

## CASE STUDY - MEDIATION

Mediations of commercial disputes can be short and easy with both parties looking for a compromise solution and simply needing an independent chair. At the other end of the scale they can entail the resolution of complex multi-party disputes with many different interests. To the surprise of many who have not experienced the mediation process they frequently involve considerable emotion regardless of the complexity.

I learned that lesson many years ago when I was acting as a co-mediator in one of my first mediations. The courts in that country were beginning to try out compulsory mediation before litigation and had sent the parties away from the hearing with a requirement to attempt to settle before a new hearing date was set.

The claimants were an Islamic couple, who owned an edible oils wholesaling company, and the defendants were a bunch of redneck management accountants who had bought their company with an agreement that the husband stayed on as an employee to transfer knowledge over a couple of years. Things went wrong almost from the start. The accountants installed a new manager, who was said to have held considerable racial and religious prejudices and failed to understand the cultural implications of wholesaling to a largely Asian clientele. It also became apparent that the previous owners had run the company equipment brilliantly, given its age, but in a manner that had disguised its limited remaining lifespan. Within months manager and employee had fallen out. The new owners missed progressive payments for the purchase of the company and the previous owner walked out claiming breach of contract. The new owners counterclaimed that the previous owner had breached his employment agreement. Both were claiming large value amounts from the other.

As we brought the parties into the conference room it was evident that they were each represented by high powered barristers and solicitors of their own ethnic backgrounds. They all glowered at each other offering clipped courtesies. The one thing they agreed on was that they were only there because the court insisted.

We had not been going twenty minutes through opening statements when the husband complained of chest pains, only to be met with a derogatory comment from a member of the other party that this happened every time they engaged in negotiations. He went outside to rest while the remainder continued. Twenty minutes later a secretary interrupted the mediation to say that he had been taken to hospital - fortunately next door - and was being prepared to go under the knife for heart surgery. Naturally we all turned to the wife and offered to postpone the mediation. She replied, "I can either fret in a hospital corridor for the next few hours or sort out what gave him the heart problem in the first place. We carry on!"

Nine gruelling hours later, a substantial portion of which was spent shuttling between parties in private, we were closer but it appeared likely we would not reach settlement. The lawyers were doing too much talking and posturing and the decision makers were reticent to make conciliatory gestures for fear of undermining attitudes of members of their own team. We were reaching an impasse.

However, as everyone in the room had begun to truly understand each other's needs, and the wife had gained considerable respect from the otherwise all male room, the racial tensions had dissipated and both sides made conciliatory comments to that effect. Seizing on this opportunity, I suggested that we take the wife and the CEO of the management accountants, who was new to his company and carried no baggage, into a private room to see if a change of atmosphere would restart the process.

As soon as we sat down she let fly in a 25 minute tirade about what they had done to her husband. The CEO sensibly kept silent to the end when he gave a very genuine partial apology. A partial apology is one in which regret is expressed for all the hurt caused, without an admission of liability. With the atmosphere drained of pent up emotion and with an apology accepted we achieved a settlement within five minutes, to the visible relief of all the other players outside the room.

There are many lessons to learn from this case. Amongst the most important are:

- Major disputes are extremely stressful and can cause serious damage to the health of disputants. De-escalate them as soon as possible.
- Commercial disputes are not just about money. They engender significant emotions. Settlement is much more likely after emotions have been released.
- Never underestimate the value of an apology. It can often be the trigger for settlement. However be a little cautious. While in most common law jurisdictions apologies given in without prejudice mediations cannot be used in a subsequent hearing if the mediation fails, laws vary from state to state in Australia and internationally.
- Sympathetic attitudes towards cultural differences can go a long way to taking the heat out of disputes.
- It is the parties who should speak most. The role of the lawyers in mediation is to advise and assist in providing legal process not courtroom advocacy.

- As in most disputes each party had a case. Litigation produces a winner and loser. A successful mediation produces a result everyone can live with. No one works again with an opposing litigant. A successful mediation can preserve a working relationship.

Mediation has become much more popular since this example and the legal fraternity has embraced its use to the extent that only 2% of cases that commence litigation are actually litigated. While the settlement reached in the example above was financially beneficial to both parties, each side had incurred substantial costs in dragging the matter to the initial court hearing. JP Fisher Consulting is of the firm belief that mediation should be commenced early, even if it fails at first attempt. Early mediation allows parties to define the issues in dispute, settle the less contentious issues and develop plans for second and subsequent mediations, perhaps with further relevant information to assist resolution of the more difficult matters.

Call John Fisher if you need more help in mediation.