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Presenting A Case In Mediation
A QC's Perspective

by

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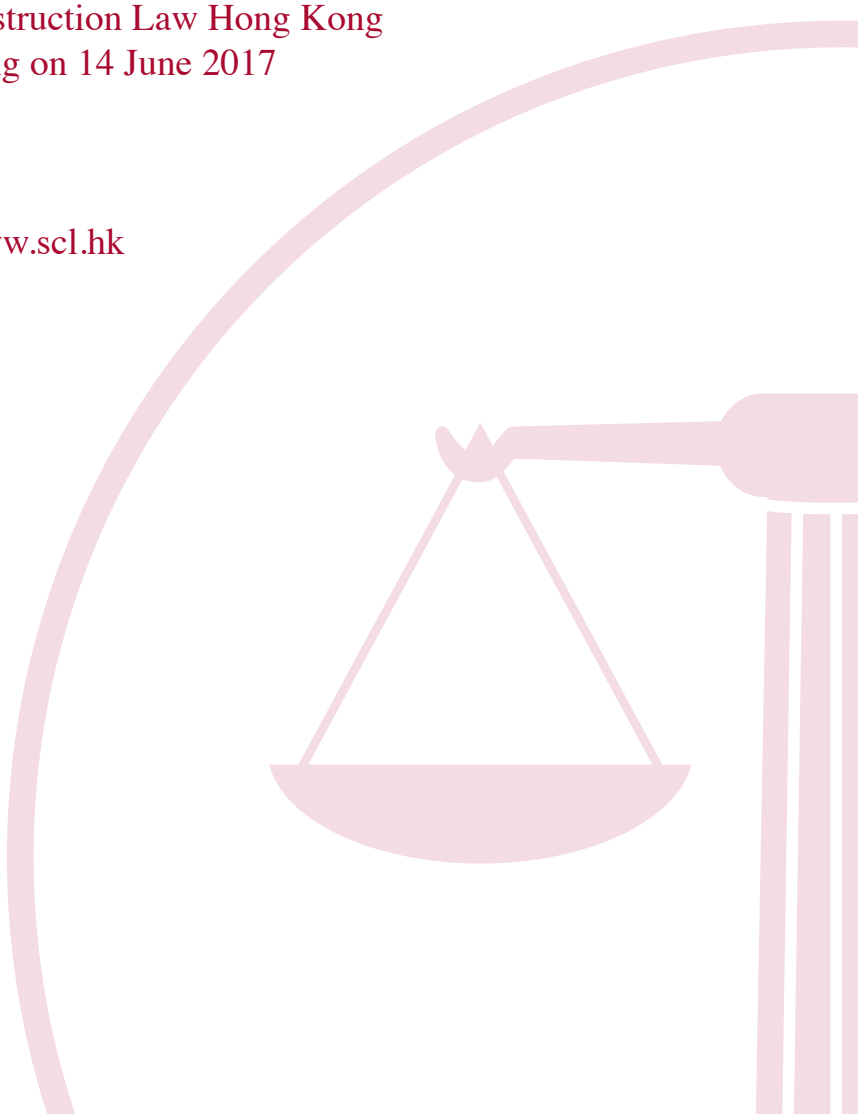

Presenting A Case In Mediation – A QC's Perspective

Philip Boulding QC

Wednesday, 14 June 2017

Graham McNeill: Welcome back and the fun part of the evening.

I am delighted to introduce our guest speaker for the evening, Mr Phil Boulding QC, who is going to share his thoughts on how best to present a case in mediation.

I'm sure most if not all of you will know Phil, but by way of introduction, Phil's a leading barrister practising in the fields of construction, engineering, technology and related professional negligence work.

He has been a member of Keating Chambers now since 1980 and is now based in Hong Kong, working on numerous High Court cases, both locally and internationally.

Phil's practice primarily comprises international arbitration work and his clients include local authorities, government departments, major international construction and engineering companies, energy, technology companies and developers.

He is recommended by leading directories in the area of construction where he is described as a "first rate silk with formidable accuracy and cross examination skills".

He is a regular contributor as both speaker and chairman of construction conferences and has been a contributor to various editions of Keating on Construction Contracts.

As always, there will be an opportunity at the end of the evening's seminar for Phil to answer any questions that you have.

Please join me in warmly welcoming Phil.

Philip Boulding: Well, thank you Graham for that introduction. I certainly recognised some of it and I'd also like to thank you for inviting me to speak tonight.

It occurred to me, when Edmund asked me, that you might be interested to hear a little bit about mediation which, in my experience, is a method of dispute resolution which is rarely touched upon in many of the lectures that I hear take place in Hong Kong. So, I am going to give you a little talk about what I think you ought to do in terms of presenting a case in mediation to best effect.

I think I ought to emphasise at the outset that mediation is very, very important in these days, not just in the UK, but also in Hong Kong, and you ignore it at your peril. It's certainly the situation now and I'm sure many of you know this that the practice direction in the construction and arbitration list makes it clear that where a mediation notice has been served by one of the parties to a construction action, and the other party unreasonably refuses, or fails to attempt to mediate, he can be subject to an adverse costs order. The adverse costs order can be made by the court, in its discretion, after taking into account all the relevant circumstances, so it's something you

really should know about and, as I have said, I hope to enlighten you just a little bit so far as my experiences are concerned.

What is mediation? I apologise for telling you perhaps what you know already, but it's a structured process, dispute resolution process. It comprises one or more sessions.

The mediators have to be impartial. It's normally one mediator. There can be more than one mediator. I have certainly acted in mediations where I've had two or even three mediators.

What they do, without adjudicating on the dispute or, indeed, any aspect of it, their purpose, their objective, is to assist the parties to do all or any of the following, and I emphasise that these are very important matters.

Firstly, identify the issues in dispute.

Secondly, explore and generate options. By "options", I mean options that can be used to compromise the dispute between the parties with, of course, their agreement.

