SEMINAR PAPER

CONSTRUCTION MEDIATION – LOCAL AND INTERNATIONAL DEVELOPMENTS AND ISSUES

Presented to the New Zealand Society of Construction Law

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22-24 September 2015

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CONSTRUCTION MEDIATION – LOCAL AND INTERNATIONAL DEVELOPMENTS AND ISSUES

1. **[Slide]** Construction disputes are difficult and expensive to litigate. This is because:

   (a) They can be extraordinarily complicated. No two experts will ever agree on everything. Causation is so often multi-pronged, and quantum is almost always a live issue. How many ways are there to fix a building?

   (b) Construction disputes can have a "cast of thousands". Uncle Tom Cobley typically comes in as the12th fourth party, because he visited the site for the roof shout; and

   (c) Construction disputes provoke strong emotions. All homeowners feel passionately about their homes. Builders and subbies feel strongly about their work too, and so do professional consultants. It seems that pride is always on the line. And so often strong emotions can run hand in hand with bad decision-making.

2. Settlement is usually the smart way forward for everyone. **[Slide]** Mediation is often the best way to unlock settlement.

3. Mediation has consequently become a key component of construction dispute resolution. It is mandated by many standard form contracts, including: NZS3910:2013 at clause 13.3 (about which I will comment further later). It is usually a tier in any bespoke dispute resolution clause. It has been virtually mandatory in the Weathertight Homes Tribunal. It is now very common in earthquake disputes. Many parties to construction disputes voluntarily choose mediation, even if they are not obliged to. The Courts can also push mediation. In the UK, even parties which are ultimately successful in litigation can face costs exposure for refusing to mediate earlier in a case[1].

4. **[Slide]** This seminar takes a look at some local and international developments and issues in construction mediation, under four topics:

   (a) Firstly, I will take you through some recent research and statistics on construction mediation;

   (b) Secondly, we will look at developments in construction mediation tailoring – by which I mean better fitting the process to the dispute;

   (c) I would then like to spend some time talking about Christchurch earthquake mediations, and related issues from Hurricane Katrina, and other US natural disasters; and

   (d) Finally, I will wrap up with some tips for participants in modern construction mediations.

Recent research and statistics on construction mediation

5. World-wide there is a growing body of data on construction mediation. It supports the efficacy of the process. The data also illustrates key perceptions about, and issues in, construction mediation, which can inform us on how best to use and develop it.

6. First up, the latest local data. **[Slide]** In the summer of 2014/2015, Dr Grant Morris of Victoria University conducted a survey of private commercial mediators in New Zealand[2]. Some of the interesting results of that survey:

   (a) Building/construction was the third most common subject area for commercial mediations. However, number one was "contracts", which might well include some construction disputes;

   (b) 88% of mediators reported a settlement rate of 80% or more. 56% were over 90%;

   (c) 94% of mediations were one day or less;

   (d) 68% of commercial mediators are lawyers; and

   (e) The number one factor perceived to influence people to use commercial mediation was:"*keen to avoid the costs of litigation; it is cheaper to mediate*". The number two factor:"*speed and efficiency*".

7. Further data on construction mediation in New Zealand is relatively sparse, but we do know that some 85% of leaky homes claims have been settled by mediation or negotiation, and that, coincidentally, leaky homes mediations have an 85% settlement rate[3].

8. **[Slide]** Some really interesting work has been done on construction mediation in Scotland since 2010 by Andrew Agapiou and Bryan Clark[4]. They have surveyed lawyers and clients in the construction industry. Their key findings included:

   (a) Construction mediation settlement rates of 74%, plus a further 9% partially settled[5];

   (b) 76% of clients thought that having mediation as a mandatory first step in litigation was an attractive proposition. 54% of lawyers supported this[6];

   (c) 74% of lawyers thought that legal practitioners made the best mediators. Only 4% of clients agreed with that. 88% of clients thought that those with industry experience as construction professionals were superior in the mediation role[7];

   (d) 82% of lawyers had received training or education in mediation, versus only 12% of clients[8];

