**Brick Court Mediators: mediating during the outbreak**

**Brick Court’s mediators are ready to help tackle the challenges of mediating under the restrictions imposed by the outbreak.**

1. It is clear that the traditional approach of face-to-face mediation is going to be impossible for some time to come.
2. Initially parties may choose to defer mediations until the outlook becomes clearer. We are happy to make clear that cancellation fees will not apply where a fixture is lost for corona-related reasons.
3. But there may be cases which cannot wait, perhaps because trials are imminent. And it may be that we will simply have to adapt to a new medium-term reality. What are the options?

**What are the alternatives?**

1. Our mediators (and indeed our clients) are already used to doing some of their most productive mediation work by telephone.
2. So we will be happy to set up and use other platforms such as Zoom, Skype or FaceTime in order to continue to mediate during the outbreak.

**Planning**

1. Where this could work parties are invited to discuss direct with one of our mediators the process that would be most suitable in terms of timing, sequence, participation and choice of media. In such cases we would postpone formalising a mediation agreement or charging any fee until the parties were both happy with an agreed approach.
2. A typical mediation day held under normal conditions involves a combination of meetings with different participants. Thus:
3. At the start of the day the mediator(s) typically meet the parties and their lawyers separately in their breakout rooms before any joint meeting between them.
4. In most but not all cases the parties and the mediator(s) then agree to hold a joint session in a main meeting room with all participants present. That meeting may be conversational in tone or it may be more formal. But most mediators regard it as beneficial for the parties to see and hear from each other at the outset or somewhere near the beginning of the day even if the balance of the negotiations are thereafter conducted through the mediator.
5. After a joint session, in most cases, the mediator(s) shuttle between the two breakout rooms exploring the issues and ultimately exploring the possibility of the parties agreeing some sort of solution. Each of those private meetings is confidential to the party being spoken to and the default setting is that nothing the party shares with the mediator(s) will cross the line to the other party unless express permission or instruction has been given.
6. At different times other meetings may be held direct between clients, or direct between lawyers, usually with the mediator(s) present. The parties may intermittently reconvene in joint session.
7. The advantage of the Zoom system <https://zoom.us/> over a pure videoconferencing system is that it enables meetings with all these permutations to take place and allows the usual mediation dynamic to happen.
8. The first part of the day, the initial private meeting may be best replicated as a separate meeting in the days before the main mediation session. The day itself would then begin with the equivalent of the joint session although the mediator(s) may still wish to meet privately first with each of the parties to make sure everyone is comfortable.
9. We know that actual face-to-face meetings seem preferable in terms of establishing rapport between the participants and enabling them to read each other’s reaction to the negotiations as they progress. But all the indications, particularly from the US where these techniques are well-established, are that parties and mediators rapidly become comfortable with the remote process. Indeed it is clear that commercial clients are in many cases already more comfortable and more familiar with these platforms and techniques than their lawyers or the mediators.
10. Zoom also achieves confidentiality in the process in two senses.
11. First, overall participation in the mediation is strictly limited to the identified participants from each side. Each side is obliged to ensure that no third parties who have not been identified and agreed to are in sight or earshot of the screen (are “behind the camera”). The parties and their representatives accept a strict confidentiality obligation under the mediation agreement in the usual way.
12. Second, when the parties and their teams are meeting privately in the breakout room to which the mediator has allocated them the conversation cannot be watched or overheard by any of the participants from the other party. Only the mediator(s) can enter the breakout room and they will give due warning before they do so (Zoom has a chat function for written communication between participants) or re-enter the room at a set time.
13. It is possible to participate in a Zoom mediation by audio/telephone only but it is infinitely preferable to have a level playing field and for all parties to participate in the same way – on screen.
14. A disadvantage of Zoom in the joint session is that the windows that you see showing each participant (and there might easily be a dozen in current conditions) will not be grouped together in accordance with the allegiances of the parties. Each sides’ windows will be visible on the screen but effectively in a random pattern. This may initially seem awkward but experience suggests that the parties get used to it.
15. It will be important to pace a remote mediation and make sure there are adequate breaks. It may be that a mediation day will be more tiring using these systems and due allowance will need to be made for that.

**A Zoom mediation protocol**

1. The parties will be asked to agree a **protocol** to enable the mediation to work as it should using the Zoom platform. The core elements of the protocol are likely to take the following form:

|  |  |
| --- | --- |
|  | The parties will each **identify** how many devices/groups of people will be taking part from their side. They will precisely list the participants who will be using/visible on each device. Clearly if complete separation of individuals is being observed there will be multiple devices. (Zoom can accommodate up to 100.) |
|  | Each party should identify a lead as a main point of contact for the mediator(s). Parties may wish to form a whatsapp group for all their team members. |
|  | Each of the **devices** will need a functioning screen and camera and a secure Wi-Fi or hardwired connection for your computer. Please do not use public access connection as confidentiality will be compromised. You will need to have signed up each device for the free latest version of Zoom: go to <https://zoom.us> and click on “meetings”. The mediator(s) will be using the subscription professional Zoom application which will enable them to administer the process. |
|  | For each device the parties should provide to the mediator(s) **separate means of communication**, preferably a mobile telephone number and an email address for at least one of the people using each device. Those will need to be available, but with phones silent, through all meetings. The mediators will provide their own contact details. |
|  | You will be able to **join** the mediation by clicking the meeting link (and if required entering the meeting ID that the mediator(s) send you by email in advance). You should join the meeting at least five minutes before start time. Initially you will be placed in a “waiting room” until the mediator(s) can see that all are ready and initiate the meeting. |
|  | The parties are free to **communicate directly** with the mediators by phone and email and should do so in particular if they have concerns about the confidentiality of the process, the possibility that they are hearing exchanges they should not or are being overheard, for any problem with the technology, the signal or audibility. In the event of a technology failure of any kind the mediator(s) are likely to call a break and either continue the process by other means or restart the meeting. |
|  | When a party speaks the frame around their window illuminates. The mediation will not work if people **interrupt** or speak across each other. Participants who are not speaking should mute their microphones (bottom left of screen). In the joint meeting of all participants it is unlikely that all will wish to speak and typically there will be at most two speakers for each party. |
|  | The mediator(s) will assign the parties to separate breakout rooms appropriately. The mediator(s) **control movement** into the breakout rooms. The parties themselves have the option of returning to the main meeting when they choose. |
|  | There is a **record** mechanism on Zoom which the mediator(s) will have disabled. Neither this or any other means of recording should be used. The mediator can ensure that no recording of the Zoom sessions take place. Each party undertakes not to record in any other way. |
|  | The parties should probably consider agreeing to vary the usual mediation agreement by agreeing to be bound to a **valid settlement** by exchange of emails expressed to be binding between the parties’ lawyers. This is important as it may not be possible physically to sign a document (unless the parties have available one of the online signing systems such as Docusign or Adobe Acrobat.) |

1. There are a number of useful Zoom tutorials available online at <https://support.zoom.us>
2. If you have a potential mediation or wish to discuss any of the issues raised in the above please in the first place contact Kate at [kate.trott@brickcourt.co.uk](mailto:kate.trott@brickcourt.co.uk)

<https://www.brickcourt.co.uk/practice-areas/mediation>

<http://brickcourtmediators.co.uk/>

Brick Court Chambers

24/3/20