Model Settlement Agreement

Model Settlement Agreement

Date

Parties

_____ ("Party A")

_____ ("Party B")

[_____ ("Party C") and add more as necessary]
(jointly "the Parties")

The Parties having agreed to settle "the Dispute" which:

- is being litigated/arbitrated [court/arbitration reference] ("the Action")[1]
- has been the subject of an RICS mediation procedure today ("the Mediation")

upon the following terms and conditions:

Terms

It is agreed as follows:

1. [will deliver…… to at …… by not later than 4 o'clock on …][2]

2. [will pay £…… to by not later than 4 o'clock on … (by direct bank transfer to …. bank sort code … account number …) …][3]

OR

[will pay £ to per week/calendar month/ in ( ) tranches by cheque/cash/bank transfer commencing on or before and thereafter until finishing on or before]

3. [In default of such payment (all outstanding sums shall fall due and payable forthwith/or) shall pay interest on the balance outstanding at the rate of % above base rate for the time being to payment][4]

---

[1] Omit this wording and paragraph 5 if there are no court proceedings
[2] Omit as necessary but otherwise be as specific as possible in respect of any act positively required to be performed, for example, how, by when, etc. or alternatively to be refrained from.
[3] Or any other tranche of payments or currency agreed
[4] Optional. Many mediators dislike putting in any default provision.

4. [ ][5]

5. The Action will be stayed and the parties will consent to an order in the terms of the attached Tomlin Order precedent [see attachment].

OR

The Action will be dismissed with no order as to costs.

6. This Agreement is in full and final settlement of any causes of action whatsoever which the Parties [and any subsidiaries ……. of the Parties] have against each other.

7. This Agreement is the entire agreement between the Parties and supersedes all previous agreements between the parties [in respect of matters the subject of the Mediation].[6]

8. If any dispute arises out of this Agreement, the Parties will attempt to settle it by mediation[7] before resorting to any other means of dispute resolution. To institute any such mediation a party must give notice to the mediator of the Mediation. Insofar as possible the terms of the Mediation Agreement will apply to any such further mediation. If no legally binding settlement of this dispute is reached within [28] days from the date of the notice to the Mediator, either party may [institute court proceedings / refer the dispute to arbitration under the rules of … [8]].

9. The Parties will keep confidential to themselves, their legal advisers [and by agreement] and not use for any collateral or ulterior purpose the terms of this Agreement [except insofar as is necessary to implement and enforce any of its terms].

10. This Agreement shall be governed by, construed and take effect in accordance with [English] law. The courts of [England and Wales] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with this agreement.[9]

Signed

_____

[for and on behalf of[10] _____]

[5] Any additional positive or negative performance obligations
[6] Only necessary if there have been previous agreements
[7] Alternatively, negotiation at Chief Executive level, followed by mediation if negotiations do not result in settlement within a specified time
[8] Reference to the appropriate arbitration body
[9] Usually not necessary where parties are located in same country and subject mater of agreement relates to one country. If the Parties elect for their agreement to be governed by the laws of another jurisdiction they should take legal advice on the implications for enforcement.
[10] Not necessary where the party signing is an individual

[for and on behalf of[11] _____]

Note: This Model Agreement and attached precedent of a Tomlin (stay) order is for guidance only. Any agreement based on it will need to adapted to the particular circumstances and legal requirements of the settlement to which it relates. Wherever possible any such agreement should be drafted/approved by each party's lawyer. Although the RICS Mediator is likely to be involved in helping the parties to draft acceptable terms, he or she is not responsible for the drafting of the agreement and does not need to be a party to it.

Attachment to Model Settlement Agreement

Tomlin (stay) Order Precedent

[Action heading]

UPON hearing from the solicitors to the parties in correspondence…..

And by consent

IT IS ORDERED that all further proceedings in this case be stayed upon the terms set out in the Settlement Agreement between Parties dated ….., an original of which is held by each of the Parties' solicitors except for the purpose of enforcing the terms of that Agreement as set out below.

