
Kluwer Mediation Blog

Don't Worry, Be Happy

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Thursday, September 1st, 2011

In my previous life as a blogger, I wrote about things that jumped up and hit me that day, that week, that month – so it is that I report here in my very first post at this most promising blog, that I was not so much hit but lynched when training aspiring mediators here in New Zealand last weekend – I mean, I gave up my whole weekend, only to be hounded for most of it because I was HAPPY.

My crime, dear reader?

That when I mediate (I announced to the group) *'I'm happy if the parties are happy'* ... that is, if they get to an agreed outcome they can live with, and whether it is fair in my eyes or not, I am content with that as their mediator.

Well, that set the cat amongst the pigeons, I can tell you.

Now don't get me wrong, in my world of mediating commercial disputes I am vitally, passionately interested in the procedural fairness and the transparency that is involved in getting to outcomes, but not so much with substantive fairness or justice.

In fact, if you pressed me I would admit to a number of occasions where I wondered how this or that outcome worked on any level for some of the participants in the mediation – but not for a moment did I consider that any one of them would be interested in *my perception of fairness*, if they themselves could live with where they had got to.

There were times when I saw a party value procedural fairness *over* outcome fairness – and the more satisfied they were with the process, the less they appeared to be concerned with the outcome. And, just to add to your total consternation, this tended to be emphasised when there was an obvious power imbalance – with David being more influenced by procedural fairness than Goliath – now, how does that work?

What? So you would have me intervene to impose my own notion of community, legal, moral and personal standards on the parties? Is that what *they* want from me? Is it not sufficient that they have voluntarily agreed to a substantive outcome as a result of a procedurally fair process? If I do intervene what happens to party empowerment and self-determination? And by the way, my perspective of fairness could easily be influenced by confidential information I had received in private session from one or other of the parties. *C'mon, is that fair?*

Yeah, sure – I need to test the outcome. Who does what, when and how? Where are the fishhooks in making it work? Is it sticky (durable)? Will it look okay to you when you wake up tomorrow morning or in a year from now? What are your chances of a better deal outside the room, in court or simply by holding out?

So, very quickly that gets us all the way across town to the decline of civil justice and Dame Hazel Genn's witty ditty that '*mediation is not about just settlement, it is just about settlement*' outlined in her three excoriating Hamlyn Lectures, *Judging Civil Justice*, in 2008.


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