Butterworths: Mediators on Mediation:

Chapter 9

Concluding the Mediation

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A. Introduction: reaching finality

9.1 It is of course the case that the parties will understand that the purpose of their mediation is to obtain a resolution of their dispute, or disputes. In that sense the mediator will have been working with the parties from the outset with that objective in mind. The mediator will have been working closely with the parties as they have gathered together the information that they need and will have encouraged the parties to analyse the essential information, so that the parties understand the opposing views and arguments, and underlying issues. However, the information phase, which is commonly seen in all mediations, must not be allowed to be an end in itself and I consistently remind the parties that the fundamental purpose of information gathering is to be in a better position to understand one's own position and the other party's position and then to use that understanding for the purpose of settlement. The parties must move to and undertake serious committed negotiations.

9.2 Moving to agreement in negotiations, therefore, involves the parties changing their behaviour to decision making so that negotiations actually commence for settlement. By so doing the mediation is prevented from becoming an academic debating chamber for issues that, whilst they might be interesting to the parties in themselves, may not have a fundamental effect on the ultimate objective of achieving settlement. In this behavioural change, moving parties' representatives and the parties on from interesting points of law, disagreements on fact, or emotional attachment to parts of the historical framework is an essential step that the mediator, working with the parties, must be able to achieve.

9.3 There are a variety of indicators which give early warnings of the parties moving into their final negotiations. These indicators enable the mediator to encourage the move to decision making. In this chapter I shall highlight some of these indicators and some of the issues that may arise when they emerge. Of course, it is an essential part of a mediator's task to help the parties achieve settlement and overcome any impediment, and I shall therefore also highlight some ways in which the final stages of the negotiations can be assisted. There are no rules that govern the ways in which parties achieve settlement in the final stages, but it can be said without any contradiction that one of the mediator's tasks is to ensure that the momentum for settlement is maintained notwithstanding any difficulties that arise in this final phase.

9.4 Once the parties have reached settlement in principle, quite understandably they are relieved and often the parties feel a great sense of release from the tension of the negotiations. However, even if there is a temptation to stop the mediation at that point, it is essential in my view that the parties do commit in writing and consequently continue to work together to produce a settlement agreement. Very often the details of the settlement agreement lead to further discussion and negotiation and it is this discussion and careful thought prior to the finalisation of the settlement agreement that embeds the agreement in principle. This final step in the process completes the mediation so that any settlement will truly stand the test of time and meet the needs of the parties. The creation of the settlement agreement itself does involve issues and processes that I will discuss, but this part of the process is important in achieving finality for all the parties.

9.5 If the mediation meeting has concluded with a settlement agreement, as can often be the case, then the parties can truly leave the mediation with total finality. However, that may not always be possible and the mediation meeting may only be a step in the process towards settlement. If the parties have not reached settlement on the day or days allocated to the initial mediation meeting, then the mediator will work with the parties in continuing the process in ways that are productive to maximise the chances of settlement after the mediation meeting. This part of the process may be as straightforward as arranging an adjournment of the mediation meeting for the parties to continue their productive negotiations on another day, or simply arranging for more time to be allocated to obtain information, and then arranging a restored mediation meeting. However, the mediation meeting may have resulted in a stand-off with the parties dug in on opposing positions and the mediator may then have to work with the parties in a variety of ways after the mediation, encouraging further negotiations and reassessment so that settlement can be achieved subsequently.

9.6 Not all mediations result in agreement and sometimes parties have to face the consequences of a mediation that does not reach settlement. Yet, I do believe that even here, the process itself will have brought considerable benefit to the parties, and I have seen the parties' conduct of their dispute change as a result of mediation, even though ostensibly settlement was not achieved. Also, it must never be forgotten that the parties, or indeed the mediator, may terminate the mediation. Whilst it is the case that a mediator would not wish to terminate a mediation without a very good reason, it is the case that if the circumstances do arise where that should occur, the mediator should indeed act decisively and effectively to do just that. That termination by the parties or by the mediator is rare, simply reflects the fact that mediation works to achieve resolution for the parties and that is the overriding experience that this chapter celebrates.