AND IT IS FURTHER ORDERED that either Party/any of the Parties may apply to the Court to enforce the terms of the said Agreement [or to claim for breach of it] without the need to commence new proceedings.

[AND IT IS FURTHER ORDERED that [each Party bear its own costs].]

WE CONSENT to an order in these terms

_____ [ ], Claimant's Solicitors

_____ [ ], Defendant's Solicitors

[11] Not necessary where the party signing is an individual

Explanatory notes for the Mediator concerning the settlement agreement

The Settlement Agreement

1. Mediators are not encouraged to participate in assisting the parties to draft their settlement agreement. This is even more true of the RICS Mediator who may not have a legal background, even though he or she may be experienced in the type of dispute being mediated. In particular the drafting of a settlement agreement by the Mediator is likely to be the one activity in respect of which an action in negligence may lie if he or she gets it wrong. Mediators should therefore generally not participate in drafting the settlement where the parties have legal representation, or at least one side has a lawyer competent to draft the agreement. If that is not the case the Mediator should encourage the parties either to settle the agreement themselves, at least as heads of agreement, and have a lawyer provide such additional detail as is necessary. If unrepresented parties require you to help draft the agreement the following general principles apply.

2. It is essential that the parties secure a concluded agreement that is workable, comprehensive, (both as to the dispute and any wider issues which have been introduced,) and enforceable. It is vital that the parties, usually through their lawyers, get the form of the agreement right, to ensure that the settlement is enforceable. The terms must be certain, specific, effective, practical and complete, in particular dealing with who is to do what, when, and with what precise consequences.

3. Consider whether a provision will need to be inserted detailing with what to do if one side or the other fails to adhere to the agreement or if it proves to be unworkable. While such clarity is desirable, it may deflate the atmosphere of successful compromise, and care needs to be taken.

4. The Mediator may suggest in advance that the lead representative on each side should take a draft containing the likely heads of agreement with him or her, and, if litigation is running, a general form of Tomlin order. If the compromise contains terms found in a recognised standard form or precedent it needs to be brought with otherwise a party will be forced to locate it, possibly out of business hours, and probably at a highly inconvenient time for doing so.

5. As settlement nears the representative should begin to draft the proposed agreement in the caucus room. The Mediator will encourage a discussion of the structure, form and contents with the client as early as possible, since this can be done as the mediation progresses and will help focus on the details. It places the client's personal agenda in context and gives focus to the practicalities of its implementation.

6. If you are asked to draft the settlement agreement by unrepresented parties be careful to strike a balance between too little, and too much detail. Do not be overly pedantic. Remember it is likely to be either quite late or very late, at the end of a long day. While the document is being settled you should ask the decision maker in each party precisely who should be the signatory, and whether they have authority.

You may wish to consider the introduction of certain standard clauses irrespective of the nature of the settlement. These should deal with:-

- confidentiality
- any relevant choice of law or jurisdiction
- that this is the entire agreement between the parties
- a default mechanism to deal with future disputes
- whether, if there is a breach of this agreement, the original cause of action should be reinstated (the opposite of the standard Tomlin order).

The settlement-specific clauses need to be certain as to:-

- payment: who pays, to whom is payment made, and how much
- the form in which payment is to be made
- whether payment is to be immediate or in stages
- the mechanism for default of payment
- the provision of interest
- the costs of the litigation
- the costs of the mediation
- any public statements
- the discontinuance or withdrawal of proceedings
- any special clauses dealing with enforceability
- who is the signatory, his or her status or authority.

7. There will be occasions when the parties can do no more than agree outline heads of agreement, but this should be avoided wherever possible. Saving an hour at the end of the mediation by agreeing only outline heads of agreement exposes the parties to the risk of further disputes in which the argument shifts from its original subject matter to contesting what has been agreed. It is essential that the intention of the parties is made plain, and there is at least sufficient detail to ensure that an impartial reader would have a clear idea of precisely what has been agreed. If there is no time to put in the complexity of the mechanics of the transaction, or, for example, the tax implications have not been advised upon or worked out, at least draw a distinction between the agreement itself and the mechanics for performing it.

