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A view from the Bar

Mediation in complex commercial litigation

R J Douglas SC

My particular interest in mediation is through the focus of counsel appearing for parties in dispute.

Mediation is not an end in itself — in truth it is but one tool in the procedural armoury afforded a party engaged in civil disputation. It may, and often does, assist in timely finalisation of the parties' lis.

Sometimes mediation, unquestionably, is the apt course (for example, previously exchanged close UCPR offers — that is, offers made under the Qld Uniform Civil Procedure Rules; plain misunderstanding by one party of the law or fact).

Sometimes mediation will be a waste of time (for example, irreconcilable but critical dispute of credit between apparently credible principal witnesses).

Sometimes trial is a waste of time (for example, penury on the part of the defendant; the prospect of pyrrhic victory by the plaintiff due to the crippling litigious cost burden of pursuit or questionable execution).

On many occasions the parties are better off completing interlocutory steps, distilling and thereby minimising the real issues for trial, and having a trial as early as possible while witnesses have fresh hearts and memories.

In these last-mentioned instances, the need for trial is dictated by the legal and factual issues, and the interests of the parties which obtain in that case.

One of the arts of a litigation lawyer is to identify which case falls into which category, and then how to best deploy a client's precious resources to maximal outcome.

The truth of these observations is underscored in the case of complex commercial litigation. That is because the stakes are so high, by dint of amount of the dollars or proprietary

remedy, and costs, at stake.

Importantly, the cost burden of large commercial trials is not shouldered only by the parties. Even in those courts which now charge court usage fees, such as the Federal Court, taxpayers bear a heavy financial burden of providing fully staffed courts for curial disposition of these disputes.

In the case of a complex supervised list matter, requiring frequent interlocutory supervision, together with lengthy trial court days, and possibly appellate disposition, the burden on both party and public purse is significant.

Against this background, I pose below a series of questions, and my answers, to mediation of disputes.

Is the case worth mediating?

I have already touched on a number of issues pertaining to this question above. Let me add several more.

If a defendant party appears plainly intractable in disposition then, ordinarily, mediation is a waste of time.

I say 'ordinarily' because the obduracy of the defendant may not be founded on

without apparent good reason, ought prompt a lawyer to enquire and search carefully to discern the financial substance of that defendant. As barristers (perhaps as with supervising judges) we ought be encouraging parties to do that more often.

What are the alternative measures to mediation?

Informal alternatives include an exchange of offers or informal meeting of lawyers or lawyers and parties, in either case to elicit latent desire for resolution.

Formal alternatives include UCPR orders for case appraisal, special referee determination of issues, or report evidence eliciting from a single expert on an issue. These are potential catalysts for non-mediated resolution in an apt case.

If mediation, or any of these alternative measures is availed, the measure adopted must be capable of being undertaken in short duration. Otherwise the cost and delay burden will be too high.

Judges sometimes order such a

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their, or their lawyers' confidence in a favourable dispute outcome for the defendant, but rather in that party's indigence per se, or in the event of judgment or substantial compromise.

The existence of such obduracy,

measure during trial. I have been counsel in long trials where judges have referred the parties to mediation during the course thereof.

I recall being in one case, a professional negligence case against a



design engineer involving a failed building at South Brisbane, in which Mr Justice Chesterman appeared for the plaintiff, with now Judge Samios as his junior. Now Justice Fraser was for a co-defendant. Mr Justice Connolly ordered, after three days of trial, an engineering issue be determined by an expert engineer as referee. The matter resolved soon after the referee handed down his findings.

Mr Justice Fryberg has expressed the view, curially and extra-curially, that lawyers would be professionally negligent if they do not advise clients of the availability and benefit of mediated compromise. With respect, I doubt that it is so professionally negligent, but at base it is certainly sound advice.

When ought parties mediate a dispute?

In summary my answer is very early or very late.

Put another way: pursue mediated compromise before a proceeding is commenced (or perhaps when pleadings are closed), *or* after *all* interlocutory steps and supervised case list directions are concluded.

