

Kluwer Mediation Blog

Never Give Up: Perseverance In Mediation – And Life?

John Sturrock (Core Solutions Group) · Thursday, February 28th, 2019

“If you had not held us back that evening, the deal would not have been done.”

“Thank you and I wish you well.”

In this post, I return to a familiar theme for mediators and for lawyers acting for clients in mediation: perseverance.

The first of the two quotations above comes from a participant in a mediation spread over four days and nearly one year. It was a complex matter involving many parties and some difficult issues. Towards the evening on day four, a proposal from the claimants was met with a lower counter by the defendants. The parties had laboured hard and the claimants felt that they had gone as far as they could go with the process. Or at least some of them did. Two principals left the building along with leading counsel.

That might have marked the end of the mediation. However, I had a sense that there was more to play for. I expressed my frustration with the situation, spoke with those who remained and suggested a further meeting, one to one, involving one of the claimants’ key advisers and his opposite number. “Let’s give it a go” was the sentiment. I knew that each were keen to find a resolution and that they respected each other. No lawyers were present.

In that meeting, things were said and options were explored that resulted, three weeks later, in a comprehensive deal settling all matters. Only because we went that extra mile. And, perhaps, in hindsight, it was helpful that the others had left early. They provided the space for someone to step forward who could bring about change in the pattern.

The second quotation narrates the words of the chief executive of a large supplier of services to the public sector. He spoke the words at 9.45 in the morning, less than one hour after the start of the mediation. Breaking with convention, and with the agreement of all concerned, I had arranged to start the mediation with a meeting of the two principals on their own. All of the legal and technical stuff had been well covered by the lawyers in the paperwork: the principals had met previously and they knew each other.

The purpose of the meeting was to explore whether either party would be prepared to move from a previous stalemate. In a friendly and frank conversation, one had explained to the other that, with further inquiries carried out and substantial further costs incurred, he was in fact not even able to start at the previous point. His counterpart responded that, in that event, there was no point in

continuing. He departed the meeting with the words set out above.

Four hours later, the parties were drafting a settlement agreement. What had happened? We didn't accept things at face value. We stuck at it. By "we", I mean myself and the two principals, supported by their teams. We continued to explore, to dig deeper, to try to understand what was really going on and what each needed. We reminded ourselves of the cost of the alternatives to a settlement. It was a classic piece of positional bargaining in one respect, each trying to find out how far the other would actually go. But without the structure and safety of mediation and a mediator with whom to talk frankly and confidentially, it is unlikely the principals would have had the ability to reach an outcome. And the lawyers supported them throughout.

What can we take from this? Here are a few observations:

- It is really important not to assume that what the other side say is what they really mean
- Even if it is what they mean at a particular point in time, that may change for a number of reasons
- Your job (as lawyer/mediator) is to challenge assumptions and keep looking for new angles and ways to see things
- That involves the classic techniques of really good questioning, really keen listening, reframing the words/topics, getting under the surface (again and again), changing the environment and/or the participants, constantly benchmarking against the alternatives, teasing out the various options however obscure
- You must maintain good relationships with all those involved: they are nearly always trying their best and you don't know who may hold the key or act as a tipping point
- And remember the outside constituencies (shareholders, lenders, government officials and ministers, business and life partners) whose needs and interests may be crucial – and therefore to whom you may need to help either party build a bridge.

A final thought: perhaps this is all going on in the Brexit negotiations. I hope so. But I fear not. So many people have suggested that mediators could help. From the examples above, that is probably obvious. So the big question for the next generation is this: how can we ensure that mediation, with all its benefits, is used in high stakes political negotiation as it is in other areas of human activity? It will take much perseverance to get there. But it can be done.

Really, these are all lessons about life itself. One of Scotland's lesser known music groups was a band known as Pilot. They had a lovely little song entitled "Never Give Up", the B side to a number one hit in 1975 entitled January. In the chorus they sang: "Stay to the end, I'm gonna try and I'll never give up". That song remains one of my favourites – and an inspiration in my work.

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