   (e) 46% of those surveyed said that mediators should offer their own opinions on the merits of the dispute – ie evaluative input[9]. More comment on this later;

   (f) Clients and lawyers both said that reasons for mediating included saving costs and time, and seeking the continuation of the business relationship[10];

   (g) There were some really interesting findings on reasons for not mediating. 43% of clients blamed lawyers' ignorance, and 42% blamed lawyers' negativity. But the clients also blamed their fellow construction professionals, with 63% saying that a problem was lack of awareness, and 50% citing negativity towards the process. **[Slide]** Angapiou and Clark say that the issue

may well be "*the well renowned machismo inherent within the construction industry*"[11]; and

(h) Finally, their work picked up an intriguing difference in the perceptions of lawyers and clients of adjudication. 84% of lawyers agreed that adjudication was a suitable forum for resolving construction disputes, compared with only 25% of clients. Angapiou and Clark say the clients' view accords with "*anecdotal concerns espoused over the costs, complexities and quality of decision making in adjudication*". The risk of one side hijacking the other with a claim was also mentioned[12].

9. **[Slide]** In England and Wales, the most important construction mediation study has been that done by Nicholas Gould, Claire King and Philip Britton, in association with Kings College London[13]. They surveyed construction cases before the Technology and Construction Court, a branch of the High Court, and produced a significant report in 2010. Their key findings included:

(a) More than 90% of cases settled before trial[14]. Of those that settled, 35% settled by mediation[15];

(b) The mediators were legally trained in 82% of cases[16];

(c) Of those parties which mediated, 91% believed that the case would otherwise have taken longer to settle, or gone all of the way to judgment[17]; and

(d) 76% of the mediations resulted in perceived cost savings of GBP25,000 or more. 9% involved costs savings of GBP300,000 or more[18].

10. **[Slide]** Turning to Hong Kong, Sai On Cheung of City University of Hong Kong has edited a book called *Construction Dispute Research* which was published last year[19]. The book incorporates survey work and analysis relating to construction mediation. Some key points:

(a) Mediation has become an integral part of Hong Kong government construction contract dispute resolution provisions[20];

(b) Having a mediator with construction knowledge is perceived to be a major advantage, particularly if the dispute involves issues of a very technical nature[21]; and

(c) "*Trust building*" and "*reality testing*" were found to be the most versatile, and, as I understand the research, effective mediator tactics[22].

11. The data from these studies is in some senses disparate. But there are common themes. Plainly enough, there is strong evidence that mediation works, in the sense that it achieves settlements and saves time and cost. It seems that most construction mediations are mediated by lawyers, but that may not always be what clients want or need.

Developments in construction mediation tailoring

12. **[Slide]** The recent research and statistics on construction mediation is informative in terms of the next topic, developments in construction mediation tailoring.

13. In New Zealand, we are very much wedded to a particular model of mediation. As noted, Dr Grant Morris's research found that 94% of commercial mediations in New Zealand were conducted over one day or less, and most are conducted by lawyer mediators. I would also suggest that most construction mediations:

    (a) Will be conducted by mediators appointed on an ad hoc basis;

    (b) Will have few, if any, agreed preliminary steps, in terms of information exchange; and

    (c) Will not have any evaluative input from the mediator.

14. This model often works. But, in my view, more cases would be mediated, and more would be mediated successfully, if a more tailored approach was taken to construction mediation. An approach which better fit the process to the dispute.

15. Mediation tailoring can mean a whole world of things, and be applied in a raft of different ways.

16. Mediation tailoring is something that can and should be considered at the contracting phase. Calls can be made at the outset on:

    (a) Whether mediation will be mandatory for all disputes;

    (b) Timing of the mediation, eg how quickly a mediation will be convened after a dispute is raised;

    (c) Agreed protocols for information exchange ahead of the mediation, eg will the parties agree to go "open book" (ie show each other any relevant discoverable documents if requested) if a dispute is raised; and

    (d) Mediator selection issues. It may be possible to agree, ahead of time, on who the mediator will be. Alternatively, the parties may want to specify what profession the mediator should come from. At its simplest, the parties can look to agree a deadlock provision, in the event that they cannot agree to a mediator, eg that they accept an AMINZ or Resolution Institute (formerly LEADR) appointee.

