

ANTHONY'S MEDIATION ROUNDUP – WINTER 2010/11

This year began with the Jackson report on the costs of litigation and is finessing as I write this in a major fandango about funding universities. Everything these days has to be costed, weighed and analysed, and mediation itself isn't immune to the same process. Users and clients are asking themselves how best to achieve a positive outcome as quickly and inexpensively as possible. No harm in that as the same mantra has been repeated for the past 10 years or more. But it now has a greater urgency. I practiced litigation and arbitration for almost 30 years, and I am not going to propose that we write an obituary to either. No, mediation isn't the panacea to resolve every dispute, and isn't a substitute for more formal ways to resolve things if that is what is required.

I mediate an awful lot of disputes. In that respect I am indeed lucky, as there are a lot of mediators, and I love what I do. It is rare that I have unsatisfactory experiences with mediation even on the odd occasion when they don't settle. Contrast that with litigation and the highs are more often matched with the lows. But, if I am being honest, there are some agreements reached in mediation which could have been better for both parties had mediation been tried earlier. Take the example of a domestic building dispute where the claimant was supported by a legal expenses policy. How satisfied was the builder when they paid £50,000 to settle a dispute worth by my reckoning £32,000 on a full liability basis? How satisfied was the house owner when his costs were £50,000 to include contributions from insurers? The answer may surprise you in that they were both happy more so that they were relieved to get it over with. But why couldn't mediation have been tried earlier?

Those of you inured in the subtle arts of litigation will know that the principle behind pre issue protocols is that it enables all the arguments to be up front and on the table before you entertain issuing a claim. You might again be surprised to know that the Association of Northern Mediators has monitored over 2,000 mediations over a 10 year

cycle, and that the number of disputes mediated during litigation has increased not decreased from 75% to just over 80%. If the arguments are about rights of way, a machine that doesn't function properly, a breakdown of relationships between erstwhile partners or whatever, why isn't mediation treated as a natural extension of negotiation such that mediation isn't tried earlier? It may be that we feel more comfortable in doing things formally with the trappings of pleadings, statements and long lists of documents. It may be that we feel less inclined to advise the clients on a likely result until that's been done. A recent article in the American Journal of Psychology questioned the way lawyers forecasted case outcomes, perhaps being less realistic about the odds against than they should be even on the basis of scant initial information. After all we don't like being the harbinger of bad news if we can avoid it. Yet our reputation is based or should be based more on our ability to successfully calculate case outcomes earlier than perhaps some of us do.

So don't expect to have mediation forced on you or your clients by either the government or the judiciary. But do expect the muses to continue to entertain you with the same old song, and watch the expectations of the clients change towards seeking better solutions in 2011 and beyond. May I take this opportunity to wish you and your family a very happy Christmas.

During 2010 I have joined the **In Place of Strife Chambers**. It is a great pleasure to be associated with so many great mediators. I also continue my links with **Consensus Mediation**. I remain contactable directly or via my diary organiser Jane Claypole on jane@mediate.co.uk. Many thanks for your continuing support during the year both personally and for the Association of Northern Mediators.

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This year is the 18th year of my involvement with Leeds Metropolitan University's degree course in Construction Law and Dispute Resolution. The mediation segment now has a module of its own. For full details of the distance learning course log on to www.leedsmet.ac.uk/coursehandbooks/index.

PICK OF 2010

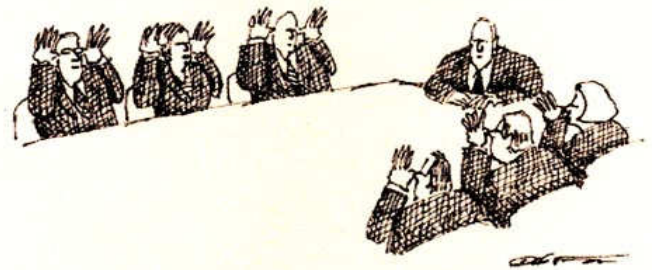
Property nightmares - What do you do with a housing estate owned in parts by 5 different family members? One claimed against others that the estate layout blocked the right of way to adjoining developable land. The resulting litigation ensured that most house owners in the estate had defective titles. This turned out to be an ideal case for mediation. Little pieces of land were transferred to enable all the defects to be corrected. The most difficult areas were stage managing everyone before the mediation, doing the mediation without outwardly blaming anyone for the problem as in essence it was a shared problem that hurt everyone, and getting the right property plans marked up.

Construction cracks – Both parties agreed that the factory floor was not absolutely perfect, but one side wanted over £200,000 for the repair and the other offered about a tenth of that. The otherwise good working relationship between the parties made this a good one to mediate. It began and ended with sincere handshakes. The inclusive settlement provided closure and relief all round.

Agricultural blues – farming dilapidations can involve an array of claims from fencing and building repair to soil erosion. Concentration on the better parts of the claim and dropping the peripheral parts encouraged the tenant to make a sensible commercial settlement – a good example of concentrated negotiations that crossed bridges that might otherwise have been difficult if negotiations were purely direct.

Partners see red – the breakup of a solicitors' partnership always causes shockwaves whether that is with the clients or the local community at large. No-one can bust up like a bunch of solicitors. This was interesting as sensibly they chose to mediate very early on when the costs were low. The danger was whether the extent of the exchange of argument and documentation would be sufficient for everyone to make an informed decision. They did and thankfully it worked to everyone's satisfaction.

Rights of way rules OK – the Yorkshire Dales on a fine summer day provided the backdrop for a fascinating dispute. It took 2 days to mediate to include agreeing to sell/buy bits of land. Tens of thousands of pounds were saved in the process.



The mediator sensed that the negotiations were in trouble.

TOP TIPS

- Never **mediate** before you have had a chance to exchange the arguments – last minute surprises don't help
- Don't inundate the process with too many documents beforehand and if you need access to them bring them with you
- Putting a brief position statement together really helps the mediator understand the client's priorities, steers clear of legalese, summarises the offers and what it's cost your client to get to where they are now, and future costs if it doesn't settle
- Make sure that the client understands what mediation involves so they don't come with expectations of the mediator that simply aren't realistic
- Be **polite** even when you/your client is venting in the initial joint meeting!
- No matter how serious the issues, never lose sight of the power of humour to reduce tension
- Be brave and advise the client that it isn't a sign of weakness to make the first offer