Explanatory notes for the user of the settlement agreement (i.e. unrepresented parties)

The Settlement Agreement

1. Mediators are not encouraged to participate in assisting the parties to draft their settlement agreement. Your RICS Mediator may not have a legal background, even though he or she will be experienced in the type of dispute being mediated. RICS Mediators will therefore generally not participate in drafting the settlement where you or the other party has legal representation. If that is not the case the Mediator will encourage you either to settle the agreement yourselves, or at least the heads of agreement, and then have a lawyer provide such additional detail as is necessary.

2. It is essential that you secure a concluded agreement with the other party or parties that is workable, comprehensive, (both as to the dispute and any wider issues which have been introduced,) and enforceable. It is vital that the parties, usually through their lawyers, get the form of the agreement right, to ensure that the settlement is enforceable. The terms must be certain, specific, effective, practical and complete, in particular dealing with who is to do what, when, and with what precise consequences should that party fail to do what it has agreed. Normally such agreements are reduced to writing at the conclusion of the mediation since, although you may aftewards have some reservations about what was agreed, and you may wish to build in a 'cooling-off' period prior to the agreement taking effect, it is important that you are not influenced by someone who was not at the mediation and did not see what happened to enable the parties to agree.

3. Consider whether a provision will need to be inserted detailing with what to do if one fails to adhere to the agreement or if it proves to be unworkable.

4. The Mediator may suggest in advance that the lead representative on each side should take a draft containing the likely heads of agreement with him or her, and, if litigation is running, a general form of Tomlin order which deals with the completion of any court proceedings. If the compromise contains terms found in a recognised standard form or precedent used by lawyers in such cases, it needs to be brought to the mediation otherwise you may be forced to locate it, possibly out of business hours, and probably at a highly inconvenient time for doing so.

5. As settlement nears, your lawyer or representative may begin to draft the proposed agreement in the caucus room. The Mediator will encourage a discussion of the structure, form and contents with you as early as possible, since this can be done as the mediation progresses and will help focus your mind on the details, place your personal agenda in context and deal with the practicalities of its implementation.

6. Your settlement agreement needs to strike a balance between too little, and too much detail. You should understand it. Remember it is likely to be either quite late or very late, at the end of a long day. Please ensure that the signatory, if not you, has authority to sign.

There may be certain standard clauses irrespective of the nature of the settlement. These should deal with:-

- confidentiality
- any relevant choice of law or jurisdiction
- that this is the entire agreement between the parties
- a default mechanism to deal with future disputes
- whether, if there is a breach of this agreement, the original cause of action should be reinstated (the opposite of the standard Tomlin order).

The settlement-specific clauses need to be certain as to:-

- payment: who pays, to whom is payment made, and how much
- the form in which payment is to be made
- whether payment is to be immediate or in stages
- the mechanism for default of payment
- the provision of interest
- the costs of the litigation
- the costs of the mediation
- any public statements
- the discontinuance or withdrawal of proceedings
- any special clauses dealing with enforceability
- who is the signatory, his or her status or authority.

7. There will be occasions when you can do no more than agree outline heads of agreement, but this should be avoided wherever possible. Saving an hour at the end of the mediation by agreeing only outline heads of agreement exposes you to the risk of further disputes in which the argument shifts from its original subject matter to contesting what has been agreed. It is essential that the intention of you and the other party/parties is made plain, and there is at least sufficient detail to ensure that an impartial reader would have a clear idea of precisely what has been agreed. If there is no time to put in the complexity of the mechanics of the transaction, or, for example, the tax implications have not been advised upon or worked out, at least draw a distinction between the agreement itself and the mechanics for performing it.