If parties are about to litigate a large commercial dispute, usually there has been exchanged a body of open and privileged correspondence, comprising at least a formal claim and a formal response.

That is a good time to conduct a short form mediation. The documentary battle is then in its infancy.

It is also a prime opportunity for a lawyer to inform or remind his client that:

- They will soon commence expending what will ultimately be about X dollars in costs.
- They confront a result in two or more years time and live with and be annoyed by it for that period.
- The outcome of any trial will depend upon:
 - the document disclosure that ensues inter se and by third parties;
 - the substance of expert and lay evidence not yet fully explored; and
 - just occasionally, judicial disposition or possibly caprice,

those all being circumstances they cannot necessarily control.

If the parties have commenced litigation I am extremely cautious about suggesting mediating until the exhaustion of all interlocutory steps, and at least that of document disclosure.

To mediate during the currency of litigation short of finalisation of issues, but in particular short of any disclosure dispute, is fraught with danger.

There have been a number of instances in the last few years of compromises being achieved but set aside, or in a case I was in for the appellant on appeal, a judgment set aside, on account of inadequate opponent document disclosure infecting the result.

These instances, plainly, are disadvantageous to the affected clients and embarrassing to their lawyers (or probably their former lawyers). A fortiori in the case of large commercial litigation.

Unless the pleadings and disclosure are exhausted, hopefully with the experts having 'hot tubbed', and the issues minimised to those truly in dispute, the matter is not ordinarily ready for mediation.

It is in this sphere that the courts have an important role to play.

What ought the court order in advance of mediation and expect in consequence of unsuccessful mediation?

For what I am about to canvass, I do not claim sole authorship.

I picked up the idea in this last Christmas break in London, as an observer of CMCs (an acronym for 'Compulsory Management Conferences') in the Technology and Construction (T&C) Courts, located in Dunstan House in Fetter Lane, one street up from Chancery Lane.

I say, without hesitation, from my reading and observation of the complex commercial litigation practices of the English courts, our commercial list and supervised case list management compares very favourably with the T&C Court.

The High Court judges sitting in the T&C Court, that I listened to, in particular, at least as between the



principal parties to the litigation, seemed determined to ensure, upon the CMC, that the usual direction of the preparation of a list of issues be undertaken before any consensual or mandated mediation was to ensue.

Several judges informed the parties, in the event that the matter did not settle at the mediation, the judge wanted to receive from the parties:

- (1) the truncated list of issues for trial; and
- (2) the revised trial length estimate.

I must confess this was something of an epiphany for me.

Without piercing the statutory veil of secrecy which envelopes the mediation process, the supervising judges, on whose docket the case in question was registered (that judge thereby ordinarily being the trial judge), could thereby impose pressure on the parties.

For the party and public cost reasons already canvassed, such pressure is not infelicitous or unwarranted.

That course, obviously, was to ensure that the mediation, if unsuccessful, yielded at least the benefit of issue refinement and a shorter trial. If it were otherwise, mediation would only add unnecessarily to the costs and delay of trial.

Surely there can be no mediation where the parties walk out the mediation door bereft of realisation that some previously disputed matters can no longer be in issue! If it is otherwise, parties should expect no favours from a supervising judge, in terms of prioritisation or award of costs on issues ultimately lost.

The Qld UCPR non-admission/denial pleading rules are unique in that the apogee thereof interstate is only that of specific traverse (for example, Fed Crt, NSWSC). These UCPR rules providing for the giving of reasons for non-admission and denial, are designed to flush out and eliminate issues unnecessary for adjudication.

These UCPR pleading rules, often honoured more in breach than observance, warrant enforcement.

In this vein, Chief Justice Gleeson,

recently, in an interview published in *The Australian* newspaper, commented that the issues in modern civil litigation greatly exceeded (and inaptly so) that in litigation of the same kind of dispute 30 years ago. The time, he said, had again come for reasonable confinement of issues for trial.

