# No case too big to mediate

By Mark Kelly

**Major litigation, the** "mega-cases", can resemble plot lines from *Game of Thrones*.

Elegantly coiffed and costumed lawyers lead armies of extras into an apocalypse of injury and expense, from which only one side will emerge victorious, and none unscathed. Egos affect decision-making, battles turn on unexpected twists, and people says lots of ostensibly clever things that actually make no sense at all.

There are many who do not see these mega-cases as susceptible to mediation. To carry the analogy one step further, there is a sense that a whiteboard will not mollify angry dragons.

But, in fact, mediation has been the key to unlocking settlements in many mega-cases. What follows are but a few examples.

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## Significant, and difficult

There are few disputes more difficult, and significant, than that which developed between US bond holders and the Argentine government after Argentina's $100 billion sovereign debt default in 2002. Politics, social justice, sovereign rights and commerce collided with colossal force. In 2014, New York mediator David Pollack was appointed to resolve issues between Argentina and hold-out bond holders, who had refused to participate in earlier debt restructurings. Through two years of intensive and difficult mediating, Mr Pollack helped the parties reach deals. Those deals will see more than 90% of the extant claims settled, with payouts of over $8 billion.[1]

The *AMD v Intel* case was also substantial. AMD and Intel are the world's largest makers of computer chips. From 2004, there was extensive litigation, in multiple jurisdictions, between them. AMD accused Intel of anti-competitive behaviour. In turn, Intel contended that AMD was in breach of patent cross-licensing arrangements between the two parties.[2] In 2009, enter US mediator Antonio Piazza. Mr Piazza mediated this case for two days at a hotel in Maui. After a marathon session, the parties hammered out a deal. The settlement included:

- a payment of $1.25 billion from Intel to AMD;
- agreement on future business practices;
- new patent cross-licenses;
- dispute resolution provisions, including regular meetings between the parties' general counsel; and
- the withdrawal of the litigation.[3]

Interestingly, rebooting the relationship between the two companies was an important aspect of settlement.

AMD Vice-President for Legal Affairs Thomas McCoy stated: "we needed to find a way to conduct ourselves in a manner consistent with industry leaders, not tribal warriors".[4]

Yet another goliath in the US was the class action suit filed against AIG in the wake of the 2008 financial crisis. That case was eventually mediated by retired US District Judge Layn Phillips. In 2014, AIG agreed to a mediator's proposal to settle the case for $960 million.[5]

## In Britain

The UK has also seen its share of mediated mega-cases. Leading mediation body CEDR excludes mega-cases from its value statistics because they skew them so dramatically. As far back as 2007, it had a £1.5 billion case mediated.[6]

The *Corby* toxic waste case was one of the more significant cases in recent UK legal history. The plaintiffs were 18 young people who alleged that toxic waste dumped by Corby Borough Council between 1984 and 1999 was the cause of their deformities. The case was fought for over 10 years, before being successfully mediated by Sir Henry Brook. On 16 April 2010, the council released a joint statement with the families' solicitors announcing that it had agreed a financial settlement with the families. The council also apologised.[7]

The applicability of mediation to significant cases has been recognised by the UK's courts. Even the UK's Court of Appeal has a mediation scheme.[8]

## In New Zealand

Here in New Zealand, we too have mediated

mega-cases. Canterbury earthquake claims have taken the recent spotlight in this regard.

In 2013, after a mediated negotiation process, Lyttleton Port settled its dispute with its insurers, Vero, NZI and QBE. The payment in aggregate to be made by the three insurers was $438.3 million plus GST.[9]

More recently, the Christchurch City Council reached an even larger $635 million settlement with its insurers. Mediation was also a part of achieving that deal.[10]

The stakes, and the amount of money involved, in these mediated mega-cases may draw our attention. But it is also interesting to consider why it is that even these cases are so amenable to a consensual facilitated settlement process, that is, to mediation.

## Repairing relationships

The opportunity that mediation presents for addressing, and even repairing, relationships may be one reason.

A lot of hard-nosed lawyers scoff at the importance of relationships in commercial disputes. They are wrong to do so.

In a speech on mediation in 2015, Lord Neuberger, President of the UK Supreme Court, cited a 2007 UK survey: "which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation".[11]

Mediation also encourages parties to work together to seek solutions beyond those that might be available from a court. Apologies, licensing agreements, mechanisms for resolving future disputes, joint statements and technology transfers are but a few examples of what is achievable.

## Mediation works

Many cases are negotiated before they were mediated, and it is mediation that brings them home. Statistics worldwide support the efficacy of the process. The latest CEDR mediation audit in the UK, released on 11 May 2016, reported an aggregate settlement rate for UK civil mediations of around 86%.[12]

Perhaps also, mega-cases are particularly amenable to mediation precisely because there is so much at stake.

High stakes cause stress, and fear, for the parties and their advisors. Overcoming that stress and fear can require an almost pathological commitment to the cause. Sometimes that commitment can lead to parties, and their advisors, becoming unduly positional – clinging to absolutes becomes the only way to cope. Perhaps the intervention of a neutral mediator, who is seeking to help the parties turn the rhetoric into a constructive conversation, and to have each walk a mile in the other's shoes, is just what is needed.

And finally, there is closure. A mediated settlement also brings closure, at the point of agreement and beyond.

Scottish research has shown that mediated settlements are more likely to be complied with than settlements reached simply between parties.[13] And even mega-cases need to come to an end. Otherwise, for their participants, there must always be the risk that "*winter is coming* ..." ■

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