        For my part, I do not think that lawyer mediators are necessarily preferable for construction disputes. Sometimes technical subject matter expertise is important, so that the mediator is "*speaking the same language*" as the disputants. This will be particularly the case if evaluative input on a technical issue is sought. But I do think that whoever is appointed should, first and foremost, be a skilled mediator. Mediation is a consensual process at its heart, and a mediator who loses the trust and respect of one or more of the parties will struggle to find a deal, whatever they think they know about the case.

17. **[Slide]** A further possibility to consider at the contracting phase is the idea of having a mediator to the contract. This can be someone who is appointed as a neutral to help the parties get the contract agreed, and then assist with disputes as the contract is performed. The parties build a relationship with the mediator. The mediator knows the parties, the agreement, and the fundamentals of the business dynamic. The

mediator stays involved with the contract as it progresses, on an as required basis. They are well placed to mediate disputes which arise under the contract.

18. The concept of having a mediator to the contract is very close to the Dispute Resolution Adviser ("DRA") role. The first recorded use of DRA was on the Queen Mary Hospital project in Hong Kong. On that project the role of the DRA was spelt out in the contract. He attended site at least monthly. When he attended site, he engaged in pro-active steps to try and identify future problems and take measures to overcome them. The DRA also got involved whenever there was a formal notice of dispute. He was free to choose the most appropriate ADR technique, be it mediation, mini-trial or expert determination. If the mediation was likely to require specialist knowledge that he did not have, a specialist was to be brought in. Arbitration, conducted by someone other than the DRA, was the final back-stop[23].

19. The DRA system has since come to be widely used in Hong Kong projects. It apparently achieves both cost and time savings[24]. Hong Kong arbitrator and mediator Colin Wall recently surveyed 176 building and engineering projects in Hong Kong that had used DRAs. Arbitration had been necessary in only one[25].

20. **[Slide]** There are a multitude of other ways in which, on an agreed basis, mediation can be incorporated into a hybrid dispute resolution process. The following are some international examples:

    (a) In late 2014, in Singapore, the Singapore International Mediation Centre ("SIMC") was launched. It has an international panel of mediators. An interesting aspect of the SMIC is that it offers an ARB-MED-ARB procedure, in partnership with the Singapore International Arbitration Centre. Under this procedure, a dispute begins as an arbitration, which is adjourned while mediation is tried. If a settlement is reached at the mediation, the mediated agreement can be formally incorporated in a consent arbitration award. As consent awards properly made in arbitral proceedings, they are generally enforceable in approximately 150 countries under the New York Convention[26]. This might be a useful hybrid model to consider in disputes over construction projects with an international flavour;

    (b) There has also been reported use of ARB-MED[27]. This process is said to work particularly well for quantum disputes. As reported, it involves a short form, "rough and ready", arbitration. Once the arbitration is concluded, the arbitrator prepares an award, and gives it to the parties in a sealed envelope. The parties then mediate, and only open the award if they cannot reach a settlement. The thinking is that the preceding arbitration gives the parties a thorough reality check, but the mediation gives them a chance to still come to a mutually acceptable agreement; and

    (c) Finally, a mention of MEDALOA[28]. This is a hybrid that uses a combination of mediation followed by last offer arbitration/adjudication. It is apparently used in the US in labour disputes and in the baseball industry. A mediation is conducted. If settlement is not reached, the mediator then changes hats, and takes on a determinative role. She decides the matter solely by choosing between the parties' last offers.

21. As we can see, there are a wide range of options and factors to consider in terms of tailoring mediation in the contracting phase.

