

Kluwer Mediation Blog

The Place of Money in Mediation

John Sturrock (Core Solutions Group) · Monday, February 29th, 2016

Three recent mediations in three jurisdictions raised some interesting issues.

Each mediation was different. One involved a claim for professional negligence against a firm of solicitors for (allegedly) incorrectly including an occupied building in the sale of a large piece of land. The sellers were unhappy that many years had elapsed since the transaction, a number of them passing while attempts were made in court and elsewhere to rectify the error.

Another involved a large-scale IT project in the Middle East where invoices for a significant amount remained outstanding to a contractor and the “employer” had since assigned the contract to another company. Again the passage of time had magnified the frustration for the claiming party.

The third featured a unique engineering project which seemed to have failed spectacularly. One challenge was how to measure the loss and assess the appropriate means to rectify the problem on the ground, whatever errors may have led to the initial failure. The situation was exacerbated by multiple party involvement and the need for ratification by external constituencies.

Learning?

I found myself pondering the learning from these diverse and rich experiences. The utter humanity in each was a point to explore. Even the most commercial dispute was heavily influenced by the relationships (or lack of them) at senior levels. Part of the function of mediation in each matter was to build or restore a level of communication sufficient to enable a modicum of trust to be established on the day – and, in three of the four cases, to enable the principals to engage directly in the final stages of the negotiations.

One or two quotations emphasise the point: “We have never had a forum to say what was said today”; “All I needed was to have that dialogue, I have never been able to talk to [x] as I am to you now”; “The problem was not the sending of the message but not being offered the opportunity to comment on the content”; “In order to have the conversation, we needed all the people here”. “I was sceptical about mediation but this really worked.”

Addressing Money

The other big point was the timing of addressing money claims. Each mediation had financial aspects, whether for the purpose of rectification, as compensation or as debt apparently due. In one, parties and their representatives were content to be guided by me as mediator on the timing. As a

result, the financial talks were relatively straightforward in so far as that is ever so in cases like these. The point was that, with other issues on their minds (how they felt about the other party, the need to understand past events, exchange of new information, risk analyses, and so on), it was more effective for the parties to address these issues in advance of bargaining about money.

In the other matters, one party in each mediation wished to move early to making an offer. The reasoning was that such an offer would establish whether the other side would be prepared to do a deal or if the gap was too great to bridge. As one negotiator put it to me: “The sooner we make an offer, the sooner we’ll know whether it is worth staying on, or if we can be on the next plane home.”

That would of course be true but, in my view, the prospect of being on the plane home without a resolution could be much greater with such an approach. People have many reasons for taking the stance they do, including a disinterest in whether the matter resolves now or later. It does test the mediator’s resolve too – and may be intended to do just that in some instances. It may also put pressure on others in the rooms with foreseeable – and often unforeseen – consequences.

What happened next? In one, I had a frank and direct discussion about what I saw as the risks and benefits of such a strategy. I didn’t need to beat about bushes as the negotiator and I had already formed a mutual respect in the short period since our first meeting. I knew he meant business and he knew I was not a pushover. I said I would be content that we had explored together the risks involved in the strategy proposed and reminded him that, as client, it was his prerogative to make informed choices. We also agreed that I would advise the other party about the process issues which I perceived arose. That at least was a partial insurance policy. I said I would enjoy seeing if what I predicted would actually happen. I observed that it was all good learning. We explored it all with a lightness of touch.

In fact, the move rather backfired in an unanticipated way but, because the negotiator had prepared himself for a knockback by the other party, we were able to deal with it. And it did indeed require us to go back and explore underlying issues before we finally got to the numbers. When we did, it was a remarkably short process because the necessary prior due diligence had now been done. Indeed, the principals got together privately and completed the deal in a friendly spirit in the late afternoon, earlier than either had predicted first thing in the morning.

In the other mediation, I decided to hold the line. It took some explaining and regular short meetings with one player to reassure that, despite the passage of time on complex technical and quantification issues involving experts, the expenditure of a few extra hours would make the end game much easier, despite the apparently large gap between the parties around financial settlement. And so it turned out. By the time one client’s senior legal adviser was able to sit down privately with the lead client negotiator on the other side and look that person in the eye and say “I can go no further”, all the pieces were in place for the jigsaw to be completed. Intricate and time-consuming it may have seemed (if one day can be described as “time-consuming”, compared to the years of positional negotiation and litigation prior to mediation), but the parties had achieved the result they sought, not only financially but in a host of other ways.

“Keep the money to the end,” I often say in negotiation and mediation training. In my experience, it tends to work in most cases.

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