

General Guide to Mediation for Land Compulsory Sale Cases

Direction Issued by the President of the Lands Tribunal LTPD: CS No. 1/2011

I. Introduction

1.1 This leaflet is designed to provide you with a brief outline of the President's Direction of the Lands Tribunal ("the Tribunal") LTPD: CS No. 1/2011 ("PD") - Mediation for Compulsory Sale Cases - and how it applies to all cases ("Compulsory Sale Cases") under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) ("the Compulsory Sale Ordinance").

1.2 The Civil Justice Reform ("CJR") has come into effect on 2 April 2009 and the commencement date of the PD is 15 February 2011. As stipulated in the Direction on Application of the CJR to the Tribunal issued on 12 February 2009 (LTPD: CJR No. 1/2009), the underlying objectives of the Rules of the High Court introduced by the CJR are of general applicability in the context of cases in the Tribunal.

1.3 An underlying objective of the Rules of the High Court is to facilitate the settlement of disputes. Thus, by applying the above objective to the Tribunal, the Tribunal has the same duty as in the High Court to facilitate the settlement of disputes, before or after the commencement of a court action. If settled, the dispute will come to an end without going through a trial process. It will save time and costs.

1.4 The Tribunal has the duty as part of active case management to further the above objective by encouraging the parties to use an alternative dispute resolution procedure ("ADR") if the Tribunal considers

that appropriate (“the duty in question”) and facilitating its use. Mediation is one of the common modes of ADR and a cost-effective means of resolving disputes.

1.5 The aim of the PD is to ask the parties to assist the Tribunal to discharge the duty in question in Compulsory Sale Cases.

II. Mediation

2.1 What is Mediation?

- Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.
- During the process, each party to the dispute has a chance to put forward his case and to listen to what the other side has to say. The mediator’s job is not to make a decision for the parties, but to assist the parties to explore the strengths and weaknesses of their own cases and to identify possible solutions, so as to facilitate them to reach a settlement agreement. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

2.2 When to seek mediation?

- In general, mediation can start before any litigation begins or at any stage during the process of litigation.

- This leaflet would provide the procedure to be followed by the parties to engage in mediation after commencement of Compulsory Sale Cases.

2.3 The application of the PD

A) All parties are legally represented

- If you are an applicant and legally represented, your solicitors shall file with the Tribunal a Mediation Certificate at the same time when the Notice of Application is filed indicating whether the applicant is willing to attempt mediation or not. A sample of such Mediation Certificate is in Appendix A.
- If you are a respondent and legally represented, your solicitors shall file with the Tribunal a Mediation Certificate at the same time when the Notice of Opposition is filed indicating whether the respondent is willing to attempt mediation or not. A sample of such Mediation Certificate is in Appendix A.
- If a party (either the applicant or the respondent) wishes to attempt mediation, he should, as soon as practicable after filing the Mediation Certificate, serve a Mediation Notice on the other party or parties in the dispute and file a copy with the Tribunal. A sample of such Mediation Notice is in Appendix B.
- Upon receiving the Mediation Notice, the other party or parties should respond to the party serving the Mediation Notice by way of a Mediation Response within 14 days (or such other time as the parties may agree or as the Tribunal may direct) and file a copy with the Tribunal. A sample of such Mediation Response is in Appendix C.

- Parties should attempt to reach agreement on the proposals they put forward in the Mediation Notice and Mediation Response as soon as practicable. Any agreement consequent upon such discussion should be reduced into writing in a minute called Mediation Minute to be signed by the Applicant and the Respondent or their solicitors and filed with the Tribunal.
- Where the parties are unable to reach agreement on certain terms of the proposal in the Mediation Notice and the Mediation Response, the parties may make a joint application, (or any party may apply where there is no agreement on a joint application), to the Tribunal for directions to resolve the differences regarding the proposal.
- The Mediation Notice and Mediation Response shall be filed with the Tribunal at the time of the service of the same on the other party. The Mediation Minute shall also be filed with the Tribunal within 3 days after it has been signed by or on behalf of both parties. These documents may be taken into account by the Tribunal in considering whether to grant an order under a compulsory sale application and in exercising its discretion on costs as stipulated in section 2.4 below.

B) One or more of the parties acting in person

- Where one or more parties are not legally represented, on the application of a party or on its own motion, the Tribunal may, at a suitable stage, give directions that the parties should attempt mediation by following the procedures similar to section 2.3A above.
- Parties may also, by consent, approach the professional bodies or an appointed mediator to seek mediation at any stage.