22. **[Slide]** There are also a wide variety of tailoring options to consider as and when a mediation clause is triggered, or a mediation agreed upon. And it is important to have an open mind at this point. As Hinchey and Harris point out in their *International Construction Arbitration Handbook*:

> "*The inherent shortcomings of any pre-dispute resolution provisions are that, in most instances, the procedures are decided upon and incorporated into the contract long before the nature and quality of the claims and controversies are known.*"[29]

23. **[Slide]** What are the options for tailoring once a mediation clause is triggered, or a mediation agreed upon? First up, I think it is a mistake to assume that a mediation must always be a one-day wonder. Elsewhere, it is not. The European Association of Chambers of Commerce and Industry undertook a "*Survey on the Use and Practice of b2b Mediation*" in the 2012/2013 year[30]. Its report was released in November 2014. It looked at thousands of civil and commercial mediations across the EU, including in France, Germany and Italy. The majority of participating countries reported that mediations had an average of up to three sessions[31].

24. Obviously there is sometimes value in the pressure cooker that a one-day process can create. And sometimes time and cost pressures will allow for no more than a day to be spent. But, in my view, particularly for more complex disputes, staging a mediation over time, in a way that allows for more comprehensive information exchange, and expert consultation, can greatly improve the prospects of reaching a quality settlement.

25. Next, a controversial topic – whether to seek evaluative input from the mediators during the mediation. In New Zealand (and the UK, but not the US), the predominant view within the mediation establishment is that mediators should not give evaluative input. There are good reasons for this predominant view: even well prepared mediators will not know the case and the applicable law as well as the participants/their lawyers; the mediator might not be as skilled a lawyer/engineer/QS as s/he is a mediator; providing evaluative input can compromise the neutrality of the mediator; and, it is better to encourage the parties to work out the problem themselves.

26. But participants can be surprised, and disappointed, to learn that mediators may not give evaluative input. The sense is: "*why pay someone we all respect to help us, but not get to hear what they think*"? The establishment position is also to a degree disingenuous. Mediators are encouraged to reality test the strength of litigants' cases in private sessions, and there has to be an evaluative aspect to the choice of questions asked in that regard. My own view is that, if a major weakness in a case seems apparent in open session, it is in order, and indeed important, to say in a private session with the party who has the weakness something along the lines of: "*I don't know the ins and outs of this as well as you guys, but what was said in open session on topic x didn't make much sense to me/seemed to me to be readily answered by the limitation point, etc. Tell me what I missed*". A hopefully nuanced approach that sends the right signal, without pushing anyone into a corner, or overstepping any boundaries. In the UK, Professor Andrew Goodman has put it a little more bluntly in his argument for evaluative input:

> "..*the mediator should not permit the reality of the situation to be clouded by the party's self-delusion*"[32].

27. When there are particular technical issues at stake, and a technically qualified mediator has been appointed (often someone better qualified than the disputants), it would seem like a wasted opportunity not to get at least some gentle evaluative guidance.

28. **[Slide]** Well known US construction mediator Barry Grove utilises both an evaluative and staged approach. The following is a description of a mediation undertaken by him in relation to a complex case involving the renovation of an historic building, which had become subject to significant litigation:

> "..*the parties desired an "evaluative mediation" meaning that they required the Mediator to... evaluate the claims to the point that credible predictions.. of the outcome on the parties' positions.. could be formulated for the guidance of the parties in the final negotiation. To that end, during the first several months the Mediator spent...over 60 hours of independent review and research of the parties' positions and pre-mediation submissions and court filings... .* [*T*]*he Mediator spent over 80 hours in private meetings with the parties to probe and analyze... their positions. There followed... joint meetings between the Mediator and the parties wherein presentations of positions by each party were made for the benefit of the Mediator and the other parties (95 Mediator hours). Finally the Mediator and the parties spent about 70 hours in negotiations between June and August.*
>
> ..
>
> *In the end, it worked. The parties found common ground. For this particular case, this was the only style of mediation that had any chance. For most cases it is a style that ought to be considered."*[33]