They obviously need to get the parties to communicate with one another, which is often one of the great difficulties, that's why they're in dispute in the first place, but, ultimately, the objective is to reach an agreement regarding a resolution of the whole or, if that cannot be achieved, part of the dispute.

Now, if a client is involved in a mediation, what sort of points should an advocate emphasise to his client?

Well, many things need to be emphasised, but I would have thought that some of the most important matters from my perspective would be as follows.

Firstly, mediation gives the parties the ability to control the outcome. That means they can enter into any settlement they want, if they want. Obviously, some mediations do not end in settlements. That's unfortunate, but in many instances my experience is that parties go into a mediation with a meaningful objective.

Compare, of course, litigation and arbitration I'll just say a little bit about that later on where, of course, the parties have precious little control, if any control, over the outcome.

Secondly, I always emphasise to the client that the parties own the settlement. It's the settlement that the advocate can and must assist his clients to achieve.

What do I mean by "own"? I mean "own" in the sense that they can do, within the bounds of legality, whatever they want. By that I mean they could achieve an objective which would be beyond their wildest dreams in arbitration or, indeed, litigation. For example, they could get an agreement that they remain on the tender list, or that they get further work. That sort of settlement would be virtually impossible in a classic conventional arbitration or litigation situation.

Really, although I think I've touched upon it already, mediation can produce outcomes that more formal conventional dispute resolution procedures simply could not achieve, and I have touched upon that already.

Now, what about arbitration or litigation by way of a comparison?

Many of you are very, very familiar indeed with this, but, of course, first of all, it's more public or a totally public process. Even arbitration is a public process, in my experience, in a village like Hong Kong. There's far more formality; lack of flexibility and rules which have to be obeyed. In a mediation, within reason, the parties can do what they want.

There's always a need to direct the advocacy and, of course, the legal submissions at the arbitrator or the judge as, of course, he will decide and he will decide who's right and who's wrong, and it's certainly not his function just to facilitate a settlement. I'll come back to that in a little bit more detail later.

Of course, in arbitration, I have mentioned the lack of flexibility; the same applies to the court. Again, the tribunal is constrained by matters such as the pleadings, all the formal rules of pleadings: is something pleaded; if not, can you run the point, rules of evidence and, of course, legally available remedies. None of that applies or need apply to mediation.

Another important point, of course, is that in litigation or arbitration, a party must prove its case in what I describe as a managed process. That's something you do not have to do in the mediation.

What you have to do is get through to the executive mind set of the other side, with the assistance of the mediator, to persuade the other side that what you are proposing is, indeed, reasonable and that it should come to the table and make an agreement with you that serves to compromise the dispute. That certainly cannot be achieved, in my experience, in arbitration or litigation.

Arbitration or litigation will have no extended hours to suit the parties, certainly in Hong Kong, where you sit a very, very short day indeed. Many mediations I have been involved in start at about 8 o'clock in the morning and end after midnight, so it is flexible in that way. You cannot walk away in litigation or arbitration, of course, without paying a lot of money by way of costs or, indeed, settling for the sum claimed, or something which satisfies the other side, and, as I have mentioned already, there is indeed no control over the result. There is in fact the prospect of an uncertain result which, of course, is binding on the parties subject to any appeal.

Now, taking account of all this, in my view, there are certain further points for the mediation advocate to bear in mind and, indeed, explain to his client and these, in my view, are as follows I think I touched upon the first one already.

In most cases mediation is voluntary and, subject to a possible cost sanction, the parties can walk away at any time provided, of course, they have been reasonable. I rely again on the practice direction in The White Book so far as cost sanctions are concerned. It's non binding, unlike an arbitration or a court, so the settlement can only be achieved on the authority of both parties involved in the mediation in which case, of course, the settlement forms part of an enforceable contract.

I think it's also important to note that in many cases mediation is only a catalyst for settlement, with many cases settling shortly after the mediation once the parties have had an opportunity to reflect on what occurred in the mediation.

In my experience, one often goes away from a mediation thinking, "Oh my God, that's it, we've not achieved the objective, we've not achieved the settlement", but what happens over the course of the following days or, indeed, weeks is that the parties, informed of the other party's position, and having opened up the avenues of communication, have an ability to pick up the telephone or work on the email and ultimately they resolve their dispute.

Certainly if you are a good experienced mediator like, for example, Rosemary Jackson QC of my chambers, Keating Chambers, it's certainly her practice as a mediator to keep in contact with the parties, after the formal mediation has finished, with a view to seeing whether or not, even though it's finished, a deal can be achieved.

And finally, of course, it's private, without prejudice, and, indeed, confidential and that has a number of consequences so far as the parties are concerned.

The first important consequence is something which is not available in arbitration or, indeed, in the court proceedings and that is, the parties acting by themselves or their advocate, can disclose information or express views, make suggestions, or even offer concessions, knowing and I do emphasise the word "knowing" that if the matter proceeds to a trial, they will not be precluded from arguing and adopting a different position. That's important in my view. And, again, provided they've not acted unreasonably in the sense referred to in the Hong Kong Court Practice Direction, they can refuse offers or even end their involvement in the mediation, without any risk of such fact being held against them if a court determines costs in the future.

By way of a contrast, of course, the courtroom or even an arbitration which is public, or at least public to some degree, involves a situation where such approaches, in my experience, cannot be adopted for fear, for example, of prejudice or embarrassment at some subsequent stage of the proceedings.

The objective of mediation, as I've emphasised already, is to achieve a settlement. It can only be achieved by the consent of the parties. That's something that the advocate needs to emphasise, in my view not only to his own client, but in his opening statement I'll come to that soon to the other side.

The settlement, in my experience, needs to maximise the parties', and I emphasise "parties", not "party" interest. By that I mean there can be a win/win outcome for both sides. There does not have to be a loser in the conventional sense.

The settlement is usually confidential, but that needn't be the case in appropriate circumstances. For example, if there is a mediation concerning a defamation case, a settlement can include a public apology, if that is what's required and is part of the agreement.