C) Stay of proceedings pending mediation

- The Tribunal may, on the application of one or more of the parties or of its own motion, stay the proceedings or any part thereof for the purpose of mediation for such period and on such terms as it thinks fit, bearing in mind the importance of avoiding, so far as possible, disruption to the progress of the case, and of avoiding, save in exceptional circumstances, any postponement of the trial dates.
- Where the Tribunal stays the proceedings, the applicant must promptly inform the Tribunal if a settlement is reached and the parties should take the necessary steps to conclude the legal proceedings formally.

2.4 What are the consequences of failure to engage in mediation?

- The Compulsory Sale Ordinance stipulates that the Tribunal shall not make an order for sale unless it is satisfied that, amongst other things, the majority owner has taken reasonable steps to acquire all the undivided shares in the lot*.
- The majority owner in Compulsory Sale Cases may not be considered by the Tribunal as having taken all the reasonable steps under the Compulsory Sale Ordinance to acquire the minority owner's undivided share of the lot, if he unreasonably fails or refuses to attempt mediation with the minority owner. The Tribunal is entitled to take into account such failure or refusal in determining whether an order for sale should be granted.

* See Section 4(2) of Cap. 545.

- Further, in exercising its discretion on costs, the Tribunal shall take into account of all the relevant circumstances, including any unreasonable failure of a party to engage in mediation.
- However the Tribunal shall not refuse to grant an order for sale or make any adverse costs order against a party on such ground where
 - a) the party has engaged in mediation to the minimum level of participation agreed by the parties or as directed by the Tribunal;
 - b) a party has a reasonable explanation for not engaging in mediation, e.g. active without prejudice settlement negotiations between the parties are progressing.
- Please note a party's application for attending mediation information session or mediation will not lead to an automatic stay of the legal proceedings.

III. Assistance you can get from Integrated Mediation Office and Building Management Mediation Co-ordinator's Office of the Judiciary

3.1 The Integrated Mediation Office and Building Management Mediation Co-ordinator's Office are set up to serve the parties/litigants in court and facilitate them to seek mediation from the professional bodies.

3.2 The Integrated Mediation Office holds information sessions on mediation and assists parties to approach the professional bodies for seeking mediators.

3.3 You may approach the Integrated Mediation Office at Room 113, 1/F, Wanchai Tower, 12 Harbour Road, Wanchai, Hong Kong or the Building Management Mediation Co-ordinator's Office at Room 206 – Room 208, 2/F, Lands Tribunal Building, 38 Gascoigne Road, Kowloon for further information. However, you should note that the assistance provided at the Offices are confined to court-related mediation matters only and the staff there will not give legal advice or make any comments on the merits of your case.

3.4 This publication is for general reference only and should not be treated as a complete or authoritative statement of law or court practice. Whilst every effort has been made to ensure that the information provided in this leaflet is accurate, it does not constitute legal or other professional advice. The Judiciary cannot be held responsible for the content of this publication.

Judiciary
February 2011

List of Appendices

Appendix A - Sample Mediation Certificate

Appendix B - Sample Mediation Notice

Appendix C - Sample Mediation Response

Appendix A

Sample Mediation Certificate

[Title as per proceedings]

Part I

1. Is the Applicant / Respondent willing to attempt mediation with a view to settling these proceedings?¹
2. If the Applicant / Respondent is not willing to attempt mediation, please state the reasons in this Certificate or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Certificate in a sealed envelope².

¹ If a party is willing to attempt mediation, he should issue a Mediation Notice in accordance with this Direction.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Tribunal only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

Part II

I, [name], solicitor of [firm name] having conduct of the proceedings on behalf of the Applicant / Respondent confirm as follows:

- (a) I have explained to our client the availability of mediation with a view to settling the dispute or part(s) of the dispute, and the respective costs positions of mediation as compared with the costs of the litigation.
- (b) I have explained to our client the Direction on Mediation for Compulsory Sale Cases (LTPD: CS No. 1/2011).
- (c) The information set out under Part I is to the best of my knowledge and belief true and correct.

[signed by the solicitor]

Part III

I, [name], the Applicant / Respondent [if the party is a corporation or an association, describe the position of the person signing this certificate, and state the authority of the person to represent the party] in these proceedings, acknowledge that I understand the Direction on Mediation for Compulsory Sale Cases (LTPD: CS No. 1/2011) and the availability of mediation to resolve the dispute instead of litigation. I further confirm the information set out under Part I is true and correct.