B. Indicators of the final phase

9.7 I have found that the following are some of the indicators that appear which signal that the final negotiation phase of the mediation is being entered into. How long the final negotiation phase will be, and whether the final stage will be effective are other matters, but nevertheless the final phase of committed and determined negotiation, invariably has one or more of the following characteristics involved.

9.8 The parties discuss with the mediator or amongst themselves which issues are to be linked to which values in money and how any offers are to be presented.

* It is clearly the case that if the parties are looking at and thinking about opening offers and eventual settlement areas, that the final settlement phase may be being entered into. Whilst some may consider this to be self-evident, this may not in fact be the case as commitment to final negotiation may not yet have taken place.

9.9 Care must be taken by the mediator to find out whether in fact there is a commitment to moving to money, or whether any of the parties are just playing with figures with no real commitment to them.

* Have the negotiations really 'become serious', or are the consequences of the figures too much for any of the parties so that they run away from the negotiations that have been entered into? In these circumstances the mediator should proceed carefully and test the party concerned to ensure that they are content to move into committed negotiations on money or issues, that that is what they intend, and that they do intend the positions being produced via the mediator to be taken seriously by the opposing party.

9.10 Another sign that final negotiations are being entered into is that the parties are in fact agreeing on minor issues and beginning to place values on them, even if agreement is not immediately possible on major areas.

* Where there are a great variety of issues to be agreed the parties can be encouraged to undertake agreement on the minor issues before they try and agree the major issues. A mediator looks out for those early simple wins and either helps in organising them so that the parties gain confidence, or

introduces them by way of reminder when negotiations on the major issues are facing difficulty, in order to encourage movement to overall settlement.

9.11 The final phase nearly always includes discussions about where to start the offers.

* Quite often the parties will have formed their own view of where they want to start and what their anticipated settlement zone is. Sometimes that is not the case and they may simply not have undertaken that thinking. In these cases the mediator will work with the parties to help each party find the settlement range that they wish to use for their negotiations, and find the place where the settlement negotiations are to start and whether the settlement proposals concern money alone or money and offers in other forms. The classic approach is that the parties start at a 'low point' and then to move to a 'higher point', thereby implying flexibility in the negotiations. Alternatively, parties may start at a point that they regard as reasonable and then move by very small steps from it. This approach to negotiations has another implication, which is that the realistic early offer has been pitched at the zone for settlement and that 'realism' is to be used by one or more of the parties to justify the small moves that are made thereafter. Whichever approach is used the parties should be encouraged by the mediator to gain awareness of their negotiating techniques and how they intend to obtain agreement when using their chosen techniques.

9.12 A mediator will also look out for a situation where it is apparent that even though some members of a negotiating team are keen to acquire information, decision makers or influential members of the team are not so keen and want to move on to negotiation.

* In these circumstances, giving a full voice to those who want to move on can often be used by a mediator in order to enable the group itself to move on to undertake the final negotiations.

9.13 It may be thought that when one or more of the parties move quickly to a 'take it or leave it' offer, that in fact the final phase of negotiation is being indicated.

* That may or may not be the case. This approach may in fact be indicating that the party taking that stance has not absorbed critical information or has not thought through how the negotiations are in fact going to be progressed. A mediator will often work with the party taking this stance in private session and explore with that party how the 'take it or leave it' offer fits in to the ultimate objective. Quite often, whilst there may be a degree of emotional commitment to such an offer, when the offer is explored in the context of the dispute, the party will recognise that such an offer does not achieve the desired effect with the opposing parties, and leaves the problem of how the negotiations are going to move on, and what the residual effect of such a tactic will have on the other parties involved. Nevertheless, the fact that such an offer is being discussed, and indeed may be presented to the other parties, can often be a clear indicator that the final stage is in fact occurring.