As I have said already, but it is an important point, and I do emphasise it to you all, mediation and the settlement is inherently flexible. It can be ingenious and incorporate reliefs that you would never dream of being able to achieve in a court proceeding or, indeed, arbitration.

As I have said, I have given a couple of examples already about remaining on the tender list, but other examples would be an explanation, an agreement as to a future relationship, or even an agreement by one party to do something without any legal obligation whatsoever to do it. But, nevertheless, you can include that, if you can get it agreed, with the other party, in a mediation settlement. The advocate has got to be alive to that. He has got to be alive to his party's objectives, commercial objectives, and he has got to be in a position to be able to sell those not only to the mediator but, more importantly, to the other party to the mediation.

I think that really takes me to the last point here.

Importantly, this flexibility frees the advocates and, indeed, both parties from having to think in terms of and I give examples causes of actions, proving the case, destroying a witness in cross

examination, and, of course, legally available remedies. You are not constrained by those sort of things in a mediation.

Put bluntly, mediation advocates often need to think right outside the 'box' to serve their clients' interests.

So what about preparation?

Well, I could only give you my experiences here, but very much with arbitration and litigation, the advocate's preparation is absolutely vital.

There are various points to remember. Whilst mediation does not have to be expensive, you can often have a couple of clients and a relatively inexpensive mediator, they do it themselves, they do it without the involvement of any lawyers, that's a relatively inexpensive mediation, but, on the other hand, it can be as expensive as a day in arbitration or in court. So, bearing that in mind, the advocate has to be properly prepared. Of course, if you are not properly prepared there is far, far less chance of obtaining the settlement, which has got to be your objective. If you are not properly prepared, it means the costs are likely to be wasted, you're not going to endear yourself to the client if that what happens, and, in my experience, the advocate must prepare in what I regard as the manner that best represents the client's interests and is most likely to achieve the desired solution which, as I have said once already, is very, very flexible.

That, in my experience, means that instead of being closeted away as a barrister in my chambers, or as a solicitor in his or her office, you do actually need to work as part of a team in close contact with the client to really understand what they need and how to plan how they're going to achieve it.

I think reliance on documents should be minimal. I despair when I get directions from mediators who act more like arbitrators and judges. They're talking about agreed bundles, pleading bundles and witness bundles. In my experience that is not the way to go. I think reliance on documents should be absolutely minimal. I emphasise there's no need to prove the case, so the function of documents does not have the same function that it would have in an arbitration or, indeed, a court case. In my experience I think you need, as a minimum, a jointly agreed core bundle of key documents and perhaps a statement of case, and I'll come to that. I think the main reason for that is so the mediator can prepare.

Many parties and their advocates, in my experience, have made the mistake of relying on too many documents. I think there are one or two tips that I would like to share with you so far as the approach to documentary evidence is concerned.

Well, what sort of reliance should you place upon it? I have said that there ought to be a background bundle and, as I emphasise here in my first point, it should be in order to:

- establish the relevant background and explain the issues to the other party;

- to get to the other party's executive mind set;

- to tell the mediator what the key points are;

- to enable the mediator to focus on those key points and in the joint sessions and the private sessions, work away at those points.

I'll come on to that in a moment. As I have said, if there is a statement of case, it should only be to establish the framework within which the mediation can take place. It shouldn't contain all those classic legalistic terms such as "hereinbefore" and "said" and "aforesaid" and all that lark. You don't need that sort of lark. You need a statement of case which sets out in plain English what the real issues are.

Quantum: a slightly different matter there. We all know that most of these mediations, certainly in the construction field, they're all about money, aren't they? That's why we're in dispute normally. It does seem to me that there can be a role for quantum documents.

Documents relevant to quantum should be provided to the other party and the mediator well in advance of the hearing, for obvious reasons. That's what you're after. You've got to explain that you're entitled to money, if that's what the mediation is about that's what it's normally about and I think that's a good tip.

Now, confidential documents, ordinarily you would not conceive, would you, of releasing confidential documents, certainly without a fight in an arbitration or in a court case. What do I mean by that? By "confidential documents", I mean sensitive pricing documents.

However, in a mediation, you might think that there is scope, I certainly think there is scope, for releasing those confidential documents, at least to the mediator so that he can satisfy himself that the sort of figures you're after, the sort of money you're after, is indeed substantiated by the confidential documents within your power, possession and control.

Ultimately it's a matter for judgment, for your judgment, or the advocate's judgment as to whether they're given to the other side, but that's my view on confidential documents.

What about experts' reports? Normally, no, unless the mediation is very, very technical indeed and the mediator needs to understand the issues between the parties, but even then my view would be that a summary or abstract of views should prevail over what we all know and love as the classic experts' report. I do see a function for experts to be present in some mediations, but they have got to have the ability to "cut to the quick" and identify the real issues between the parties, if the advocate and his client and/or the mediator considers it's relevant to be able to explain, in short order, what the real points are.

Now, what else should the advocate do? Probably obvious already from what I have said. You don't prepare as if the mediation was a trial or an arbitration or, indeed, get ready to prove to the mediator that your client's case is better than the other side's, not least, as I have said in my note, because that would require far too much material and, indeed, in my view, ignores the whole purpose of the mediation.

What about witness statements? Generally, no. No, save in exceptional circumstances, and certainly if the people who would give the witness statements are available to come to the mediation.

I have often given a witness an opportunity to speak from the heart in a mediation, without too much of a script, once again to hit the other side's executive mind set and perhaps to explain in colourful terms, sometimes, what the real problem is to the mediator.

If you've got to have a witness statement it needs to be as short as possible but, as I have said, generally I would avoid them.

What about an opening statement? Yes, I think opening statements are important. Again, the opening statement should be addressed by the advocate to the other side. Not so much the mediator, the other side. Hit that executive mind set and just bear in mind, conceivably, it could be the first time that the other side's senior personnel have heard and, indeed, understood what the real issues are, so it is vitally important that you are in a position to summarise those issues, make the opening statement short and punchy and, as I'm going to go on and say, I often think that there is a role for one of your clients' key personnel to share the opening statement with the advocate, and I'll come on to that in due course.