I was in a matter recently before Mr Justice Chesterman, namely *Todrell Pty Ltd v Finch* [2007] QSC 286 (14 December 2007), where his Honour made disparate orders for costs between the parties, including against the successful plaintiff for whom I have acted in relation to issues which ought to have been conceded in the pleadings.

My client elicited an order for costs on an indemnity basis up to the first day of trial, and was ordered to pay the costs of the further three days because we lost on the factual issues which took that further trial time.

In my view this approach, although difficult to apply in practice the jurisprudence canvassed in his Honour's decision reveals, ought to be followed more often. More so where the court can often safely proceed on the basis of the parties,

even in those complex commercial cases, to be set down for more than one (albeit long) day. This assumes adequate prior documentary exchange (to which I will come).

An exception may be in a case where there are multiple defendants. In such a case it is sometimes apt for those defendants to meet on a prior (not necessarily the previous) day to consider their position inter se.

Who ought to be the mediator?

Usually, but not always, it ought to be an experienced senior lawyer.

The person:

- need not be a silk nor indeed a barrister;
- ought to be a barrister or solicitor who, by experience, could just as easily be acting for one of the parties; and
- ought to be a person who, by reputation, is prepared to be forcefully evaluative of the case, but not so as to embarrass, in open (as opposed to private) caucus, one or other party.

Sometimes, a case is better mediated by an experienced engineer, other expert or industry independent CEO.

In my experience, Parkinson's Law (that is 'work expands so as to fill the time available for its completion') is alive and well in [mediation]. It would be rare for any mediation, even in those complex commercial cases, to be set down for more than one (albeit long) day. This assumes adequate prior documentary exchange ...

albeit fully informed by exhaustion of interlocutory steps and mediation, unnecessarily run matters and take considerable trial time in so doing.

For how long should the mediation be set down?

In my experience, Parkinson's Law (that is 'work expands so as to fill the time available for its completion') is alive and well in this sphere.

It would be rare for any mediation,

Ought anything to be exchanged before the mediation?

A mediator should always direct (and if I am a mediator I always note it is 'without exception'), the parties deliver outlines of argument, not exceeding 10 pages, canvassing the salient factual and legal issues.

No outline, no start!

That delivery process must commence with the party that bears the persuasive onus on any particular issue.



Plainly copies ought also be given to the mediator so he or she can consider the mediation brief, and the issues, before the day.

Outlines, and their exchange, are important because the need for instruction can often not be met on the day of the mediation.

Insurers have reserves. Corporate defendants have boards of directors. A sharp outline of contentions from an opponent can often form the basis for a prior submission for increased authority at forthcoming mediation.

It is very helpful, as well, particularly for a plaintiff party, to make an offer before the day of the mediation.

In a complex commercial case the offer ought be the subject of condescension to particularity of calculation. That is so the defendant can see how it is arrived at, and more importantly, how much of a discount is afforded, to meet the risks, in the offer ultimately made.

All the better, too, if a defendant can make a counter offer before the commencement of the mediation. All this avoids any 'who blinks first' approach on mediation day, and then saves the time entailed in the first round of offers at mediation.

Preparation for the mediation?

I am not speaking here of ordinary preparation, but rather who should the lawyers speak to, and what they should speak of in advance of the day of mediation.

The mediation advocate, usually a barrister, come the day of mediation necessarily will be articulating, debating and making submissions upon the critical factual issues. While proofs of evidence and expert reports will inform those submissions, prior brief conferences with the principal lay and expert witnesses can often sharpen the debates submissions made, just as they do at trial.

Appearing at a trial requires careful descent to the case or trial theory for the purpose of openings, objections, examination and submissions. No different approach is apt upon mediation.

In written or oral submissions,

however one must be careful, short of trial, in attempting to propound the virtues of your client's case, not to give away any particular forensic or other adversarial advantage. There may be some factual nuances, or fillable gaps in the opponent's case. It would be foolish to alert the opponent to any such lacunae.

