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AGREEMENT TO MEDIATE



MARK KELLY.
Barrister & Commercial Mediator

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Parties

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Engagement of mediator

1. A dispute has arisen between the parties ("the dispute"). Schedule 1 contains a brief description of the dispute.
2. The parties agree to engage Mark Kelly ("mediator") to mediate the dispute in accordance with his terms of engagement. This agreement and those terms of engagement are jointly and separately enforceable.
3. This agreement governs the conduct of the mediation (including any associated conferences and correspondence).

Role of mediator

4. The mediator will be neutral and impartial. The mediator will assist the parties to explore options for the possible resolution of the dispute, by helping the parties to:
 - (a) Isolate the issues in dispute;
 - (b) Identify the interests of each party;
 - (c) Develop options for the resolution of the issues; and
 - (d) Explore to what extent each option meets the interests of each party.
5. The mediator will not:
 - (a) Make decisions for any party;
 - (b) Impose a solution on the parties; or
 - (c) Be responsible for the provision of professional advice of any kind whatsoever (including legal advice) to any party.

Legal representation

6. Each party may be legally represented at the mediation.

Conflicts of interest

7. Prior to the commencement of the mediation, the mediator will disclose any material conflict of interest which he might have, that he is aware of, to the parties.
8. If, during the course of the mediation, the mediator becomes aware of any material conflict of interest which he might have, he will immediately inform the parties of this. The parties will then decide whether or not the mediation should continue.

Commitment to mediate

9. Each party will co-operate with the mediator and each other, and use their best endeavours to resolve the dispute.

Preliminary steps

10. Prior to the mediation, the parties, or their legal representatives, will, at a preliminary conference, or by correspondence, agree between themselves and with the mediator:
 - (a) The time and venue for the mediation;
 - (b) Arrangements for the exchange and/or presentation of any documents or other relevant material;
 - (c) Who will be present at the mediation;
 - (d) Such details of the mediation process as can usefully be agreed in advance; and
 - (e) Any other necessary matters.

Authority to settle

11. Each party, or their representative/s, at the mediation will have full authority to settle the dispute.

Communication during the mediation

12. The mediator may communicate privately with any of the parties, at any time, provided such communications are kept confidential (unless authorisation to disclose is given).
13. The mediation, all steps preliminary to it, and all associated communications, will be:
 - (a) Without prejudice; and
 - (b) Kept confidential, save as required by law, or otherwise agreed by all.

14. Without limitation, the following will not be relied on or introduced as evidence in any Court, arbitral, tribunal, or other proceeding:
 - (a) Any settlement proposal made;
 - (b) Any view expressed on a settlement proposal;
 - (c) Any admissions made;
 - (d) Any exchanges (oral or documentary) made; and
 - (e) Any information or documents prepared for, or in, the mediation (save for evidence of a settlement agreement called pursuant to clause 22 below).
15. The parties will not subpoena the mediator as a witness in any Court, arbitral, tribunal or other proceeding.
16. There will be no audio or video recording of the mediation, or any part of it.
17. Non-parties present at any time during the mediation (excluding counsel) will sign the confidentiality and conduct agreement at Schedule 2.

Mediation by videoconference

18. If the mediation, or any part of it, is conducted by videoconference, it is agreed that:
 - (a) The names of all participating individuals will be declared to all parties, in advance. Only those so declared can attend the videoconference;
 - (b) Separate contact details for each participating individual will be provided to the mediator, in advance;
 - (c) To the extent practicably possible, all participating individuals will ensure that:
 - (i) They participate from a space which is private;
 - (ii) Their camera shows a full view of the space they are in, to demonstrate privacy;
 - (d) All participating individuals must:
 - (i) Advise when they enter, or leave, the videoconference;
 - (ii) Advise, immediately, if anyone who has not been declared under (a) above has become able to see and/or hear the videoconference (for example, if someone else enters the room); and
 - (iii) Advise, immediately, if, through a technical error, or otherwise, they become able to see or hear a communication they ought not to be able to see or hear.

Termination

19. A party may terminate the mediation at any time after consultation with the mediator.
20. The mediator may terminate the mediation at any time after consultation with the parties.

Settlement agreements

21. No settlement agreement reached during the mediation will be legally binding unless and until it has been reduced to writing and signed (or, where permissible by law, agreed to by email) by or on behalf of the parties.

Enforcement

22. Any party may enforce the terms of a settlement agreement by Court proceeding. For the purpose of such a proceeding, evidence may be called of the settlement agreement.
23. In the event of any dispute arising about any settlement agreement, the parties agree to revert to mediation in the first instance.

Exclusion of liability and indemnity

24. Excluding fraud, the parties release, discharge and indemnify the mediator in respect of all liability of any kind (whether negligent or not) which may be alleged to arise in connection with or result from or relate in any way to the mediation (including, but not limited to, any associated teleconference or videoconference, and the hosting, and/or operation, thereof by the mediator).

Defamation

25. The parties and the mediator agree that no statements or comments, whether written or oral, made or used by them or their representatives during the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded in bar to any such action.

Costs

26. The mediator's fee is as set out in his terms of engagement.
27. The mediator's fee will be divided equally between the parties, unless otherwise agreed in writing.

28. The mediator's fee will be paid within seven days after the conclusion of the mediation.
29. Unless otherwise agreed in writing each party will otherwise pay its own costs and expenses of the mediation.

Execution

30. This agreement may be executed in counterparts, and shall be binding when the same are exchanged, by email or otherwise, between the parties (or via their representatives) and the mediator.

SCHEDULE 1

BRIEF DESCRIPTION OF DISPUTE

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SCHEDULE 2

CONFIDENTIALITY AND CONDUCT AGREEMENT BY NON-PARTY

I, _____, hereby agree with the parties to the dispute and the mediator that, in consideration for my attendance at the mediation, I will observe and adhere to such requirements of confidentiality, privilege and conduct as are set out in this mediation agreement, and as otherwise apply to the parties by law.

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Signature

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Date