Avoid duplicating the position statement. I think there ought to be a position statement, but I'll move on to that in a little bit more detail in due course.

It does seem to me it's important to concentrate on undermining the other side's position statement which should be served in advance of the mediation.

Don't use legalese, I've made that point already. Don't keep going on about "said"s and "aforesaid"s, and all that lark, and don't present evidence and don't make submissions, "I submit this" and "I submit that." That's not the way you should do it. In my experience you should use plain English.

Another key advantage that I explain to my clients, and you've got to explain to the client that it can go on during the course of the mediation, is that they can in fact speak to the other side without having to go through their lawyers. My experience is very much to the effect that during the course of the meeting, it is often worth having a "time out" for principal to speak to principal, having taken account of what's occurred before the meeting.

I think the other point that I need to make is that so far as the dress code is concerned, I prefer what I think the party invites describe as "smart casual." I think the last thing that one really wants to do in a mediation is have lawyers turn up with pin stripe suits, like I've got on tonight, and college ties and white shirts. It is far better that it's conducted in a relatively informal manner with a view to achieving that all important settlement.

Now, other things to remember: I have made the point already, I think, but nevertheless, it is important. Mediation is a complete departure from the independent decision-making dispute resolution process which is represented by arbitration and, indeed, the courts. It is controlled by the parties. It has the advantage of no formal structure and any settlement reached is voluntary.

There are no exclusive rights of audience. I have posed the question before: who should speak? In my experience, I always like to take the lead with the opening statement, but lay involvement is, of course, permitted and, in my view, should be encouraged, not only to release emotion but to have the equivalent of a day in court; perhaps, if appropriate, to embarrass the other side, depending upon what the dispute is about or, indeed, even to show that A or B might be a potentially good witness if, God forbids, the dispute has to end up in the court or in arbitration. But, of course, if you're going to do that, make sure that you plan any split role well in advance of the hearing. Make sure you know who will do what.

Now, how about the approach to a mediation?

Five important considerations in my experience.

Do not concentrate so much on winning and losing as of course we all do in court and arbitration,

but I think it is important to evaluate the client's true needs and interests.

Secondly, consider any underlying problems with the parties' relationships.

Why do I say that? In my experience, if you can identify and resolve these, you are well on the way to achieving the result you want, namely, the compromise.

Encourage common parlance and straight talking. Encourage the parties themselves to embrace the mediation process and to find and subscribe to their own solutions, and I've already emphasised the importance of allowing principal to principal meetings or even team meetings between the parties, during the course of the mediation, once they understand the issues and have perhaps alighted on a possible course of settlement.

Now, continuing with this theme, what else would I as an advocate be looking for? Well, I would be looking for and identifying joint gains. If you can identify joint benefits it might seem obvious, if you can identify joint benefits, in my experience, you are far more likely to get a settlement than might otherwise be the case.

It's also important, a matter I have touched upon already, but it bears reiteration, that you ought to look for and articulate goals beyond the ambit of the existing dispute. Certainly from my perspective I often try and think of something that the parties have not thought of themselves, with a view to breaking any logjam that exists between them.

I have already talked about the documentation that ought to be involved in a mediation. I do emphasise, because it is important, that the legal case should provide no formalistic boundary in the way it would in a court or an arbitration and, in my view, should exist only as a very, very loose framework to assist the parties and the mediator to identify the issues and guide them to what they regard as an appropriate settlement. It's really the background I've talked about before.

I think the fourth point I make on this slide is very, very important, indeed.

Have a draft settlement agreement prepared in advance of the mediation.

Now, there are several reasons for that. One of them I've put down here, not least because it helps in terms of identifying the matters that need to be agreed, but, secondly, in my experience, mediations can often last for many hours, go well into the night, and sometimes you just do not have the energy at 2 3 o'clock in the morning to put pen to paper and draft a complicated settlement agreement. You go home and then people have changed their minds, you come back in the morning, and the deal's off. So my view would be have the settlement agreement in your back pocket.

Now, what about negotiations? I have touched upon negotiations already. Negotiations between the parties are essential and, indeed, an integral part of all mediations. I thoroughly encourage them, but, having said that, it is important that before they go ahead, the advocate sits down with his client and establishes the ground rules for any sort of deal. For example, offers on the basis of an adjusted contract sum, or what's going to happen to matters such as tax.

I think it's also important to identify with your client the two, three, four, or whatever number, of hurdles that the client's got to overcome to achieve its objective and, of course, to agree the strategy that is going to be adopted with a view to attaining that objective.

You will have heard me talk already about the joint meetings and the private meetings with the

mediator, and I'd like to say a little bit more about that. You've got to recognise the differences between these two sorts of meetings.

So far as meetings with the mediator are concerned, I think it is vitally important that on behalf of your client or, indeed, using your client, that you do not hesitate to make points in private that may assist the mediator to achieve your client's needs and interests.

What I have in mind by that I give several examples. You might suggest to him, "Well, look, mediator, we think we'd be prepared to do a deal on that basis, what do you think about that? Would you be prepared to raise that with the other side?" Again, you might say to the mediator, "Look, I know you're not here to decide upon this dispute, but so far as we're concerned, the other side's point on X is weak." You might think that's the case and you might want to relay our views on that, or, indeed, your views on that to the other side, particularly if you think it's some sort of Achilles heel.

I think you also ought to ask tough questions of the mediator concerning the other party's position in what, in my experience, is the reasonable expectation that the mediator will relay those points, those tough questions, to the other side and thereby get those points within the other side's executive mind set and hopefully, from your client's perspective, perhaps reduce the other side's expectations.

You've effectively got to use the mediator as you can, as your client's own advocate. Let him do the work for you and I've often been able to do that to good effect.