It is vital that a client be fully informed about costs, in writing, by the solicitor, prior to the commencement of the mediation. The client ought be told:

- what solicitor and own client costs they have incurred to date;
- what solicitor and own client costs they will incur in the future until the end of the commercial trial (and if necessary in the appeal);
- what standard costs, in contrast, will be recovered in the event of success;
- in light of these first three matters how much more a judge will need to award than any offer made to garner later, the equivalent of any compromise sum under consideration; and
- finally how much in costs they will pay to the opponent in the event that they are the unsuccessful (or partly unsuccessful) party.

Doing this is not just important so as to assist each litigating client in evaluation of any offer at the mediation, in comparison with an award at trial, but it is also important in order to meet the ubiquitous circumstance of the making of an 'all up' offer.

Scrambling around on the day in relation to the costs burden is a wasteful exercise. Mediators ought direct the prior availing of such costs information.

How ought offers be made?

I have already touched on this as to when they ought be made.

I think it helpful, before the mediation, for each solicitor to draft and circulate a form of discharge which contains all of the necessary terms proposed in the event of 'getting to yes'.

Compromise of large commercial litigation these days usually involves capital gains tax and other tax issues.



The client ought be advised prior to the mediation to consult its tax advisors as to the most favourable cognate terms for resolution. If the likely terms are complex or extravagant, and themselves likely to require the opponent to seek accounting or other legal advice, then flagging them early, is essential.

Confidentiality or media/stock market statement requirements raise cognate considerations.

As to the prospect of compromise, the mediator must articulate, anterior to and at the mediation, that there is to be no binding settlement unless and until the parties have written out the terms and signed them off.

Parties can occasionally be disappointed when they strike an oral deal at mediation only to have it fall over when it comes to documentation.

Who ought attend the mediation?

I cannot emphasise enough the need for each party, and the mediator, to ensure that there is a decision maker present on both sides who is in a position, within the bounds of corporate reason, to make a decision at the mediation within more than ample range.

This is my greatest disappointment with mediation to date.

Senior people do not attend as decision makers on either side of a very large case. Sometimes they do but harbour limited authority from the litigating corporation, or insurer, to compromise.

Orders or directions to the contrary seem to be useless in circumventing this trend.

We tend not to confront the problem as much in Queensland now because of our burgeoning good reputation among many 'Mexican' (NSW and Vic) insurer decisions makers, namely that we take mediation seriously. This reputation fits seamlessly with the equally burgeoning fine reputation of our commercial court in the event mediation is unsuccessful.

In any event, possible shortcomings

in authority affords all the more reason to exchange outlines, and offers well before the mediation. I find it useful, too, in large cases, to ensure that your principal witness, or witnesses if no more than two or three, together with your principal expert, also attend the mediation of such cases. They need not stay for the duration.

That is so for three cognate reasons.

- First, it looks good to the other side that you are confident enough to bring your principal witnesses to assist you.
- Second, you are able, as part of your submissions, to invite each of them to speak (and thereby project himself or herself as a witness) on critical factual issues. They may make a favourable impression on the opponent or its lawyers.
- Third, in the event that the opponent raises some factual issue not previously addressed, they are there to immediately give you instructions with respect to the same so you can respond, or otherwise to enable you, promptly, to take into account any deficiency in your own case.

There is no ethical impediment to any party, or its lawyer having a detailed confidential discussion with the mediator prior to the mediation as to their case concerns, and as to how they would prefer matters conducted at mediation.

This underscores one of the advantages of mediation, even if unsuccessful: it affords a significant opportunity to test your client's case. So often, after an unsuccessful mediation, one comes away with a better appreciation of the case, not just of its virtues and shortcomings, and what truly is in issue, but also what additional evidence needs to be canvassed in order to meet arguments put up by the other side.

Further drilling down into the law also often ensues.

What of confidential discussions with the mediator?

There is no ethical impediment to any party, or its lawyer having a detailed confidential discussion with the mediator prior to the mediation as to their case concerns, and as to how they would prefer matters conducted at mediation. In truth, in my opinion, it is essential. Certainly such discussion occurs at mediation. Some mediators do not view favourably such approaches, not appreciating the role of mediator is quite different from that of a judge.