9.14 The time of day is an indicator of the final phase of settlement.

* The parties' expectations as a group can be managed so that the group may anticipate, for example, that shortly after lunch, or by a specific time, or by completion of a presentation on a particular aspect, the parties and the whole group will in fact move on and deal with final negotiations, if that has not occurred before. I often signal this at the beginning of the mediation and remind the parties of the time that is passing and the group's expectations as the mediation progresses, so that the group does in fact move on and everyone feels a responsibility to each other to achieve compliance with the self-imposed timescale that everyone has bought into. This technique can be useful, but it should not be allowed to suppress true disagreement, which needs to be explored by the parties, and it certainly helps in enabling the parties to leave aside technical, factual or emotional issues and to start final negotiations.

C. Arriving at settlement and agreement in principle

9.15 The mediator is in the position of seeing both parties as they approach and arrive at settlement. In disputes which are essentially straightforward and involve money in discharge of claims, then the process of gathering together the issues that are to be resolved and the essential structure of the settlement is, for both parties, essentially relatively straightforward. However, in disputes which are multi-faceted, the essential structure of the settlement may be complicated and in addition to involving money, could well involve future obligations, understandings or actions that must be undertaken by both parties as part of the settlement itself.

9.16 In the more complex settlements which have many aspects to them, the mediator will be reminding the parties of the items that they have put on their agenda and assisting the parties in their negotiations by getting them to gather together the earlier easier items that were agreed and to define the emerging

consensus with care on the subsequent items that were the subject of successful detailed negotiations. In cases such as these, before any steps are taken to document the settlement or enter into the formal settlement agreement, the mediator may agree with the parties that they will write out in the form of a check list exactly what the core of the agreement is, so that that can be used as a touchstone for all those involved in formally concluding the settlement agreement itself.

9.17 The mediator, in addition to helping the parties clear their thoughts on the structure of the settlement as they finally agree it, will also be helping the parties to take a decision on what is to be core to the agreement in principle. Many people will recognise from their own personal experience that there is a natural hesitancy to settle at a particular point. The mediator will be providing encouragement and if necessary changing the pace of the negotiations in order to raise expectancy of settlement as well as, if it is necessary, changing the people who undertake the final step. Quite often increasing the pace, with the mediator acting in the usual role of neutral intermediary, will achieve a settlement agreement.

9.18 On other occasions the final step needs to be undertaken by the principal decision makers and the mediator must be sensitive to recognise the needs of the principal decision makers to meet to reach agreement. This is especially so if there is likely to be any continuing relationship between trading partners or business ventures. I found this to be the case in a dispute between two national retailers where the final settlement agreement could only take place when I brought the two Managing Directors together. The first half hour of their meeting was spent discussing future developments and then only minutes were spent in deciding the final settlement. Both needed to see the future for themselves before they could deal with the past. On several occasions I have suggested that decision makers do meet to undertake the final step for settlement and very often decision makers welcome that opportunity, if they have not indicated beforehand their own wish to meet.

9.19 Mediators also recognise that the last step to settlement in principle may be extremely difficult due to a very small difference remaining and the parties being reluctant to bridge it. There are a variety of techniques and options that a mediator can make available to help the parties. These include 'splitting the difference', undertaking a joint session between defendant payers to show the insignificance of the amount involved in relation to the contributions given, using the mediator to winkle out how hard the 'final figure' in fact is, and one or more of the parties leaving compromise figures and authority with the mediator. Not everyone may solve this problem in the way that I encountered in a dispute between a Hong Kong property company and a building contractor, both of which were led by Chinese entrepreneurs. The unbridgeable difference was resolved by betting on the spin of a coin. Both parties were highly satisfied with the ultimate outcome and I have no doubt that both went off to a local casino to continue their betting together after the mediation!

9.20 It is often the case that a great deal of effort will have been put into reaching the agreement in principle, and it will be the case that the essential dynamism and energy which produced the settlement agreement will lessen after the point of agreement in principle. Indeed, one or more of the parties may even say that they would prefer to stop the mediation at that point and to leave the lawyers or the documentation to follow the agreement in principle that has been reached. In fact the parties should be kept together at that stage and a formal, signed settlement agreement should be entered into if at all possible. The parties should therefore remain together in mediation until such time as a formal agreement is concluded.