Following that, I think there are a sort of rag bag of points that I'd like to make before perhaps moving on to one or two other aspects of presenting a case in mediation. Obviously, the advocacy should not be pointless in any event, know when to shut up, and know when you ought to leave it to the mediator, if it's possible to advance your case with the other side, or, indeed, talk your client into adopting a position that you've not been able to explain to your client is in fact a reasonable position.

Assist your client to move from entitlements to needs. That, I think, is very important.

Entitlements, in my view, smacks of a court case and in arbitration, whereas, in a mediation, it's more in the nature, in my view, what do you need? "What do you need out of this?", "Let's talk about this realistically. We want to avoid going to an arbitration or, indeed, litigation with all the costs, what do you really need to get out of this to avoid all of that?"

Make sure this is vitally important, and, unfortunately, I had a bad experience once here make sure that there's authority to settle on both sides, otherwise the whole mediation process, certainly the day of the mediation, can be futile. I once had a mediation where we agreed a deal and it transpired that there wasn't someone there who was senior enough to sign off on the money because it was beyond his power to do so. That was a rather unfortunate occurrence. Ultimately it settled, but it took a lot longer to settle and cost the parties a lot more heartache and a lot more money.

Obviously observe any mediator's directions. Try and keep him on side. If you've got the mediator on your side, it's more likely to be to your advantage and make sure that the parties are in fact prepared to stay at the mediation for at least one session. It sounds pretty obvious, but there have been occasions, I've heard of it's never happened to me where after the opening statement, because of what's been said, the other side have walked out and that's been the end of it.

Now, what about the position statement? I've already talked about the position statement.

I regard it as a very important part of the advocate's job to produce a position statement which is a concise and I emphasise the word "concise" statement of your client's case put forward in "Janet and John" language and that ought to be produced and sent to the other side, and the mediator, before the mediation. So there really can be no doubt or, at worst, little doubt as to what your client's position is.

I think it serves a number of purposes, but at least the following three purposes are, in my view, so important that they need to be emphasised.

Firstly, of course, they inform the mediator and the opposing party of the live issues in dispute and your client's position.

It might seem obvious, but make sure it includes that.

Secondly, explain and justify your client's stance which, in all probability, might not be based upon strict legal grounds.

Thirdly, I think it's important to do what you never do in an arbitration or a court case which is to use the contents of the position statement as a vehicle for settlement. For example, you might identify possible settlement terms or even concessions that you are prepared to make and, indeed, emphasise that you are there in a spirit of cooperation with a genuine intention to compromise the case if, indeed, you can do so.

Again, I emphasise the importance of the other side's executive mind set. It should not be directed so much at the mediator but, of course, at the other side. As I have said once already, that's because it could be the first time when the guys who really make the decision on the other side see what your case is, what your grouse, is all about.

So, so far so good. What else is it important, in my view, that the position statement contains?

Well, obviously I think a concise but relevant history leading to the dispute.

Secondly, the identity of the parties and their representatives. It might seem obvious, but I think that's important.

Outline the dispute and, of course, set out the bones of your client's position, the bones of your side's case. That should, in my view, be primarily the merits of your case. The merits of your case as opposed to a case based upon law. There is scope for law, but as my Pupil Master told me many, many years ago, Richard Fernyhough QC, "Phil, if you get the merits on your side, the law will look after itself", and I have to say that that's served me pretty well over the course of my career. I think that one can benefit from taking a similar view in mediation. Obviously you include any reference to quantum, that's normally what it's all about.

You might say why your client's case is likely to be upheld in court, but, as I've said, don't get too legal, that tends to make the other side's eyes glaze over. As I've said already include any settlement proposals, including issues or claims which it's believed are capable of being resolved, including the terms.

I think it's also important to identify any objectives, legal, commercial or personal, which, on a wish list, would be desirable. An example would be an apology. An example would be a letter that one can take to an authority to obtain a result that might not otherwise be achievable. As I've

said, I think I have mentioned this already, but a neutral chronology can often assist, particularly in a complex dispute.

Now, you've done all that and you've served that and the big day arrives, so what are you going to do?

The opening statement, I've referred to that already. I do not apologise for emphasising again that you address the other party. You hit the other party's executive mind set; it might be the first time they've heard what the real disputes are about.

Provide, in my view, information about the client's concerns and avoid, in the first instance, negotiating or upsetting them too much. If you upset them too much, they're likely to walk out.

It ought to be as brief and punchy as possible and deal with the core issues, but concentrating on the future as opposed to the past. I've talked about win/win situations before. If you can look to the future and identify benefits for both parties, in my experience, you're far more likely to achieve a settlement.

Avoid reference to documents unless essential. The last thing you want is a sort of classic boring barrister's opening in a court case or an arbitration where everyone is asleep by the coffee break, that won't do you any good at all. And, as I think I have said already, summarise the main points of dispute using broad themes.

Now, what else can I think of? I think I've said that you ought to use Janet and John language, but it shouldn't be so Janet and John language that it's foul language or, indeed, emotive language, but you do need to explain the effect of the dispute on your client. In my experience it benefits to suggest what decisions need to be made at the mediation and, indeed, perhaps identify topics and the order in which the topics ought to be discussed. That assists the mediator, in my view, and of course the other side, provided they are prepared to go along with it.

Be realistic and be frank. Do not ignore your own weaknesses. If you are going to go in there and thump the table and say, "There's absolutely nothing wrong with my case at all, when are you going to pay me all the money I want?", well, you might as well not have bothered. You've really got to identify your weaknesses and, in a sense, make a virtue out of a vice and identify them and say, "Well, notwithstanding those weaknesses, we are prepared to go forward. We're looking to the future. We think that the way to resolve this deal is, for example, if you were prepared to compromise on that, we recognise that we ought to compromise on that" and that, in my experience, is the sort of way that you can move forward.

I think leading on from that it ought to be recognised that there are risks on both sides and emphasise the opportunity to avoid any adverse outcome by agreeing a settlement that recognises the risks. I've already emphasised that you ought to recognise your own weaknesses.

Use language that engages the opposite party and be positive. For example, that you want a settlement that achieves something for both sides, the win/win arrangement that I've talked to before.