A NOTE ON THE TEXT

The purpose of this information pack is twofold: to provide lay and professional clients details of what they can expect from RICS Mediators; and to offer such mediators practical guidance where necessary to help draft agreements in clear English as part of the RICS Mediation process. The standard forms offered are by way of suggestion, since they can not be a panacea for all drafting problems you may encounter in preparing for or settling a mediation. Drafting well comes only with practice, thought and experience rather than being taught. The contents of this pack offers ideas for best practice to achieve clarity and certainty, and for lay parties to have consistency in the approach offered by RICS Mediators.

By drafting we mean the composition of legal documents, be they contracts, settlements or any other piece writing with a legal content or for a legal purpose. It is a special written word skill.

The RICS Mediator will usually not be a lawyer, but like a lawyer will have to apply the law and legal principles when drafting agreements and other similar documents and must achieve legal certainty - which may mean using legal words and phrases that are best avoided in general writing. Lay parties need to be aware when you are composing legal documents, you cannot write as you would in an everyday letter or an opinion. Every word counts, every word must be chosen with care, every phrase must be apt, every sentence must be immaculately constructed. This means there will be less fluency in the writing process: drafting involves trial and error, chopping and changing until you feel what you have is right.

.

The effectiveness of a legal document depends on a number of factors, some large and others by comparison insignificant. All are worthy of attention. It is the combination of them all which produces the effect we want. With habit, these factors become embedded and natural.

USING CLEAR ENGLISH

There are a number of compelling reasons why legal documents should be written in clear (sometimes called Plain) English.

1. Professionalism

• RICS is a professional organisation that is correctly judged on the clarity of what we write. We have a professional responsibility to use clear English in the parties' interests .

2. Image

• We are seen as what we write. Lazy, clumsy, muddled or old fashioned writing suggests a lazy, clumsy, muddled or old fashioned writer.

• Clients and business contacts do not like to spend time and money interpreting (or asking us to interpret) a badly written document, or to find out later that it didn't mean what they (and the writer) thought it meant. Mediation should solve problems, not create more by using sloppy documentation.

• Good content loses much of its effect if it is poorly presented.

3. Using Language as a Precision Tool

Legal writing is stuffy, pompous, wordy, artificial, often ungrammatical, jargon-filled, and pretentious. And bad writing makes the reader's job harder. So, why make your task more difficult by failing to use plain language? Avoid any word that does not command instant understanding - you need to let the reader see your ideas without struggling to grasp your meaning. Sentences should be constructed so the reader may read with understanding effortlessly. You are aiming to produce a document that is clear, precise, unambiguous, comprehensible and complete. In addition it should contain no errors of spelling, punctuation, grammar or syntax, and cause no difficulty to those who have learned English as a foreign language. Professionals should know how to use English properly; and be able to spell.

4. Efficiency

• A reader should be able to understand what is written at the first reading. This is especially important with shorter documents, and much easier to achieve if the writer takes care with what they write. If you spend time to write clearly, you will save your reader's time in understanding what you have written.

• Clear English drafting is easier to amend accurately - especially in negotiations when under pressure.

5. Market demand

(a) Clear English is increasingly being used in the business and legal worlds:

• The Plain English Campaign has resulted in a substantial increase in the preparation of plain English documents by, for example, banks and insurers for their retail and consumer businesses (including a number of our clients).

• The Unfair Terms in Consumer Contracts Regulations 1999 require consumer contracts to be written in plain and intelligible language and to be accessible in design and layout. If there is any doubt over the meaning of a consumer contract it is interpreted in the way which is most favourable to the consumer.

• The Office of Fair Trading promotes changes in unclear terms in consumer contracts and the removal of unnecessary or pointless language. Similar requirements apply throughout the EU.

• The Civil Procedure Rules encourage the use of plain English in drafting statements of case (which used to be called "pleadings").

• The European Parliament, Commission and Council adopted an Inter-institutional Agreement in 1998. This provides that Community legislative acts must be drafted "clearly, simply and precisely".

(b) English is the common language for many cross border transactions and correspondence; it is in particular the global language of technology. If we write and speak in clear English we increase the mutual understanding between native and non native English speakers (whether they are lay parties or their professional advisers). It also makes translation easier.