29. **[Slide]** A word here on clause 13 of NZS3910:2013. That clause allows for mediation if either party is dissatisfied with an Engineer's formal decision. It does not prescribe how a mediation should be conducted. Interestingly, it does provide for the possibility of evaluative input, and, indeed, a decision by the mediator. Clause 13.3.4 states that:

> *"The Principal and the Contractor may at any stage agree to invite the mediator to give a decision to determine the matter. The mediator's decision shall in such cases be binding on both parties unless within 10 Working Days either party notifies the other in writing that it rejects the mediator's decision."*

This is essentially a MEDIATION-ADJUDICATION model. I understand that this is an approach which is quite common in Ireland. For my own part, I wonder if goes a little too far. If the mediator may ultimately have an adjudicative power, it may well have a chilling effect on the candour of parties during the course of the mediation.

30. **[Slide]** Aside from staging the mediation, and getting evaluative input, there are a raft of other factors to consider in terms of tailoring options once a mediation clause has been triggered, or a mediation agreed upon. A non-exhaustive list includes the following:

(a) Issues around information and documents exchange. Has discovery been completed? If not, do documents need to be exchanged, and, if so, how and when can this be done?

(b) Would a site visit be useful?

(c) Are experts involved? If so, have reports been exchanged or should they be? Should the experts meet ahead of the mediation to narrow areas of difference? Often experts end up having such meetings during the mediation, off in a room on their own. This can work, but it can also lead to others waiting around for them. Sometimes too, by the time the experts report back, the commercial dynamic has gone past the point where what the experts have to say matters;

(d) Can there be agreement on some points ahead of the mediation? Preparing a draft settlement agreement is common, and often sensible. Many settlement agreements contain quite a lot of uncontroversial material: who the parties are, that they are fully and finally settling all issues, confidentiality, who any payment is to be made to, discontinuance etc. Setting all of that out in a draft document ahead of the mediation can save a lot of time late in the day, when everyone is usually quite tired;

(e) Are there any preliminary technical or legal issues that might benefit from a non-binding opinion by a neutral expert or lawyer? And

(f) Practical issues such as timing, access, travel, translators, and the need for third parties (including insurers) to be consulted.

31. Preliminary meetings ahead of any mediation can have real value in enabling tailoring to occur. Carol Powell has written about this in a 2013 article in the New Zealand Law Journal[34]. Absent a preliminary meeting, my respectful view is that a mediator should still try and do his/her best to find out about the case, and at least offer to work with the parties on tailoring the mediation. The parties and their representatives have to play a part too, recognising that taking a constructive approach will likely be to the benefit of all.

32. Tailoring, undertaken in a considered way, should help the parties find the most efficient and effective way of getting to a workable settlement.

Christchurch earthquake mediations, and related issues from Hurricane Katrina and other US natural disasters

33. **[Slide]** I do not pretend to have extensive experience at Christchurch mediation work, or to be a guru at it. But I do not think that a seminar on construction mediation in New Zealand should ignore Christchurch earthquake mediations. They are a very important part of the current landscape.

34. So, in the hope that I can say something useful on the topic, I have taken the liberty of canvassing others who are working in the field, both in an advocacy and mediator capacity. I have also looked at research out of the US on the mediations which have followed natural disasters there, particularly Hurricane Katrina.

35. What follows is not comprehensive. Nor is it intended to be prescriptive. Rather, hopefully, it represents some thoughts and points for consideration.

36. **[Slide]** Firstly, some context. At this year's AMINZ conference, John Goddard set out some incredible statistics on the scale of the earthquake claims industry:

> "*According to EQC's website, residential building claims have been accepted for 167,613 properties, 187,003 contents claims and 149,886 land claims have been accepted. In addition, 68,677 managed repairs have been undertaken as part of Fletcher EQR's Canterbury Home Repair Programme. According to the Insurance Council of New Zealand..., at the end of March 2015, 24,200 residential claims had been assessed as overcap and 15,000 of those claims had been settled. In total, the Canterbury earthquakes have resulted in 528,702 earthquake claims.*"[35]