Finally, and we all know our clients are always right, but, finally, get your client to listen carefully to what the other side says because, actually, he might not have heard it before.

So, whilst you've got a role to inform the other side's executive mind set of what your client's position is, make sure that your client understands what the other side's position is.

There are other important functions during the hearing.

I have talked about allowing the client or the client's representative to speak in both the open and closed sessions. It often helps if the client can get something off his or her chest to the mediator or to the other side, but I emphasise you shouldn't lose overall control.

Secondly, don't be just a mouthpiece. You also need to be a supporter and manage the client's expectations as necessary during the course of the mediation process. It's your function as an advocate to listen to what the other side's advocate says, to listen to what the mediator says, and to react accordingly. If you think, based upon your experience you're probably a lawyer anyway based upon your experience, you think that things are likely to go badly were the mediation not to achieve a settlement, badly in any future arbitration or court proceedings, it's obviously your job to tell the client, tell the client what the likely consequences would be, and, indeed, manage the client's expectations. It's ultimately up to the client whether he takes those points on board but that, in my experience, is what you've got to do to fulfil your obligations.

You need to focus on interests as opposed to strict legal rights and obligations. Negotiate as necessary and promote positive solutions. I think I've mentioned thinking outside 'the box' before.

What else? Stay cool. We've all had mediations, I'm sure, where sometimes, notwithstanding our best efforts, it does get rather emotional. You've got to stay cool. If you are to achieve the objective of a settlement, you've got to keep the lines of communication open even in challenging circumstances.

I think it always helps to remain positive. Try and have a laugh. Enjoy the day and keep the momentum going in potentially lengthy sessions when it appears nothing is happening, because the mediator, you hope, is in a private session with the other side extolling the virtues of the position you've adopted.

I remember doing a big mediation on the Wimbledon Millennium development many, many years ago. I was for the insurer of the designer, I think, and we often sat there for two or three hours at a time not really knowing what was going on, but it was a bit like selecting the new Pope. Ultimately the smoke came out of the chimney and we hadn't really paid very much at all, so we were quite pleased about that.

The other thing about the Wimbledon Millennium development was that, as you can imagine, the players and the members of Wimbledon knew exactly how to look after themselves. We were shown all of the new players' dressing rooms and their dining rooms, and the committee's dining rooms, and I said to one of the Wimbledon officials who was taking us around, I said, "This looks a fantastic place. How do you get in as a member?", and he said, "Well, sir", he said, "The easiest way is to win the competition", so that certainly counted me out.

I think finally on that slide, I just emphasise the importance to the client of, if possible, having a range of settlement options. It's all part and parcel of staying flexible.

Now, what about more advice concerning those private sessions with the mediator?

Disagree with the mediator if you need to, but, as I've said, remain flexible. Always try and be constructive. Consider with your client whether the mediator should be permitted to divulge what he is being told and for what purpose. I have already given you the example there of the confidential

pricing documents. It can, in my experience, be beneficial for the mediator to be shown such confidential documents and he can then go in to his private meetings with the other side and say with some convection, "Well, I can tell you that I've seen there is supporting documentation to support the sort of money that Boulding's clients want."

Check what the mediator intends to do at the end of each session and certainly if you have the opportunity to do so, approve it or disagree with it, and, of course, use the mediator if you possibly can to obtain information from the other side that you might not otherwise get, and that's something that you can discuss with him during the course of your private sessions.

But don't forget, and I've referred already to the fact that mediations can go on for a very, very considerable amount of time, there is indeed a need for stamina. The court day, the arbitration day, of course, is regulated. I know it's relatively short, but it's quite a hard working day, but it's nothing like the sort of day that one might be reasonably expected to have in a mediation. As I have said, mediations are often lengthy and any movement usually takes place quite slowly. It might take a long time to start. Certainly avoid personal engagements on the day of the mediation and, last, but not least, make sure you eat and drink and that refreshments are readily available because they've always said an Army marches on its stomach, and I think the same is to be said about many lawyers I've known.

And then I think finally, and perhaps I'll make these points again, but it's not a bad way to end, constantly evaluate the case and its progress. Think laterally to try and achieve or improve your client's position, and explain to your client exactly what is happening at all times and the likely consequences, particularly if a settlement is not achieved.

Now, if you do all that, you might get the thumbs up, but if you ignore what I've said, I'm afraid it's going to end in tears.

So there we are, Graham. I hope that's some guidance and I hope you've enjoyed that.

If I can answer any questions from the floor, I will certainly do my best to do so.

Graham McNeill: Fantastic, thank you. Are there any questions from the floor just over the next few minutes?

Audience Member: Just one. The principles that you've laid out would also be applicable for a court enforced mediation where it's not so flexible, you know, but there is a process?

Philip Boulding: Well, obviously you've got to comply with the court's rules and regulations so far as the mediation is concerned, but unless you retain at least the most important elements of the flexibility I've described, I think the mediation is likely to be a futile exercise. My view would be, yes, as much flexibility of the kind I've described as possible should be retained.

Audience Member: Can you give me an example of non monetary resolution, can you give an example of what you mean?

Philip Boulding: You can do anything you want by agreement. So the answer is, yes, and it seems to me that is one of the important things about mediation.

It is an inherently flexible process and you can achieve the sort of settlements that would be beyond your wildest dreams in a court case. I mean, for example, you could mediate, I suspect, over the

ownership of a dog if you wanted to and one would think that no money would change hands, although the dog might have to.

Graham McNeill: We will take one more question.

Audience Member: Phil, if you have been appointed as the advocate and you're talking to a managing director or chairman, tell us how you would help him to select who would be doing the job on speaking from his side, assuming that that managing director or chairman was also going to be there beside you?

Philip Boulding: Right. Well, obviously it depends upon the case, but if it were a construction case where one was talking about defects, progress of works, I would expect to at least consider having a horny handed son of toil along, with dirt under his fingernails and mud on his boots, who could actually explain the position from the coalface, that's something I would want to give serious consideration to.

