Is it *RUDE* to talk about WHO WOULD WIN?

In part 2, **Robert Fisher QC** considers the mismatch between rhetoric and reality in New Zealand mediation

As befits their pioneering origins, New Zealanders were quick to take up mediation. Mediation as a means of resolving litigated disputes arrived here in the 1990s. By the end of the millennium, it had become a routine step in the conduct of civil litigation.

Much of the credit for this goes to LEADR. Some tertiary education institutions and the New Zealand Institute of Judicial Studies also taught mediation, but LEADR Australia, followed by LEADR New Zealand, provided the main training courses for lawyers and other professionals. The LEADR courses were hugely influential in the development of mediation in this country.

From the outset, LEADR (and for that matter the tertiary institutions and New Zealand Institute of Judicial Studies) relied heavily on Fisher and Ury's facilitative model. This model included BATNA/WATNA discussions (best and worst alternative to negotiated agreement), but in its purest form, the model required mediators to refrain from expressing any view on the merits of the dispute, to refrain from promoting any particular settlement, to avoid shuttle diplomacy, to facilitate direct negotiations between the parties, and to help each party work out for themselves what was truly in that party's interests.

At early LEADR courses, legally trained novitiates received a long overdue lesson in humility. Even when it came to process, they were taught to invite the parties to identify the issues meriting discussion and the sequence to be followed in discussing them. Only if the parties could not agree on process were mediators to step in with guidance. This was important if the parties were to feel that they 'owned' the process. Nor was achieving a settlement to be seen as the be-all and end-all of mediation. It was not for mediators to push for a settlement. The parties would settle if they wanted to. But the mediation would have achieved its purpose if the parties came away with a better relationship or understanding.

As for the merits of the dispute, LEADR made it plain that mediators should butt out. If mediators tried to influence the content of a settlement it would 'disempower' the parties. It would return everyone to the days in which solutions were imposed from above, lawyers dominated, emotions were trampled underfoot, relationships neglected, and underlying interests overlooked.

So dedicated was LEADR to this model (things have moderated since) that its early representatives took time out to redefine the very word "mediation". If dictionaries thought that "mediate" meant simply "bring about (an agreement) between parties in a dispute" (*Collins English Dictionary*, Third Edition) or "intervene (between parties in a dispute) to produce agreement or reconciliation" (*New Zealand Oxford Dictionary*), this served only to show how far dictionaries had fallen behind current thinking. Even more outmoded was the *Collins* definition of "mediation" as "a method of resolving an industrial dispute whereby a third party consults with those involved and recommends a solution which is not, however, binding on the parties".

It turned out that "mediation" actually meant facilitative mediation. Anything short of facilitative mediation would have to find itself another label. "Evaluative mediation" was an oxymoron. If mediation novitiates wanted to take part in discussing the merits of the dispute – even in caucus – they should go off and become arbitrators. What they were raising had nothing to do with becoming mediators.

Foundering on the rock of litigated money claims

Thus equipped, early LEADR graduates went forth to put their new training into practice. In many fields, their learning fell on fertile ground. But what they encountered in litigation over money brought them up short. They had taken their harp to a party where no one wanted them to play. In that world, the punters were looking for something else.

As with their overseas counterparts, New Zealand mediators found that the hard core of commercially minded plaintiffs and insurer defendants were not interested in self-discovery, a better relationship, or a win-win solution. What they were looking for was money. Plaintiffs wanted as much as they could lay

their hands on. Defendants wanted to pay as little as they could get away with. Their only shared interest lay in avoiding the time and cost of going to trial. To these hard-core litigants, it did not matter whether or not they 'owned' the process. All they cared about was reaching a figure they could both live with.

Even non-commercial litigants were disappointingly materialistic. Although other considerations were certainly important (face-saving, anger, pride, mistrust, self-respect, sense of justice etcetera), their overwhelming concern was to escape the time, cost, stress, and uncertainty of running a modern court case. It was all very well for mediators to say that other things mattered more. They did not have to pay for, and endure, the nightmare of going to trial. Avoiding a trial was the reason they were here. They were here to get a settlement.

Some mediators were quick to see the writing on the wall. In the field of litigated money claims, mediators who could energetically reason with, persuade, cajole, badger, and wear down the parties flourished. Parties harried in this way took consolation in the knowledge that it was also happening to the others in their mutual pursuit of a settlement. Settlement mediators were essentially advocates for a settlement. Give me your dispute and I'll give you a settlement. The higher the rate of settlements, the greater the reputation of the mediator. The age of the settlement mediator had arrived.

