator. All Representatives agree that they shall continue to abide by their profession's applicable Code of Conduct during the *mTD*.
- 6(4) Each telephone conversation is private and confidential as between the Mediator and that Participant/ Representative. The Mediator will not pass information from one Participant/ Representative to another without the express permission of the Participant/ Representative providing the information.
- 6(5) Exceptionally, at the Mediator's option and with the agreement of all concerned, the Mediator may convene a telephone conference of all Participants/Representatives.

## 7. PRIVACY AND CONFIDENTIALITY OF THE MEDIATION<sup>2</sup>

- 7(1) Subject to Section 8(1), all offers, promises and proposals, actions, determinations, representations and statements (including but not limited to admissions) made or transmitted in the course of the *mTD* by any of the Participants or Representatives or by the Mediator, and all notes, documents and reports prepared or exchanged during the *mTD* are "without prejudice" and for the purpose of negotiation only.<sup>2</sup>
- 7(2) Such offers, promises, proposals, conduct, statements, notes, and documents shall not be disclosed to any third party and they shall not be offered as evidence in any arbitration, judicial or other proceeding.
- 7(3) Notwithstanding Rule 7(1), evidence that is otherwise admissible shall not be rendered inadmissible simply because it has been used in an *mTD*.
- 7(4) There shall be no electronic recording, stenographic or other transcribed record made or reconstructed of the whole or any part of the *mTD*.
- 7(5) Any notes of the Mediator are confidential to the Mediator and shall be destroyed by the Mediator immediately after the *mTD*: they shall not be available to the Participants at any time, nor shall they be subject to subpoena for production as evidence in any arbitration, judicial or other proceeding.

## 8. SETTLEMENT AGREEMENT

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<sup>2</sup> See also paragraph 3(1).

- 8(1) No settlement or agreement reached at the *mTD* shall be binding in law or deemed as intended to be binding in law unless it is reduced to writing (or printed text) in some suitable form (which may for example include heads of agreement or, a draft Order) and signed by all of the Participants who intend to be bound by it before the *mTD* has been terminated.
- 8(2) Nothing in 8(1) shall stop Participants agreeing during the *mTD* to settle or agree to anything on any unrecorded or unsigned basis always providing they accept and appreciate that such a settlement or agreement shall not by reason of Section 7 above be capable of being relied upon at a later date.

## 9. TERMINATION OF A *mTD*

- 9(1) A *mTD* shall be terminated:
- (a) by agreement between the Participants; or
  - (b) if a Settlement Agreement is concluded by the Participants; or
  - (c) at any time if in the Mediator's absolute discretion the Mediator believes it ought to be terminated: in such an event the Mediator shall not give any reason for the termination of the *mTD* and the Participants hereby undertake not to ask or to pursue the Mediator for the reason at any time or by any means.
- 9(2) Once the *mTD* has been terminated then, if the Participants continue to negotiate, their negotiations and any subsequent settlement will not be concluded under these Rules or under the *mTD* Agreement.

## 10. EXCLUSION OF LIABILITY/ PROCEEDS OF CRIME ACT 2002

- 10(1) Trust Mediation and its employees or agents, including the Mediator, shall not be liable to any Participant or Representative for any act or omission howsoever arising in connection with any *mTD* conducted by the Mediator or as booked by Trust Mediation for the Participants. The Participants accordingly hereby agree and acknowledge that no claim action or proceedings can be brought against the Mediator and that the Mediator is not a compellable witness or Participant in any matter.
- 10(2) The Participants' legal advisers agree that they have made any or all necessary disclosures relevant to the Proceeds of Crime Act 2002 and they indemnify the Mediator in such respect.

## 11. FEES FOR SERVICES

- 11(1) The standard fee for an *mTD* is
- for the Mediator in respect of the *mTD*: **£300 (plus vat** where applicable) plus
  - for Trust Mediation for the administration of the *mTD*: **£50 (no vat** unless and until such time as Trust Mediation becomes registered for VAT).

(As at March 2010, with a vat rate of 17.5%, the total payable is **£402.50**, including vat of £52.50)

- 11(2) The Participants shall be jointly and severally liable to Trust Mediation for the payment of fees of the Mediator and Trust Mediation (whether those fees arise under this Section 11 or under Section 13).
- 11(3) Notwithstanding 11(2) **the Defendant** (or the First Defendant if there is more than one) **shall make payment of the fees by a cheque drawn in favour of "Trust Mediation Limited" no later than 4 days before the date of the mTD**. Trust Mediation will collect the fees from the Participants /their Representatives as the agent for the Mediator or for the Mediator's Firm or the Company (see the Schedule to the mTD Agreement) .
- 11(4) The provisions of 11(2) and 11(3) do not purport to determine the responsibility as between or among the Participants themselves as to the costs either of the claim or of the mTD. The Participants are free as between or among themselves to agree as to which of them ultimately shall bear those costs and in what proportion.
- 11(5) The Participants shall therefore be deemed to intend in any reference to "costs" set out in any Settlement Agreement or draft order concluding the mTD that "costs" shall be taken to include the costs of the mTD including any associated disbursements, fees, and expenses, unless some other arrangement is expressly stated.
- 11(6) The fees covers a period of up to **two hours** from the beginning of the mTD. If the mTD is to extend past two hours then the Participants must agree in advance Overtime as set out in paragraph 13.

## 12. COST OF MEDIATOR'S PREPARATION

- 12(1) The Mediator's preparation for the mTD is **included** in the fee.

## 13. OVERTIME AND ANY SUBSEQUENT TIME

- 13(1) If the Mediator is prepared to work overtime beyond 2 hours on the date of the mTD overtime will be charged at £150 per hour plus vat. The Mediator shall have the right to determine the time available for overtime. The Mediator will ask the Participants to email or fax the Mediator with confirmation of their request and willingness to continue the mTD under Overtime rates. Overtime fees are payable within 14 days of the date of the presentation of the overtime fee note by Trust Mediation.
- 13(2) If after the mTD has terminated the Mediator is summonsed by any Participant or the Court for any reason or has to deal with any non-administrative matter arising from or relating to the mTD in any way then the Mediator shall be entitled to be paid for such time reasonably engaged (including waiting, travelling time, and preparation) at the rate of £200 per hour (plus vat where applicable).

13(3) In the event of paragraphs 13(1) or (2) applying then the Participants shall be jointly and severally liable to discharge fee notes raised by or on behalf of the Mediator within 14 days of presentation to them by Trust Mediation.

13(4) The fees due under 13(2) shall be payable in any event, regardless of the outcome of any hearing or proceedings and irrespective of the general rule in respect of costs in a civil action: the Participants agree to this acknowledging that the Mediator only acts because this term, is in place as a condition precedent.

13(5) The Participants also agree as a condition precedent that they shall at no time for any reason whatsoever claim, seek, or request any legal or other costs or expenses, fees, disbursements or damages from the Mediator on any account.

#### **14. CANCELLATIONS AND ADJOURNMENTS**

14(1) If the *mTD* is cancelled by either Participant prior to four business days before the date scheduled for the Mediation and is rescheduled, there is no cancellation fee for the first adjournment.

14(2) If the *mTD* is cancelled within four business days prior to the date scheduled for the *mTD* and whether or not rescheduled, a cancellation fee of £150 plus VAT will be payable.

14(3) Cancellations shall be in writing, faxed and e-mailed to the Registrar.

**These Rules are effective as of 01 March 2010.**

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