I'd also want to consider having someone from higher up the chain within the company, perhaps to express the company's dissatisfaction with the situation and the consequences of the dispute, whatever it was, on the company's position and what from an executive mind set's point of view the company was actually after achieving. That's where you would bring in the possibility of doing a deal on this basis. You might be content to throw something in to get something else.

It depends on the dispute, but I think the flexibility of the mediation enables you to do, within reason, whatever you want. I hope that's answered your question.

Audience Member: Thank you. Thank you.

Philip Boulding: I think someone else wants to ask.

Graham McNeill: Okay. Just one more.

Audience Member: Sure we can be very on the dog, but I want to be very on the dog and the cat, that's where we're headed, so we can bring that in an answer as well?

Philip Boulding: Within reason. You can mediate over anything you want. If you've got a dispute, you know, how fast is a fly going up the wall? You can mediate on it. That's completely unrealistic, but what one can conceive of a situation which would not be a classic commercial situation, to use your quote, you know, "Not involving money", where you could go and get a facilitated negotiation, going in front of a mediator, with a view to coming up with a settlement. I mean, that's the beauty of it.

In fact, you could even resolve some disputes which probably wouldn't be capable of ever seeing the light of day in an arbitration or a court case, although it's not the sort of thing I get involved in, as you can imagine, but I have heard of them.

Audience Member: Thanks, Phil.

Graham McNeill: As I was saying before we let you go, could I please ask you to present our scholarship prizes. Perhaps if I could call Tommy, Peter Chan and Paul up to the stage, please.

Philip Boulding: Tommy Cheung. Well done, Tommy.

Tommy Cheung: Thank you, sir.

Philip Boulding: Congratulations and good luck on your career.

Peter Chan, again, congratulations. Really well done.

Last but not least, Paul Lee, who happens to be known to me because Paul was the pupil of my junior, James Niehorster, and I can certainly tell you that he deserves the prize because he did some very, very good work for me, through my junior, so well done, Paul.

Graham McNeill: Ladies and gentlemen, another round of applause please for Philip.

Philip Boulding QC

KEATING CHAMBERS

Presenting a case in mediation – a QC's perspective

Phil Boulding Q.C.
Keating Chambers

What is mediation?

- A structured process
- Comprising one or more sessions
- One or more impartial individuals (without adjudicating a dispute or any aspect of it) assist the parties to do all or any of the following:
  1. Identify the issues in dispute;
  2. Explore and generate options;
  3. Communicate with one another;
  4. Reach an agreement regarding the resolution of the whole, or part, of the dispute.

Points for the advocate to remember/ emphasise to client

- Ability for a party to control the outcome
- The parties 'own' the settlement that the advocate can and must assist his client to achieve
- Mediation can produce outcomes that more formal, conventional dispute resolution procedures simply could not achieve

What is arbitration/litigation?

- More public or totally public process
- Far more formality/lack of flexibility/rules
- Need to direct advocacy and submissions at arbitrator/judge – as he will decide and not just facilitate a settlement
- Constrained by pleadings/rules of evidence/legally available remedies
- Must prove case in a 'managed' process
- No extended hours to suit the parties
- Cannot walk away (absent paying costs or sum claimed)
- Uncertain result (over which there is no control) but binding – subject to any appeal

Further points for the advocate to bear in mind:

- In most cases mediation voluntary and (subject to a possible costs sanction) parties can 'walk away' at any time
- Non-binding (unlike arbitral dispute resolution processes) so settlement can only be achieved on the authority of both parties concerned (in which case the settlement can form part of an enforceable contract)
- In many cases mediation is only a catalyst for settlement, with many cases settling shortly after the mediation
- It is private, 'without prejudice' and confidential

Consequences:

- Parties, acting by themselves or their advocate, can disclose information or express views, make suggestions or offer concessions KNOWING that if the matter proceeds to a trial they will not be precluded from arguing and adopting a different position
- A party can refuse offers, or even end its involvement without any risk of such fact being held against them if a court determines costs in the future

Compare and contrast:

- The courtroom, or even an arbitration, which is public (or at least 'public' to some degree) where such approaches cannot be adopted for fear of e.g. prejudice or embarrassment

Never forget - settlement in a mediation

- Can only be achieved by consent of parties
- Settlement seeks to maximise the parties' interests ("win"/"win" outcomes)
- Usually confidential, but need not be the case e.g. if public apology is a term of the settlement in a defamation case
- Inherently flexible, so can be ingenious and incorporate reliefs that cannot usually be the subject of claims of determination in arbitration and court e.g. an explanation, agreements as to future relationships or agreement by one party to do something without any existing legal obligation to do so
- No imposed solutions
- This flexibility frees the advocates and parties from having to think in terms of e.g. causes of action/proving the case/destroying a witness in XX/the remedies that are available at law

Advocate's preparation is key

- Mediation can be as expensive as a day in arbitration or court
- Inadequate preparation means less chance of settling
- Unsuccessful mediation, particularly in a small claim, could substantially increase a party's costs (and perhaps even double them
- Advocate must prepare in manner that best represents the client's interests and most likely to achieve the (potentially very flexible) desired solution
- Reliance on documents should be minimal (no need to prove case) and generally only a jointly agreed core bundle of key documents is required (not least so that the mediator can prepare)

Further 'tips' for the advocate - documents

- Reliance – if documents relied upon, it should be in order to establish relevant background and explain issues to the other party e.g. by way of a Statement of Case to establish the framework within which the mediation can take place
- Quantum - documents relevant to quantum should be provided to the other party (and mediator) well in advance of the hearing (for obvious reasons)
- Confidential documents - consider whether the mediator needs to be shown confidential documents either before or during the mediation
- Exception to the general rule on limited documents - expert reports if mediator needs to understand issues between the parties (but can a summary or abstract suffice? NB over-complexity unlikely to assist)

What else?