Last year, in a mediation in Sydney, I told the mediator, an ex-judge, what I wanted him, fairly, to communicate, inter alia, to the opponent, on our behalf in private caucus. He told me not to tell him how to do his job! My riposte was he ought get used to the fact that in his new party-funded role that this is what he was obliged to do.

When dealing with non-lawyer mediators, it ought be borne steadily in mind that they are likely to harbour understanding the confidentiality of non-caucus discussions of this type, and the need to avoid, in open caucus, any evaluative approach.

It is one thing for a mediator to tell a party, in private caucus that, in the mediator's opinion, that party is likely to lose. But some mediators (including some lawyers) feel the need to ventilate his or her opinion in open caucus. This is an anathema to effective mediation. Parties must feel that the mediator is, and appears to be fair.

I have experienced such apparent lack of fairness, unfortunately, on several occasions. On two of those occasions the mediator was not a barrister, or an engineer, but rather an ex-judge. Perhaps



judges are too used to, from their previous life, adjudicating matters.

What is the principal procedural tactic one adopts at mediation?

Minds differ on this. A number of you have heard my views on this before.

Depending upon the sophistication (including the preparedness to listen) of the opposing client, one of two tactics, and occasionally both, ought to be adopted.

- First, you ought to be attempting to erode the confidence of the opposing client in his or her legal team in the advice he or she has been given.
- Second, you ought to be using the opposing legal team against their client.

Each of these tactics has a common genesis.

By the factual and legal submissions made, you ought to be attempting to impress the opposing decision maker and lawyer with the reasonableness and strength of the points made on your side of the case and all the reasons why the legal and factual issues raised in response are weak. The lawyers, hopefully, will feel compelled to justify their (or their client's) previous position in the teeth of the argument raised by your side.

In this regard some subtlety and skill is required. If there are, say, 10 points in a case that could be canvassed in a mediation, five of which favour my client and five of which favour the opposing client, then I will say as much, and why (at least apropos the former).

Most opposing litigants and lawyers will sharpen their listening if, on the without prejudice occasion of mediation, points are properly conceded as likely to be lost at trial. As a corollary they tend to take the remaining asserted points more seriously.

Ending and subsequent offers

Because it may be necessary for a mediation decision maker, at mediation end, to go away and obtain approval in respect of any opposing offer worthy of consideration, it is apt to leave closing offers open, say, for two weeks.

In any event, offers made at the end of the mediation should ordinarily be followed, the next day, by a UCPR formal offer. Remember, however, in

this regard, that such UCPR offer made will not be accompanied by the benefit of any elaborate term (for example, confidentiality), of the type just discussed, which may have found its way into your drafted discharge.

If you act for a defendant confronting a judgment of some amount, it is foolish for your client, at or following mediation, not to put in place an offer which affords reasonable costs protection after trial. Otherwise your client is litigating at the plaintiff's leisure.

Conclusion

Large commercial litigation is expensive and time consuming. If a trial is required, then the parties should get through the interlocutory steps and garner a trial date at the earliest opportunity.

If mediation in such litigation is apt to do it early or late.

Parties should be prepared to meet the costs of litigation, in part even if successful, if they do otherwise.

Mediation behaves thorough preparation, just like for trial. Proper selection of mediator, exchange of outlines, disgorging information as to costs, together with consideration and prior drafting of compromise agreements are critical elements of mediation of large disputes.

Take your critical witnesses to the mediation.

Erosion of confidence in an opponent's case is what mediation (and indeed litigation) is all about. By your arguments, use your opponent's lawyers against their client.

Be prepared to bite the bullet and reduce the issues and trial length after having the benefit of unsuccessful mediation. Courts ought expect this and tailor costs orders accordingly.

I am not suggesting for a moment that 'one size fits all'. The above template, however, has worked for me, both as counsel for a party engaged in, and as mediator of complex commercial (and other) litigation. ●

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