Hastily drafted heads of terms in mediation: the risks

by Harry Spurr, 11 August 2020

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The effect of so-called 'heads of terms' agreements produced at mediation, and in particular the extent to which they bind those who sign them, is often misunderstood, with unfortunate consequences. In a recent High Court decision, Abberley v Abberley [2019] EWHC 1564 (Ch), HHJ Jarman QC considered exactly this question; his judgment acts as a useful reminder, to all those involved in mediation, of the need to draft such documents with care.

The case concerned a family farm in the foothills of the Brecon Beacons. A falling out between brothers complicated the succession plan, and whilst various unsuccessful attempts were made to resolve things informally, eventually the family gathered at solicitors' offices in Cardiff for mediation. Evidently this was a difficult case, but by 8.30 in the evening, a deal had been reached in principle – a complex arrangement covering many issues, including provision for the transfer of land. To commit this to paper required a whole hour, the mediator typing on a PC borrowed from the host solicitors. But then, by a stroke of profound bad luck, the completed document vanished from the screen before it could be printed, and was never seen again. At this advanced stage of the evening, the mediator resorted to pen and paper and wrote out 'heads of terms'. He subsequently read this document to the parties, it was signed by solicitors for both sides, and everyone departed into the night, anticipating, apparently, that a full agreement would be drawn up over the next few days. The following morning, a handful of extra points were raised, and before long, drafting progress stalled and the dispute blew up once more. Sadly the case ended up in the High Court where the brothers were at odds over the status of the heads of terms, and whether what had been committed to writing was of any legal force at all.

Despite convincing arguments that the document was never intended to be binding, supported by attacks on its validity on various grounds, the judge upheld it, thus giving full force to the mediator's hastily prepared note. And whilst it is hard not to empathise with the parties at their frustration late that evening when the screen went blank, ill-fortune aside, the case contains some useful lessons for all involved in the drafting of documents at the end of a mediation. The following points arise out of the judgment, and merit brief reference here.

First, merely because a more formal document is envisaged will not of itself prevent heads of terms from taking effect as a binding agreement. In this case, there were two important factors: (i) the signatures at the bottom; and (ii) the context – namely that the purpose of the mediation was to resolve a long running dispute. These were strongly indicative of a binding agreement, and in the absence of anything in the agreement to suggest otherwise, this was the only available conclusion.

So the first lesson is clear: the often encountered assumption that heads of terms are not binding is a misconception; everything depends on the circumstances. In practice, to avoid any room for doubt, the status of any document produced at mediation should always be made abundantly clear on its face by the use of appropriate wording.

Second, drafting complex binding agreements under pressure at the end of a long and tiring day is fraught with danger; the risk of error or omission is significant. Parties may occasionally be better advised to resist the understandable temptation to 'get the thing done', and instead record the substance of the resolution in a document that is clearly expressed as non-binding, before relying on fresh minds to produce better quality work the following morning.

Third, and on a more practical level, it usually helps to give some advance thought to the logistics of producing any agreement, heads of terms or otherwise: who does the drafting, when the process starts, how to exchange drafts, printing, copying, and so on. Lawyers sometimes come prepared for this and begin work as negotiations progress; this can save valuable time at the end of the day and help to avoid the pressurised situation in which the unfortunate parties in this case found themselves.