37. **[Slide]** A truly colossal world of potential disputes, many of which are still ongoing. Mediation is part of this world in a variety of ways:

(a) EQC has a free mediation service for complaints it receives, established in August 2012. Mediators are provided from an AMINZ panel. It does not seem, however, that a lot of cases make it to mediation via this service. The following is from Radio New Zealand's website:

> "*Information provided to Radio New Zealand under the Official Information Act showed that EQC had received complaints about almost 5% of its 470,000 Canterbury earthquake claims since October 2010.*
>
> *More than 600 claims were currently being processed by the EQC, some of which were first lodged two years ago.*
>
> *Seventy complaints were in the pre-litigation stages while a further 12 were in the EQC's mediation process.*
>
> *The EQC said each complaint was unique and some could take several months to resolve.*
>
> *It said it closed an average of 54 complaints a week.*"[36]

At least those that do make it to mediation under the EQC scheme seem to do quite well. There is a dedicated website for the scheme, at http://www.eqcmediation.org.nz. That website contains summaries of 14 cases mediated under the scheme, which record that 13 of the 14 settled;

(b) Multi-party meetings ("MPMs"). MPMs are promoted by the Residential Advisory Service, a free legal advice service governed by CERA, and provided through Community Law Canterbury. MPMs are like mediations in almost all respects. They use facilitators provided by Fairway Resolutions (the government mediation service). Between 85-90% of MPMs are reported to result in agreements being reached by the parties[37]. MPMs are, as I understand it, generally a pre-litigation step; and

(c) Through the traditional ad hoc method, where parties to earthquake litigation agree to mediate. Some significant cases have been dealt with in this way. On 9 September 2015, the Christchurch City Council was reported to be about to enter into a three day mediation with its insurer, Civic Assurance, over a $900M claim[38].

38. **[Slide]** In the US, natural disasters, particularly hurricanes, have caused waves of claims against insurers. Since Hurricane Andrew in 1992, individual states have reacted to specific disasters with dedicated mass mediation schemes. Such

schemes were put in place in the aftermath of Hurricanes Katrina and Rita, and, more recently, Storm Sandy. Common features of such schemes have included:

(a) They are for residential claims only;

(b) They are optional for the insured, but mandatory for the insurer;

(c) The insurer has to make the insured aware of the mediation option; and

(d) The insurer has to bear the costs of the mediation[39].

39. These schemes seem to succeed, in the sense that settlement rates are high. For Katrina, settlement rates of 82% and 75% were recorded in Mississippi and Louisiana respectively[40]. However, it does not seem that the penetration levels are necessarily high. Estimates for the number of insurance claims arising out of Katrina range from 700,000[41] to 950,000[42]. But apparently the number of cases mediated was around 17,000[43].

40. It may now be too late in the piece for such a mediation scheme to be put in place to cover Christchurch earthquake claims. But it is definitely something for careful consideration for any future disaster that we may face. In any event, there are certainly things that we can learn from what has occurred in the US in terms of mediating disaster disputes.

41. **[Slide]** A major factor in the mediation of any disaster dispute can be the psychological trauma suffered by the insured as a consequence of the disaster. So far as Christchurch is concerned, a lot has been written about the levels of post traumatic stress in the community as a whole. This has of course permeated into mediations. In this regard:

(a) I recently mediated an earthquake dispute in which I was quite concerned about the psychological well-being of the insured. Her house had been substantially damaged, and had remained un-remediated for years. She was extremely upset, and at times struggling to understand what was going on through an understandable fog of emotions. She only managed to get through the mediation with the help of support people, and a very hard-working lawyer;

(b) One experienced earthquake lawyer told me that he believes that you "*cannot assume that people are going to make rational decisions*". He said that, sometimes, he thinks it is necessary to break a dispute into manageable chunks for a client. He told me about a site visit that had to be aborted because a client lost it when a builder said "*2011*"; and

(c) Another experienced earthquake lawyer told me about a client who lost control in a mediation after an insurer apologised to her. From a mediator perspective, such an apology is often a positive development. But, in this case, it was just too much for the insured to handle.

