

Property mediations: tips to improve your outcomes

Notes from a short talk given to groups of property lawyers throughout Autumn 2023

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NB much of what follows applies to most mediations, albeit with added force in property mediations because of the heightened emotions (see the first point)

1. Property disputes require a sensitive touch

- a) Conflict concerning land generates unusually high levels of emotional engagement:
 - i. Evolutionary basis: early hominid tendency for heightened aggression in competition for scarce resources
 - ii. Evolution of human behaviour has failed to keep up with speed of transition to settled society
 - iii. Modern legal battles over land are especially bitter
- b) Tread sensitively with your own client and the other side: expect easy provocation and emotionally-driven decision-making
- c) Work hard to defuse tensions in both rooms
- d) This will lead to more rational litigation risk-based decision-making

2. Think carefully about whether to hold a site view

- a) Disadvantage: takes extra time
- b) Advantages:
 - i. Can be useful for mediator in complex 'layout' cases, but rarely essential in practice...
 - ii. More important: allows parties to feel 'heard' by providing opportunity to point out 'important' features
- c) Practical points:

- i. Joint site view quicker, but risk of premature exchanges that are difficult to manage
- ii. Plan itinerary carefully – what to see, in what order, for how long
- iii. Move to alternative venue for negotiation phase if possible – for practical and psychological reasons

3. **Work with the mediator**

- a) Choose a mediator who speaks the language of the dispute (law and context)
- b) Talk honestly to the mediator in advance about:
 - i. Your expectations of them and their role: eg facilitative vs evaluative; voice of reason vs problem solver etc
 - ii. The case and its merits
 - iii. The parties / individuals and your views on how to handle them
- c) Help to set a constructive vibe in both rooms by conveying positive messages
- d) Support the client by assisting with a litigation & cost risk analysis that is realistic and not optimistic

4. **Don't reject an opening joint session automatically**

- a) Not always appropriate – eg when used as a posturing exercise
- b) But several advantages:
 - i. Joint demonstration of shared commitment to good faith negotiation is powerful
 - ii. Exchange of social courtesies (eg opening doors & moving chairs for each other) is also helpful. (In role plays negotiators who exchange item of personal info achieve higher settlement rates)
 - iii. Venting in front of other participants (if it can be tolerated) is important stage in transition from conflict mindset to settlement mindset
 - iv. Useful opportunity for mediator to observe dynamic between parties
 - v. For lawyers:
 - Rare chance to see client interact with other side
 - Opportunity to assess likely witness performance at trial
 - Chance to set constructive tone
 - Can to some extent reverse the 'demonising' effect of protracted legal correspondence
 - vi. Most important: opportunity to demonstrate 'listening' (see next point)

5. **Listening is more effective than pushing hard**

- a) 'Listening' is crucial in mediation for two key reasons:
- b) First because it helps you to understand how the other side is thinking, so your negotiation strategy is better informed
- c) Second because it helps create the platform for a rational negotiation:
 - i. In conflict when our narrative is challenged we defend it more fiercely and unthinkingly: amygdala triggers stress hormone release and our capacity for reason diminishes
 - ii. So rational negotiation is less likely
 - iii. By contrast when we are listened to we feel validated, less defensive and more willing to question our own version of events
- d) If the parties demonstrate they are listening to one another it can be transformative
- e) NB this doesn't mean agreeing or accepting; it does mean acknowledging that their position is valid and important for them

6. **Consider making the first offer**

- a) Parties often reluctant but three good reasons to do so:
- b) First, it is a sign of good faith which will make them trust you more, and humans prefer doing deals with people they trust
- c) Second, remember that humans avoid indebtedness. 1970s Christmas card experiment: US sociology professor sent cards to total strangers and received many in response, because of the 'reciprocity rule'... so make a sensible offer first and you're more likely to get one back
- d) Third, because of anchoring: humans tend to use pre-existing data as a reference point for subsequent data. So make the first offer and you 'anchor' the negotiation around it – all subsequent offers are judged relative
- e) But bear in mind the first offer needs to be reasonable and realistic

7. **Deploy the 'Golden Bridge' theory**

- a) From the Art of War by Sun Tzu (5th BCE): avoid unnecessary losses by offering your enemy a way out that preserves their pride – ie a golden bridge over which to retreat
- b) Different theories on application to mediation, but my two thoughts are:
- c) First, ask how the other side will justify to those to whom they feel 'accountable' (eg co-owners, fellow directors / shareholders, family, friends) the outcome that you seek
 - i. They will have those future conversations in mind when negotiating
 - ii. They will be anxious to avoid any threat to their self-esteem
 - iii. So they will fiercely resist any outcome that they fear will do so, however reasonable that outcome might seem to you

- d) Second, especially in apparent deadlock: ask what you can offer that is of more value to the other side than it costs you
 - i. Perhaps a small concession as to access, rights, boundaries or even an apology
 - ii. The aim is to give them something that makes it all feel worthwhile

8. **How to 'think' in mediation...**

- a) Mediation is negotiation, which is about persuading people to give us what we want
- b) So throughout mediation, keep asking this question:
'What does the other side need to hear from us to be persuaded to give us what we want...?'
- c) (NB the answer is rarely a devastating critique of their legal position!)

9. Briefly, a **few practical points**

- a) Manage **client expectations** in advance: role of mediation as a process, role of mediator, need for solution that works for all parties
- b) Don't forget the **small things**: refreshments, room temperature, take a break for fresh air if necessary (but please come back!)
- c) Bring a **variety of plans** for settlement (different scales, different representations)
- d) **Begin drafting** the settlement as early as possible to save time: structure before the day if possible, and start filling in the detail as the negotiation progresses
- e) Bear in mind **risk of drafting mistakes** late in day / night; if necessary adopt (usually non-binding – take care to make this clear) heads of terms...
- f) ... but remember to **include in HoTs all points** however seemingly non-contentious to avoid the risk of breakdown in the following days / weeks

10. Finally, please do **get in touch** to discuss any mediation-related queries, and have a listen to tips and tactics here: <https://amomentonmediation.podbean.com>

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