Mediators who persisted in passive, facilitative, therapeutic, or non-interventionist styles were equally successful in their fields. But their fields were increasingly seen to be at the personal, family, relationship, and community end of the spectrum. Except where an institution dictated the choice of mediator (weathertight homes, tenancy tribunal, court pilot, employment, restorative justice etcetera), the market increasingly directed its litigated money disputes to settlement mediators.

Disenchantment with empty bargaining

Not even settlement mediators could satisfy everyone. Commenting on the first 10 years of mediation in New Zealand, two international experts observed:

> "We were training in New Zealand recently, and a lawyer/mediator who had dealt with huge commercial disputes there for ten years said that the use of mediation was falling off dramatically. It was now widely believed among lawyers, she said, that 'all mediators do is split the difference'. This type of mediation is strategic and manipulative just like the adversarial process. We think mediation can do much better."
> (Joseph P Folger and Robert A Baruch Bush in their 2005 interview with Victoria Pynchon – see http://www.mediate.com/articles/pynchonV1.cfm.)

While the alleged disenchantment with mediation was grossly exaggerated, there was no doubt that a growing body of lawyers dismissed negotiation divorced from the merits of the dispute as a cynical exercise in gamesmanship (eg John Walton, "Drafting for disputes" *NZLawyer*, issue 65, 25 May 2007 at 14, and Jim Farmer QC, speaking at the Legal Research Foundation and New Zealand Bar Association Conference "Civil Litigation in Crisis – What Crisis?", Auckland, February 2008). And that problem was compounded if the gamesmanship was reinforced by attrition.

This process has its critics who say that the weaker party is often 'worn down', particularly late at night, when not in a position to make a clear decision and at a time when that party might be hungry, angry, or tired. The Buddle Findlay report (*Business Community's Expectation of the Judicial System 2002*) noted, at page 17, that some respondents found mediation a time-consuming and exhausting process, with settlement achieved only because the parties had been worn down (Sir Ian Barker, "Arbitration, mediation and the Courts" [2004] NZLJ 489, 492).

The result was a growing realisation that before the parties embarked upon the negotiating phase of a mediation, an adequate foundation had to be laid in discussing the merits of the dispute. Trial prospects were far from the only thing to talk about (see the emotional aspects referred to earlier, plus judgment recoverability, insolvency, insurance, indemnity, confidentiality, form of remedy etcetera), but for most, it was the principal platform for the negotiations that followed. In short, settlement mediations needed to include an evaluative component.

An evaluative component did not mean evaluation by mediators. Mediators were not arbitrators in disguise. It was for the parties and their lawyers alone to exchange information and arguments at the mediation and to assess the result.

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Mediators might, and usually did, comment at least obliquely in caucus. But when it came to assessing prospects, the only evaluation that mattered was that of the parties.

Where has this left us in New Zealand?

The result today might be summarised as follows:

- Although mediators must be familiar with all mainstream mediation techniques (principally transformative, narrative, classic facilitative, settlement, and evaluative), their approach on the day will be a pragmatic one that is attuned to the changing needs of the particular dispute in front of them.
- Even at the hard money end of the spectrum (ie money disputes in which the parties will never see each other again), allowance must be made for the role of emotions (anger, mistrust, face-saving, self-respect, sense of justice, stress etcetera) and collateral considerations (judgment recoverability, insolvency, reputation, insurance, indemnity, confidentiality, form of remedy, time diverted into litigation etcetera).
- However, of all the components that contribute to a mediation over money, the two that cry out for special attention are evaluation and bargaining. The mediation must include a process which will help the parties to assess the likely outcome at trial, and a related process for bringing the bargaining to a successful conclusion. Despite the fact that those two processes dominate mediations of this kind, little is said and taught about them in this country.
- For some reason those who organise New Zealand mediation conferences, seminars, workshops, literature, and invitations to overseas speakers, have a particular preoccupation with transformative, narrative, and classic facilitative techniques. The mediation of hard money disputes where the parties will never meet again has been something of an intellectual orphan.
- This has encouraged some senior lawyers to dismiss mediations over money as an exercise in either touchy-feely nonsense or meritless horse-trading.
- Although the primary goal at a money mediation is settlement, settlements will be heavily influenced by the parties' own evaluation of the likely outcome if the dispute were to go to trial. For this, they need a properly structured opportunity to talk about who would win.

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