- Don't prepare as if the mediation were a trial/arbitration or get ready to 'prove' to the mediator that your client's case is better than the other side's (not least as that will require too much material)
- Witness statements? Generally not (especially when relevant personnel in attendance and Statement of Case is properly prepared). Consider summaries, but as advocate push the point if really necessary
- Opening statement - avoid duplicating the position statement and concentrate on undermining the other side's position statement
- Don't use 'legalise', present evidence or submit
- Parties can speak without having to go through lawyers and there are often considerable benefits in having a 'principal to principal' meeting

But also remember that .....

- Mediation is a complete departure from independent decision making dispute resolution process
- Mediation is controlled by the parties
- Advantage of no formal structure and any settlement reached is voluntary
- No exclusive rights of audience. Who should speak?
- Lay party involvement permitted and to be encouraged (release emotion, 'day in court', embarrass other side, need to be heard, show off potentially good witness if matter were to proceed)
- Plan any split role well in advance in terms of exactly who will do what

So how to approach a mediation?

- Do not concentrate on 'winning and losing' but on evaluating the client's true needs and interests
- Consider any underlying problems with parties' relationships
- Encourage 'common parlance'
- Encourage the parties themselves to embrace the mediation process and to find and subscribe to their own solutions

Anything else?

- Look for and identify 'joint gains'
- Look for and articulate 'goals' beyond the ambit of the existing dispute
- Legal case (any pleadings or statements of case) should provide no 'formalistic' boundary and should exist only as a loose framework to guide the parties and the mediator (or to measure any settlement proposal against what might happen subsequently if the case goes to arbitration/court)
- Have a draft settlement agreement prepared in advance of the mediation (not least because it helps identify the items that need agreeing)

Negotiations

- Negotiations between the parties are an essential, integral part of all mediations
- Discuss and agree with client the 'ground rules' for any negotiations e.g. all offers on the basis of adjusted contract sum; defects will/will not be remedied; tax considerations etc
- Identify the 2 or 3 main hurdles that your client will need to overcome to achieve its objective and agree the approach strategy in relation thereto

Recognise the differences between joint and private meetings

- Do not hesitate to make points in private that may assist mediator achieve your client's needs and interests e.g. suggest possible compromises, or offer non-binding views on the merits or seek to identify another party's 'Achilles heel' which may have nothing to do with the issues/merits of the dispute
- Ask tough questions of mediator concerning another party's position in the reasonable expectation that they will be relayed by him to another party (and perhaps affect its 'executive mindset' and reduce expectations)

What else should the advocate do?

Make sure:

- The advocacy not pointless in any event
- Assist your client to move from 'entitlements' to 'needs'
- There is authority to settle (on both sides) at limits which accommodate the client's legitimate expectations / objectives
- Parties observe the mediator's directions
- Parties will remain at the mediation for a minimum period e.g. one session

The Position Statement

- Concise statement of client's case
- Produce and send before the mediation day
- At least a three-fold purpose: (1) inform mediator and opposing party of live issues in dispute and your client's position; (2) explain and justify your client's stance (may not be just legal grounds); (3) use as vehicle for settlement e.g. by identifying possible terms/concessions and include reference to a bona fide intention to agree a settlement (although not at any price)
- Direct Statement primarily at the opposite party as may be the first time it has seen the information contained therein

Ingredients of a good Position Statement

Suggested that it should contain:

- Relevant, but concise, history leading to dispute
- Identity of parties and their representatives (including status)
- Outline of dispute
- Client's case: primarily meritorious facts but include summary of any relevant law; include any quantum and 'key' issues in dispute

- Summarise why client's case likely to be upheld in court
- Include any settlement proposals (including issues/ claims which it is believed are capable of being resolved, including terms). Any objectives (legal, commercial or personal) should also be identified
- A 'neutral' chronology can often assist, particularly in a complex dispute

Opening Statement – the day has arrived

- Address the other party
- Provide information about client's concerns, and avoid negotiating or altercations
- Brief and punchy and deal with core issues, concentrating if possible on the future and not the past
- Avoid reference to documents unless essential (see above)
- Summarise main points of dispute, using broad themes

And what else …?

- Avoid emotive language but explain the effect of the dispute on client
- Suggest what decisions need to be made at the mediation and identify topics for discussion during the day
- Be realistic and do not ignore weaknesses - say how they are factored into any proposal
- Recognise the fact that there are risks on both sides and emphasise the opportunity to avoid an adverse outcome by agreeing a settlement that recognises the risks
- Use language that engages the opposite party and be positive e.g. that you want a settlement which satisfies both sides
- Get your client to listen carefully to what the other side says - he might not have heard it before

Other VIP functions of the advocate during the hearing

- Allow the client/client's representative to speak in open and closed sessions BUT do not lose overall control (cf. arbitration/litigation)
- Don't just be a 'mouthpiece' but also be a supporter and manage the client's expectations, as necessary, as the mediation progresses
- Focus on interest as opposed to strict legal rights/ obligations
- Negotiate as necessary and promote positive solutions

- Stay cool' and keep lines of communication open even in 'challenging' circumstances e.g. when emotions are running 'high'
- Remain positive, retain a sense of humour and try and maintain momentum in those potentially lengthy, 'dark' times when the mediator is in private session with the other party
- Emphasise the importance to the client of (if possible) having a range of settlement options

Private sessions

- Disagree with mediator if you need to, but remain flexible
- Try and be constructive
- Consider whether the mediator should be permitted to divulge what he has been told, and for what purpose
- Check what the mediator intends to do at end of each session (and approve or otherwise)
- Try to use mediator to obtain information from the other side

The need for stamina!

- The court/arbitration day is regulated
- BUT mediations are often lengthy as any movement towards settlement is initially very slow, and may take a long time to start
- Avoid personal engagements on the day of the mediation
- Eat, so ensure that refreshments are readily available!

And finally .....

- Constantly evaluate case and its progress
- Think laterally to try and achieve/improve client's position
- Explain to client exactly what is happening at all times

A good mediation!

But on the other hand .....

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