D. Creating a mediation settlement agreement

9.21 As the agreement in principle is turned into a finalised written settlement agreement, which is either to be the full binding record of the settlement or if the parties wish a heads of terms preparatory to an eventual full binding settlement agreement, the mediator performs the function of the guardian of the agreement in principle. If parties are represented, it is often the case that this phase of the mediation will be a drafting session which will result in clients' instructions being obtained and a formal settlement agreement signed. In these circumstances, in the more straightforward cases, the terms of a settlement agreement may be relatively predictable and simple and need not give rise to much disagreement on the wording of the terms or substance as the process is carried out. Even here it is essential early on that the lawyers and parties understand that the mediator will be the guardian of the settlement itself, and will act as a mediator if there are any disputes between the parties or indeed the lawyers as the settlement is committed to paper in its entirety. The role to be undertaken by the mediator is that of guardian of the agreement in principle and working with the parties themselves as they ensure that the settlement agreement and the drafting of its terms are in terms that they wish to have and which they are prepared to be bound by.

9.22 In practical terms, however, that may not always be possible in every case. There are mediations where one or more of the parties may not be represented by a lawyer. In these circumstances, whilst the individual concerned may be very able and efficient in presenting their view, the mediator must ensure that

the process of documentation does not result in fact in disadvantage or misunderstanding. It may be here that immediate advice will be obtained by telephone from a lawyer who has been involved in the matter before, or the settlement agreement itself might well be signed, but subject to advice being obtained on the wording of the agreement within seven days of signature before full agreement is achieved. The mediator will then monitor the final conclusion of the agreement in those seven days.

9.23 During the course of the mediation, I as the mediator will have seen the lawyers and the relative positions of the parties as the settlement is arrived at. If settlements are complex it may be efficient to have certain lawyers drafting certain sections of the settlement agreement but usually I will put the lawyers together in order to produce a common draft. The lawyer who is charged by all with the task of writing the draft settlement and taking the initiative on the drafting in that meeting will either be the lawyer of the party who has the most interest in the settlement, or the lawyer with the most effective and accommodating drafting skills if that is not the same lawyer. It may be the case that in a simple straightforward settlement, there would be no need for a common drafting meeting between lawyers, and in those circumstances it can be left to one of the lawyers to produce a straightforward order and that can then be circulated in the normal way between the other parties and instructions obtained.

9.24 Mediation settlement agreements can often incorporate standard clauses for settlement found in orders before a court, if proceedings are in place, or be entirely stand-alone settlement agreements that function on several levels. Whilst it is the case that the mediator will have often seen parties drafting 'full and final' settlement clauses, confidentiality clauses and payment provision, in my view it is essential that the parties themselves draft what they want in the way that they want. However, the mediator's obligation to encourage progress to finality does not stop during the process of preparing the settlement agreement and the mediator should make suggestions about areas of discussion, if in fact that will help the parties get to grips with all the necessary consequential issues more quickly. In the proper context, asking the parties what they intend to achieve in relation to tax, or VAT, or obtaining confirmation of compliance with settlement terms, may enable the lawyers to make faster progress. The mediator, whilst not giving advice, should take part at least to stimulate discussions on the issues that the parties will expect to deal with.

9.25 During the period that the drafting of the settlement agreement is undertaken, it can be that the tension and energy of the mediation will considerably evaporate. Care must be taken by the mediator to ensure that the relevant decision makers and members of each party are warned that their involvement may be required if difficulties or issues do yet emerge. In the simpler cases such advance warning need not be too strident, but in more complex cases the parties to the settlement agreement should be kept in a state of alertness so that they can undertake negotiations and so that they can act effectively in this phase.

