

# MULTI-PARTY DISPUTES *and* CO-MEDIATION

*Rosemary Jackson QC and Elizabeth Repper, full-time mediators at Keating Chambers who regularly co-mediate, discuss why and how parties are using co-mediation.*



## **Mediation and Multi-Party Disputes**

For all the well-known reasons, parties to any dispute will want to consider mediation.

Where there are multiple parties, such as businesses who have contributed design, work or materials to the same project or homeowners all affected by the same event, the desire to settle is obvious. A greater number of parties will bring greater risk: each party's legal costs are likely to be increased by the fact that they are fighting on multiple fronts. At trial, one party may ultimately be ordered to pay everyone's costs.

Often no-one dares attempt unilateral settlement for fear of being brought back into the party by way of contribution proceedings by the remaining parties. Drafting a watertight Calderbank offer is challenging. The parties therefore all go forward in the litigation together.

Traditional mediation may seem impossible, with the risk that the mediator starts off by visiting each of the six, eight or ten parties in their rooms and isn't ready to convene a plenary session until noon. If each party then makes a presentation at the plenary session it may be mid-afternoon before any real work is done.

Such issues are fuelling a desire for multi-party disputes to be mediated and case-managed by co-mediators. Being a party to such a co-mediation, however, requires parties to think differently.

## **The Basics**

The sheer number of people involved in a multi-party mediation gives rise to a number of practical issues. In some cases, fifty or more people may want to attend the mediation day. Hard though it can be, finding a date when all parties can attend

with their chosen representatives, insurers and experts is often the easy part. A venue large enough to offer each party their own room, as well as a further room large enough for all attendees to gather, must be found. There are also the logistics of getting everyone to agree to the mediators' terms and the wording of a suitable mediation agreement. These matters, which are surprisingly time-consuming, are often best handled by one party, but may need a hand from the mediators.

Sometimes, simply because of the issues in play, the parties will need more than one day. It can be helpful for the mediation days to be separated by a week to enable parties to re-group and ponder the developments of Day One.

## **Case Management by Co-Mediators**

In the days and weeks leading up to a multi-party mediation, parties are likely to need assistance with case management. There may be ten or more sets of pleadings, expert reports and disclosure from which numerous issues arise.

Often, by the co-mediators talking to the parties in advance, such issues can be identified and the ground laid for fruitful discussions. It may be that a timetable is needed for the exchange of documents. It may be sensible if certain parties or groups of individuals meet or talk on the phone. Pre-meetings of groups with common or linked interests (for example all of the claimant parties, or all of the defendant parties) may be needed to agree an approach. It may also be helpful to have had a discussion about the level (and direction of payment) of a first offer before the mediation day so that all arrive with realistic expectations. Without this, there is a risk that it will take all day and into the evening to get the paying parties sufficiently aligned to put a first offer.

## **The Work of the Co-Mediators on the Mediation Day**

Managing time and people will always be a big challenge at a multi-party mediation. Co-mediators are likely to arrive on the day with a common starting plan which, as with all mediations, will evolve.

To make the best of use of the agreed time, co-mediators are likely to need to work together as well as apart, meeting up at appropriate moments to pool ideas and strategise. If one mediator has trouble getting a message across to or obtaining a decision from one of the parties, there may be a benefit in the other mediator stepping in to speak to that party with a fresh approach to see if the blockage can be overcome.

At any point in the day, the co-mediators may be chairing different meetings, talking with certain groups or trying to help start a negotiation. This allows several strands of conversation or negotiation to develop concurrently.

Mediating with more than two parties can also add a layer of confidentiality to the process that must be of paramount importance to all. Some parties may require their discussions with certain other parties to remain confidential between them and the co-mediators. Some may require the same confidentiality to apply to their offers.

## **The Future of Co-Mediation**

Awareness of the availability and benefits of co-mediation is growing in the construction, property and energy sectors and beyond. We have found that co-mediation allows us to combine our collective experience and offer a specific service to parties caught in multi-party disputes.