42. In the US disaster mediation context, a lot has been written about the impact of psychological trauma. Louisiana law professor Elizabeth Murrill states:

> *The long-term effects of disaster include anxiety, fear, apathy, depression, hysteria, anger, fantasy and delusions....In the aftermath of a natural disaster*

> *coverage disputes* [make], *insurance companies and even mediators...prime targets for these emotions."*[44]

She continues:

> *"These multiple stressors on the psyche are linked to cognition and capacity for decision making. Cognitive effects of stress are significant and include narrowing of attention or perceptual tunnelling, reducing working memory, and rigidity."* [45]

43. There are no easy answers for addressing the effects of psychological trauma in earthquake claim mediations. But hopefully awareness and compassion are a start. US commentators do recommend that mediators get training in dealing with such issues[46]. The importance of allowing people to ventilate has been emphasised[47]. Some of the US schemes also have cooling off periods, post-mediation, during which the insured can change their mind in relation to a settlement agreement[48].

44. **[Slide]** A related issue is power imbalance. Many individuals do not have the resources to litigate with their insurer. None of those that do have the resources that their insurers have with which to litigate. Insurers are more experienced in dealing with such disputes, and generally have greater access to information. Time is also a factor which helps insurers. Each passing day in a broken house adds to the pressure on the insured to get a result.

45. One earthquake claim mediator said to me that power imbalance issues had led him to seriously consider whether the work he was doing was worthwhile.

46. Power imbalance issues in disaster mediations have also been written about in the US. Various ways to address power imbalance have been suggested. These include ensuring that insureds are given instruction in advance on what mediation involves[49], providing free legal assistance to insureds[50](what the RAS is endeavouring to do), and government involvement in the process[51]. The reality, however, is that power imbalance is a factor in almost any dispute, and a factor which can often not be entirely overcome.

47. The existence of psychological trauma, and power imbalances, can affect mediator neutrality. A Storm Sandy mediator put it thus:

> "*We wound up trying to level the playing field. This was noted by a number of Storm Sandy mediators. Many of us were sheepish about admitting it – but it happened."*[52]

48. It is important for earthquake claim mediators to remember that their neutrality is central to their usefulness to everyone. If that is not enough, it may be useful to bear in mind that, in the past, insurance companies have been ruined by natural disasters[53].

49. It is also important for earthquake claim mediators to remember that the representatives of the insurers are people with feelings too, who often have a difficult job to do. Bruce Chapin is a Florida mediator who has mediated over 400 hurricane-related disputes in Florida. In training disaster mediators in the US, he emphasises the importance of making the adjusters feel appreciated[54].

50. I have really just scratched the surface of this topic, and I am sure that there is a great deal more that could and should be said. The Christchurch earthquakes

represent the single biggest challenge currently facing construction dispute resolution. Hopefully all involved will continue to reflect on and develop what they do, to best address the tragic consequences of this disaster.

Tips for participants in modern construction mediations

51. **[Slide]** I will conclude with some general tips for participants in construction mediations. Most of you will be participating as counsel or experts, and my comments are directed accordingly. Apologies in advance to the extent that I am teaching people to suck eggs, but hopefully at least some of what I have to say is of some use.

52. First up, preparation. How should you prepare for a mediation? In a word, "*well*". A failure to prepare for mediation, a "*she'll be right on the day*" approach, can be fatal.