9.26 I can recall a mediation where in this phase, in a large class action, the lawyers of which there were eight or nine, appeared to be working well together in a joint drafting session, and having stayed with them for an hour, I left the room to check that the parties themselves were committed to the settlement with no further thoughts to be brought into account. I was absent from the drafting room for no more than five minutes, and was walking back towards the room when I saw all the lawyers flooding out of the room in front of me in a high state of agitation and declaring that the settlement was off. Some lawyers had uncovered an area of disagreement in a particular term that they regarded as important and had forgotten the core of the settlement itself in the argument about the terms. The solution was to get the decision makers together with their respective teams in one meeting to reaffirm the settlement, and for the decision makers to remain in the drafting room with the lawyers as the terms were then hammered out in negotiation either directly between lawyers or with the intervention of the decision makers. In these circumstances, where there are several parties and multi-faceted settlement agreements, I do work with the decision makers just after the settlement agreement in principle has been arrived at, to agree with them that they do have a very big role to play in ensuring that the settlement agreement itself is finalised, and that the drafting and documenting process should not destroy the agreement in principle, unless there are very good reasons for that which they themselves decide to determine.

9.27 It is therefore essential in the larger matters that the decision makers themselves do control the process of hard negotiation on the terms of the agreement and that the mediator remains aware of the potential for disruption that may emerge through hammering out individual terms and subsidiary matters. During the negotiation process of the settlement agreement, care must also be taken by all the participants to ensure that whatever may have occurred which might have been personal or disruptive in the past, or in the mediation up to the point of the settlement agreement, is not used by either party to sabotage the process of producing the settlement agreement itself.

9.28 There is also the situation which can arise where the parties use the agreement in principle as a spur to agreement in other areas of their relationship. In another mediation I undertook between a worldwide distribution company based in the US and an Italian manufacturer, whilst the mediation concerned activities and disputes in the UK, once the parties had reached agreement on the UK issues, the parties then went on

to undertake detailed negotiations concerning worldwide distribution rights. The mediation went on to settle the terms of a worldwide distribution agreement and more time was involved in that than the original dispute. The parties should be made to feel secure in undertaking that approach if that is their need, even though in this case the mediation, before the distribution agreement was signed and the dispute settled, took nearly 20 hours of negotiation and effort by all. I had to guard against the original dispute being lost in the wider matters under discussion and the tiredness of all leading to inefficient negotiation!

E. Binding and final

9.29 All mediators know that the process itself has the object of creating a binding settlement agreement if at all possible. The terms of that agreement are drawn up by lawyers, and can be straightforward or extremely complicated. The process of drawing up the finalised settlement agreement may take some time in very complicated disputes. It is my firm view that that time should be taken with all parties present, and with all the capability to produce a final, finalised settlement agreement. Indeed, in one dispute which settled late in the evening, the terms of the settlement agreement that was signed off took longer to agree between the various parties than the initial part of the mediation itself. Whilst the mediator must take great care to ensure that the process itself does not damage the prospects of creating a finalised settlement agreement, it is the case that if at all possible the parties should be kept together until such time as the settlement agreement is signed. If, however, the settlement agreement does require a significant amount of time, then a heads of terms may be entered into if that is what the parties want. Whether the heads of terms is binding or not is a matter of debate between the parties, but whatever occurs, even in these circumstances, which in my view I would wish to avoid for the parties if at all possible, it is essential that the terms of settlement are written down and are the subject of considerable analysis and agreement as far as possible.

9.30 Once the settlement agreement has been agreed in principle, the parties should meet again and the mediator will then read through the agreement with all present. There is a great temptation for this not to occur, but not only is there a natural symmetry with the opening session, such that the parties can feel they are bringing closure as well as bringing closure in law, but also the meeting will provide the last reality check before the settlement is finally concluded. The role of the mediator in reading out the terms of settlement, slowly and carefully, so that all fully understand what the terms of settlement are, is in my view vital in bringing everyone to the final stage of concluded, mutual settlement understanding. It can be the case sometimes that the process of reading out the concluded settlement agreement that has been drafted will either unearth some drafting issue or, more importantly, some connected issue that everyone needs and wants to include in the agreement, even at that late stage. It is a simple matter to write in such amendments, or have it incorporated swiftly via word processing. Once everyone agrees, then the settlement agreement can be signed with the parties signing one after another, in each other's presence. Again, this further cements the mutual obligations and understandings and closure that is taking place. The act of signature by a decision maker who has undergone the mediation process is a powerful act of commitment in any event.