[signed by the party]³

³ Where the party does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Appendix B

Sample Mediation Notice

[Title as per proceedings]

To: the Respondent / Applicant and his solicitors

1. The Applicant / Respondent wishes to attempt mediation to resolve all [or a specified part] of its disputes with the Respondent / Applicant and makes the following proposals¹.
2. The Applicant / Respondent wishes to propose the adoption of the rules of [specify a particular body²] for the proposed mediation³.
3. The Applicant / Respondent proposes to appoint [name of mediator] as the mediator. The CV of [name of mediator] is attached. The estimated costs for engaging [name of mediator] are [costs in figures].
4. The Applicant / Respondent proposes [name of venue] as the venue for the mediation. The estimated costs of renting the venue for the mediation are [costs in figures].

¹ A party wishing to attempt mediation should make as many of the proposals referred to in paragraphs 2 to 7 as possible. If he is not in a position to make some of those proposals, he should nevertheless file the notice and then make proposals to the other party.

² For example the Mediation Rules published by the Hong Kong International Arbitration Centre in consultation with the Hong Kong Mediation Council or the Mediator's Rules and Code of Ethics of the Hong Kong Mediation Centre.

³ Mediation may be undertaken without the adoption of the rules of a particular body. If the Applicant / Respondent does not wish to propose the adoption of such rules, this paragraph will not be applicable.

5. The Applicant / Respondent makes the following proposals as to payment of fees and costs for the mediation and whether the same could be recoverable as costs of the proceedings if the mediation fails.
6. The Applicant / Respondent proposes that [a specified minimum level of participation⁴] should qualify as a sufficient attempt at the mediation.
7. The Applicant / Respondent proposes that the mediation should commence within [state period of time].
8. The Applicant / Respondent requests / opposes an interim stay of the legal proceedings for [] days pending the mediation process.
9. The Applicant's / Respondent's willingness to pursue mediation is / is not conditional upon an interim stay of the legal proceedings being granted.

Dated this (day and month) of (year).

[signed by the Applicant/
Respondent or his solicitor]⁵

⁴ An example of a specified minimum level of participation may be as follows: "Agreement between the parties as to the identity of the mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any) and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator".

⁵ Where the Notice is signed by a party who does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Appendix C

Sample Mediation Response

[Title as per proceedings]

To: the Applicant / Respondent and his solicitors

1. The Respondent / Applicant agrees / does not agree to use mediation to attempt to resolve all [or specified part] of the relevant disputes¹. [If disagrees or agrees only as to specified part of the disputes, please state the reasons in this Response or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Response in a sealed envelope².]
2. The Respondent / Applicant agrees to attempt mediation in accordance with [the rules identified by the Applicant / Respondent]. [If the Respondent / Applicant proposes the adoption of the rules of some other body, specify them³].
3. The Respondent / Applicant agrees / does not agree to appoint [name of mediator] to conduct the mediation. [If he disagrees, the Respondent / Applicant should identify the mediator he proposes and supply his or her CV together with an estimate of the costs of engaging [name of mediator].]
4. The Respondent / Applicant agrees / does not agree that the mediation

¹ A Respondent / an Applicant agreeing to use mediation should respond to the various proposals made by the Applicant / Respondent. Further, where the Applicant / Respondent who wishes to attempt mediation has not made proposals in respect of any of the matters in paragraphs 2 to 7 in the Mediation Notice, the Respondent / Applicant should make as many proposals as possible in relation to these matters.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Tribunal only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

³ See footnotes 2 and 3 to the Sample Mediation Notice.

should be conducted at the venue proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should identify the alternative venue he proposes, together with an estimate of the costs of renting such venue.]

5. The Respondent / Applicant agrees / does not agree on the arrangement for payment of fees and costs of the mediation as proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should specify his position on fees and costs.]
6. The Respondent / Applicant agrees / does not agree to the minimum level of participation which would qualify as a sufficient attempt at this mediation specified by the Applicant / Respondent⁴. [If he disagrees, the Respondent / Applicant should specify his position on minimum level of participation.]
7. The Respondent / Applicant agrees / does not agree on the time for commencing the mediation proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should state his position as to the time within which the mediation should commence.]
8. The Respondent / Applicant agrees / requests / does not agree to an interim stay of the legal proceedings for [] days pending the mediation process. [Specify the Respondent's / Applicant's position on interim stay.]
9. The Respondent's / Applicant's willingness to pursue mediation is / is not conditional upon the grant of an interim stay.

Dated this (day and month) of (year).

[signed by the Respondent/
Applicant or his solicitor]⁵

⁴ See footnote 4 to the Sample Mediation Notice.

⁵ See footnote 5 to the Sample Mediation Notice.