

## Making the most of mediation: We put some key questions to a panel of experts...

Following Stephenson Harwood's virtual panel session on mediation (available [here](#)), we take a closer look at the panel's practical suggestions on making the most of mediation. Topics range from how to know when a "final offer" is really final, to the challenges in virtual mediations, and the increasing complexity brought about by the advent of litigation funding.

### **Q: When is the best time to mediate and what should you look for in a mediator?**

*A: There is no magic time to mediate. The aim is to save costs and settle so in some ways the earlier the better, but you can mediate too early. Each case will have its own relevant factors. For example, where a case is dependent on expert evidence – and either one or both sides don't yet have that evidence – an early mediation can be ineffective. Disclosure of documents may be a necessary pre-requisite to a meaningful negotiation.*

*I consider the two most important features of a mediation are these. First, everyone relevant to the dispute is trapped in a building (actual or virtual) for the day and is forced to focus on the dispute. The second is the presence of the mediator whose mission is to build a rapport with all the individuals present at the mediation and to use that rapport as the mediator helps the parties with the negotiations.*

**John Fordham, Partner and mediator**

### **How do you know when the other party has reached their final offer?**

*It's unlikely to be when they first say it's their final offer! (and a good litmus test is to threaten to leave there and then if it really is).*

*I ask myself three questions about the opponent:*

*1) What is the trajectory of their offers?: i.e. by what increment is each offer increasing? If it starts at £600,000, moves up to £800,000, then £900,000, a good guess is that their final offer might be £950,000 or £1,000,000 maximum.*

*2) Are they wearing coats? If they haven't got their coats on yet then, they probably have a bit further to go.*

*3) What would you do if you were in your opponent's shoes? Do they have a credible Plan B? If yes, then this might genuine be their final offer. But If there is really no way out for your opponent but to settle, there may well be a better offer to come.*

**Andrew Myers, Partner**

### **What makes a difference to having a good outcome in mediation?**

*It's critical to have a good mediator – ideally one who is prepared to beat up both sides quite badly. Mediators need to have the kind of gravitas that makes it hard for either side to impugn them. Admittedly, it's a high risk strategy as you may not get the outcome you want, but as a regular party to mediation, in my experience, you have to be willing to compromise and suffer pain.*

*When making offers, it's important not to pluck figures out of the air. Although you want to leave yourself wriggle room, you need to wrap your offer in an appropriate rationale.*

*I also think getting a mediator involved early in the mediation process works well.*

Malcolm Cohen, BDO

### **What makes a difference to having a good outcome in virtual mediation?**

*You need to ensure that everyone is happy with the technology including for example that any conversations in your own break out room are genuinely confidential. Initially, I was worried the technology would not work. I'm now comfortable it can work, but it's crucial you get the parties to feel comfortable.*

*Because building rapport is harder remotely, you really need the right mediator. It can be more difficult for the mediator to demonstrate their authority through a video call than face to face. For the "trapped" feeling to work, it's also important that both parties are in equivalent locations. Where one party is in the office and the other party is sat at home on a sofa, there can be an automatic advantage. Ultimately, I think these elements point in favour of a face to face mediation being my preferred format.*

Kate Cordery, Partner

### **What are the red flags that might suggest that a mediation is not going to go well?**

*When your opponent fields a massive legal team (including QC) at the first plenary session, and insists on inflicting the strengths of their case compared to yours, this is often a red flag. Typically, it just strengthens the resolve of the other side and the mediation process sets off on the wrong foot.*

*The other key indicator is where not all those with authority to settle are in the room (or available). Mediations can be wrecked by a lack of approval/authority at the critical time.*

*Finally, location is important. Don't allow yourself to get pushed into meeting at an inconvenient or undesirable location. It's got to work for both parties.*

Malcolm Cohen, BDO

### **What strategies / tips have you seen that work and what doesn't work?**

*Leading the charge in making the first offer can be a good way to set the tone – and the level – for the negotiation to come.*

Kate Cordery, Partner

*Plan for the day after the mediation. Sometimes, I may line up an application for after the mediation, or I bring to the mediation a claim form ready to issue the next day if there is no settlement. This helps focus minds.*