9.31 During the process of undertaking the settlement agreement, the pure practicalities do have to be borne in mind. It is useful if one or more of the parties has brought a laptop with a draft settlement order or settlement precedents that can be used, or that arrangements are made by the mediator or by the parties themselves during the course of the day for word-processing facilities to be made available until such time as they are needed, and that the 'office' facilities are kept open beyond normal hours if necessary. The ability to photocopy the settlement agreement is also essential. It is vital that all parties have a copy of the agreement so that they can study it when they travel back to their offices or homes, and refer to it specifically when discussing it with those who are important to them. If word-processing facilities and photocopiers are not available, then the mediator should retain the original and each party should take the time to produce a hand-written copy of the original, and each party should then sign each other's hand-written copy with the mediator subsequently distributing copies of the agreement to everybody.

F. Outcomes other than settlement on the day

9.32 The primary object of the mediation process is of course settlement. The majority of cases do reach settlement on all terms and issues, and do undertake the process of undertaking negotiation successfully, the completion of a settlement agreement, and settlement at the mediation meeting. This classical form of mediation has considerable virtue and strength, and most mediators work to achieve this result in order to meet the expectations of the parties so that the parties resolve their issues immediately with the maximum amount of efficiency on cost and effort.

9.33 However, there are no rules or certain outcomes in mediation and the process necessarily involves doing what is necessary in order to confront the issues, explore failure, attempt to understand the opposer's viewpoints and examine negotiations that have stalled. In some mediations it is a fact that impasse and

deadlock is reached at the end of the mediation meeting, and the parties are in fact facing the dispute with opposing viewpoints and opposing positions which are not progressing and which are solidifying. In simple distributive negotiation, opposing offers are not moving. In multi-faceted disputes there are too many issues which are left open or unresolved, and the parties are not making progress on the principal dispute issues, such that the smaller issues can fall away. The natural inclination of the mediator is to continue to work with the parties and to assist them to keep moving, but the point may be reached where the mediation meeting is in fact not progressing, and the negotiations are stopped. The mediator must judge what is happening and work to keep the process alive and productive. In these circumstances, outlining the options for the parties as to how the mediation meeting is to be concluded that day and what the mutual obligations of the parties after the mediation meeting are is one of the functions that the mediator must undertake.

F.1 Adjournment

9.34 Often, it can be seen that one of the options involved is that the parties simply stop the negotiations and agree to consider their respective positions and then to return at another date. In multi-faceted disputes, that may well be a very productive step to be taken by the parties, and if this is agreed in principle then the mediator will work with the parties in deciding what work is undertaken on what issues in the intervening period, so that the parties do use the intervening period productively, and return to the restored mediation meeting with progress being made on information, positions or assessment, so that the restored mediation meeting can continue with fresh energy and information towards settlement.

9.35 In these circumstances, however, when the parties do adjourn, it can be the case that at the restored mediation meeting they may have resiled from compromises or available options and that at least from the commencement of the restored meeting, their negotiating position has hardened as in the intervening period they have reconsidered the concessions that they made in the first mediation meeting. This is a recognisable risk for the parties, and one which the parties are quite at liberty to undertake, but the mediator will be working with the parties in making them realise that such positions should be checked against their overall objectives and negotiating plan, rather than their feelings of discomfort about some of the concessions that have been made.