53. There are some things that need to be done ahead of any mediation. They include:

    (a) Getting a good understanding of the case, from both sides. That includes the facts and the law. Both are important. I have seen parties embarrassed at mediations by not having a full understanding of the facts. I have also seen lawyers embarrassed when other lawyers know more about the relevant law than they do;

    (b) Undertake a thorough risk and costs assessment. This is a topic which could be a seminar all on its own, and it is amazing how many experienced lawyers do not do this well ahead of mediation. The objective is to ensure that you and your client have a full appreciation of what lies ahead if the matter is not settled at mediation. Important factors for consideration include risks on the law, risks on the facts, risks on quantum, net litigation costs, recovery risks, and appeal risks. Depending on the case, some of these factors will be more important than others, but all need to be considered. Note:

        (i) Andrew Horne of MERW provided an excellent seminar on this topic at the 2015 Resolution Institute (formerly LEADR) conference earlier this month. His paper may be available on-line;

        (ii) For those of you with an on-line bent, I would recommend having a look at Olé!, which is available at www.imimediation.org/ole. It is a case analysis and evaluation tool, which can be used by counsel and parties in advance of negotiations and mediations. It is simple, and contains many of the points that should be considered ahead of mediation, including costs analyses, SWOT (strengths, weaknesses, opportunities, threats), BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement) and PATNA (probable alternative to a negotiated agreement) analyses; and

    (c) Prepare your client for the mediation process:

        (i) Explain what mediation is, and how it will work;

        (ii) Make sure that they appreciate that the mediator will not make a decision for them. I did a mediation just a few weeks ago where a represented client expressed surprise, late in the piece, that I was not going to make a decision at the end of the day;

(iii) Tell them who will be at the mediation (and this is important for you to know too); and

(iv) Most importantly, have a clear discussion with them about what might be a realistic settlement. That is not to say that you should set bottom or top lines. That can be counter-productive, because often you will learn something in a mediation that changes the settlement dynamic. But at least talk about the ball park.

54. There is also a lot that you can do at the mediation itself. The following are some tips:

(a) Be strong. Just because it is a mediation does not mean that you have to hold anyone's hand or agree with them. Clients rightly expect their lawyer to be a compelling advocate for their cause. Whilst experts are required to be objective, that does not mean that they should be meek. Being strong does not mean being unduly aggressive, being snide, shouting, or putting people down. Adoption of those sorts of tactics will either make you look laughable, or risk bringing the mediation to a premature and unsuccessful end. Be strong in a calm, considered, respectful and determined way;

(b) Acknowledge risks. Every litigant has some risks. Acknowledging some of them to the other side, without giving the farm away, has real benefits. Firstly, it makes what you have said about the strengths of your client's case sound more compelling. Secondly, it sends a signal that your side is going to take a commercial and realistic approach to negotiations, which can in turn encourage the other side to do the same;

(c) Watch reactions. It is hard in the heat of a mediation, but it is a useful skill to be able to keep an eye on how people are reacting to what is going on. What points seemed to particularly upset them, what do they seem confident about, who defers to whom, and so on. Most people are not very poker-faced, and their reactions can tell you a lot about how they view the case;

(d) Work with the mediator. Take careful heed of the questions they ask, and any cues they give. Often these will be important indicators of how an objective third party is seeing things. In private sessions, ask the mediator their thoughts on the mood of the room, and how they think settlement negotiations might best be progressed;

(e) Be there for your client. Appreciate that it will be a stressful day for them, and support them through it. Take a break with them if they look like they need it. Make sure they understand what is going on, and ask them if there is anything that is concerning them, or more that they want said. Take them back through the risk and costs assessments if necessary;

(f) Be prepared to justify a settlement offer. A position based on principle will always be more persuasive;

(g) Be constructive and imaginative when it comes to settlement. Often it is the legal advisors or the experts who spot the opportunity for something different to be added into the mix; and

(h) Lastly, don't give up. Mediations can get very tiring towards the end, and it can be a very hard day. But often the seemingly intractable can move to

settled within the last hour of a mediation, and it is very important to stay the course.

55. As a final general tip, I would recommend that anyone who does a reasonable amount of mediation work gets training in it. The Resolution Institute (LEADR), and AMINZ, both run courses, as does Massey University.

Concluding remarks

56. Construction mediation helps parties settle cases. I believe that there is scope for it to be used more often, and in a more considered way. Hopefully that will save more parties from the difficulty and expense of unduly protracted litigation.

Mark Kelly
22 September 2015

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