F.2 Giving more time

9.36 It may be that the underlying problem is that, despite arrangements to the contrary, time has simply run out because of other commitments for decision makers or vital members of negotiating teams. The mediator should find out this problem, and if it is not possible to continue the mediation on the day with others, then create the circumstances for the mediation to continue. It should be pointed out that the mediation is a process and simply, the mediation meeting is part of that process, and the process can continue by telephone direct between the parties, involving the mediator as needed. Contact can be made between lawyers or between parties and lawyers, and parties' lawyers and the mediator, by telephone or by email. In these circumstances the final steps to agreement in principle can be undertaken at a time when further consultation may have been obtained, and within a relatively short period of time after the mediation meeting. Here again the parties should be invited to consider how long they will require to conclude the mediation in this way, and each party should be left either privately or in joint session, with mutual obligations which they feel obligated to carry out to achieve the final settlement agreement. In my experience, travel arrangements that have to be met and other commitments have featured in this scenario, and mediations have settled quite satisfactorily where the mediator can see, from his perspective, that the time factor has simply intervened and the parties are negotiating efficiently and are close to, or at, the point of agreement.

F.3 Stand-off

9.37 But the situation may be that both parties are absolutely adamant that they will not advance further in their respective opposing offers, and that they have nothing further to say to each other that day, or perhaps on any day. The parties can be encouraged to leave their offers on the table for a fixed period so that both parties can consider the sums of money or offers that are available outside the mediation meeting. The power of offers being left on the table should not be underestimated, and is a powerful option for the parties in these circumstances. The parties will invariably return to their offices or homes and will be naturally disappointed they did not reach settlement, and will discuss what occurred in the mediation and what is still available on the table. There may well be senior managers or partners who have very different agendas, and who can bring a further perspective, and the power of offers remaining on the table will continue to work in

those discussions. At the very least if an offer is not accepted, it will provide a launch pad for further negotiations.

F.4 Following up after a mediation meeting

9.38 It is essential that if the parties do not reach agreement and settlement on the day, that confidence is given, if possible, to the parties to continue the process if that is necessary. Very often in these circumstances the parties will be feeling a sense of failure and disenchantment that settlement has not been achieved. Those feelings can be built upon by a good mediator and, indeed, provide the basis for further energy and commitment to settlement. What was it in the process that was not addressed on the day that needs to be addressed, is one of the questions that may be asked on the following day. It may be that the following day, a hidden reason or a true interest will indeed emerge, and indeed all mediators can refer to instances where working with the parties after the mediation meeting, where the sense of failure has occurred and brought home a feeling of disappointment and reality, that factors do come out which do enable further movement to be made in the process and settlement reached.

9.39 It is my practice that I write to the parties immediately after the settlement day when settlement has not occurred or there is any continuing process, so that they can see for themselves, in writing, where they are and what the points of disagreement are. Sometimes such a letter is in precise terms, and sometimes it is in terms of a discussion of issues outlining options and positions that may benefit from further re-examination. In any event, the act of reading the letter from the mediator may itself help in moving the parties forward immediately. Now the role of the mediator is to follow up and build upon what has emerged in the mediation and to encourage re-evaluation and further discussion by speaking to or working with the parties or their representatives. If possible there should be no lull and the mediator should leave the parties with the feeling that the mediation is moving forward in a different way, whether by email or telephone, or by new connections breaking out. In one mediation I asked the parties to email to me their own summaries of their positions following a stand-off and then worked on those summaries, with the permission of the parties, when I discussed them in an open conference call. In another dispute involving serious and substantial professional negligence allegations and claims against accountants, I encouraged each party to put forward revised offers, with reasons. In that case the parties chose to limit the number of reasons that they relied upon as the exchange continued, and then chose to give no underlying reasons at all as they arrived at settlement. The parties needed to express some reasons to kick-start the negotiations.

F.5 Failure

9.40 In fact, characterising a mediation as a failure is incorrect. Failure does not occur, in the sense that the parties have fully explored and looked at their positions and understand to a far greater level each other's perspectives. This in itself will lead to information or understanding that can be used as the dispute continues.

9.41 Equally, however, the power of failure should not be underestimated. An example of an outcome that can arise out of 'failure' is a case which I mediated, where a 'test case' between three parties entered mediation. The principal dispute between the claimant and the first defendant did not settle. Both parties in that dispute explored settlement and then defined with greater accuracy the test issue that they wanted to put before the court. The second defendant decided terms of compromise with the claimant, which enabled that party effectively to be released from the litigation save as to formal involvement, and agreed to the refined test case issue. The agreement with the second defendant was informal, and no agreement was reached with the first defendant in fact which could be documented as such, but in fact the test case litigation proceeded on the basis of the structure that the parties arrived at during the course of the 'failed' mediation, and was a successful outcome.

9.42 Even though, therefore, a settlement is not achieved, the knowledge and the steps undertaken in the mediation continue to work, and the parties may either use that information for their direct negotiations or agree to mediate again in the future.

G. Termination

9.43 One of the matters that must be clear between the parties is the point when the mediation does, in fact, cease. All participants in mediation, and mediators, will know that the mediation agreement continues until such time as either the mediator calls the mediation to a halt or the parties themselves call the mediation to a halt, either successfully or unsuccessfully. In circumstances where the mediation in effect continues to a restored mediation meeting, then the terms and conditions that apply to the original mediation

do, of course, continue in the intervening period to the restored mediation meeting. In circumstances where the parties agree to leave offers on the table for a certain period of time, or parties agree to work directly with the mediator, or between themselves through other media, then there should be agreement between the parties as to when the mediation will in fact terminate. It is the responsibility of the mediator to ensure that there is no misapprehension about the point of termination in these circumstances, where it is the mediator's function to control the process with the parties.

9.44 Whilst mediators remain ever inventive, enthusiastic and energetic in helping the parties to reach settlement, it is also the case on occasion that one or more of the parties may in fact not want to settle and/or is not in a position to settle. In that sense the sooner such matters are brought out, and having been explored fully and the consequences having been fully aired, it is simply the case that one or more of the parties cannot partake in the mediation and the mediation process is simply at risk, then the mediator is perfectly free to call the mediation to a halt. If a party simply wishes to maintain one position in a mediation because of reasons or analysis that that party has undertaken, then that is one thing, but if it is the case that a party is in effect participating in bad faith, with no intention of doing anything other than misusing the process, then the mediator will simply terminate for no reason. The reason may be given to the party concerned in confidence or, if it is known to all the parties, confirmed in open session.

9.45 Termination of a mediation may also take place in circumstances where the mediator and, indeed, the parties should not and cannot proceed with the process. There are fundamental obligations upon the mediator to ensure that the mediation process does not enter the realms of criminality or is likely to result in real harm to any of the participants. Of particular concern in this context is the danger of a mediation which in fact is becoming an 'arrangement' which facilitates the acquisition, retention or control of criminal property as envisaged by the Proceeds of Crime Act 2002 or otherwise. A mediator will be careful to ensure that a mediation does not proceed which is, or is likely to become, a device to launder money through a fictitious dispute. This may involve difficult and sensitive decisions, especially in view of the propensity of some negotiators to put their cases in the most surprising and extreme ways on occasion. A mediation agreement will normally include the right for the mediator to terminate a mediation without reasons, and the mediator should proceed without hesitation if that is required. In these circumstances, mediation is not exempt from the obligations that all citizens and dispute resolution processes are subject to.

H. Conclusion

9.46 It is never easy for parties to reach a compromise, but the mediator and the mediation process are relentless in achieving settlement. The impediments to settlement have to be confronted and overcome and as you will have seen there are many ways to do just that. It has been a constant delight to help parties reach out and move towards settlement even though the prospects of success are bleak. Whilst conventionally everyone seeks to make the mediation meeting, for good and highly practical reasons, the point at which settlement is achieved, it is always of course the case that mediation is a process. Even if the parties cannot achieve settlement on the day, the process continues and success can be achieved in the exchanges that take place after the mediation meeting. However settlement is achieved, the mediator will have challenged assumptions, enabled re-evaluation, and given full empowerment to the mediation process so that decisions are taken and resolution achieved. The process is always infinitely adaptable in helping the parties to achieve resolution and the prize of settlement is well worth having.