Andrew Myers, Partner

*As a mediator, my job is to keep reminding the parties of the down sides of not reaching a settlement.*

John Fordham, Partner and mediator

*Good cop, bad cop in the plenary session is a tried and tested formula which works well.*

Malcolm Cohen, BDO

### **Are settlements more complex because of CFAs and DBAs?**

*Yes. You need to understand what the funded party needs to be able to settle.*

Andrew Myers, Partner

*Yes. There can also be an increased scope for conflict between lawyer and client. You need to set the ground rules within your own team to minimise tension.*

Malcolm Cohen, BDO

### **Have you seen a tactic that's impressive and one that would work virtually?**

*Giving the parties a chance to speak directly to each other, to feel that they "have had their day in court" can help resolve disputes.*

Kate Cordery, Partner

*One of the most impressive strategies I think is to introduce into the negotiations things that wouldn't necessarily be available in a judgment, for example an agreed press statement, future business, introductions etc, and using these things as building blocks in the settlement.*

Donna Newman, Partner

*I always come to a mediation with a settlement agreement already drafted. It saves time and also helps flush out what we want and what we can offer.*

Andrew Myers, Partner

### **How do you avoid mediators who are more interested in their own settlement statistics?**

*You need to ensure your client knows their bottom line before you enter the room and doesn't lose sight of that no matter how much pressure is applied.*

Kate Cordery, Partner

*Sometimes you reach a good settlement at one mediation and you try to appoint the same mediator at your next mediation to try and achieve the same result, but mediation*

*doesn't work that way. It just might be your case was that much stronger first time round!*

Malcolm Cohen, BDO

*A mediator is usually interested in facilitating a settlement. Sometimes, however, it's not in your client's interests to settle on the terms on offer. Our job as solicitors is to guard against the pressure to settle at any costs. That includes guarding against an overly-persuasive mediator.*

Andrew Myers, Partner

## Resolution

Mediation is an art form and there is no substitute for practice and preparation to achieve results. But there are some pointers which can help you to get the most out of the process. We thank the panel for sharing some of their tips from the variety of fields in which they practise.

While mandatory mediation may still be a relatively distant prospect, recent court decisions<sup>1</sup> show there is an increased willingness to consider it. Even without the prospect of legislative change, unreasonably refusing to mediate (despite believing in a strong defence<sup>2</sup>) remains a very risky strategy.

If the threat of costs sanctions does not persuade you of the utility of mediation, it's also worth remembering that 87% of those attending our panel event did not regret a settlement achieved at mediation the following day, and 84% did not regret the settlement further down the line.

## Get in touch

If you have any questions about mediation or if we can help in any way. Please get in touch.



Donna Newman

Partner

T: +44 20 7809 2357

E: [donna.newman@shlegal.com](mailto:donna.newman@shlegal.com)

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<sup>1</sup> Lomax v Lomax [2019] EWCA Civ 1467 and McParland & anor v Whitehead [2020] EWHC 298 (Ch)

<sup>2</sup> DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)

## Our panellists



### Donna Newman

**Partner, Stephenson Harwood**

T: +44 20 7809 2357

E: [donna.newman@shlegal.com](mailto:donna.newman@shlegal.com)

Donna advises on a broad spectrum of commercial and financial disputes. She has experience across a wide range of financial products and markets as well as with disputes involving shareholders, partnership joint ventures, acquisitions and investments.



### Kate Cordery

**Partner, Stephenson Harwood**

T: +44 20 7809 2397

E: [kate.cordery@shlegal.com](mailto:kate.cordery@shlegal.com)

Kate has experience in a wide range of commercial disputes – with a focus on professional liability claims (particularly in the accountancy industry) and banking and finance disputes. As well as High Court litigation, Kate has experience of international and domestic arbitration and mediation.



### John Fordham

**Partner and mediator, Stephenson Harwood**

T: +44 20 7809 2300

E: [john.fordham@shlegal.com](mailto:john.fordham@shlegal.com)

John's extensive litigation experience covers the full range of commercial activity, including banking and finance, insurance, professional negligence and joint venture/shareholder/director/partnership. John is also a practising mediator (accredited by CEDR) and sits as an arbitrator.



### Andrew Myers

**Partner, Stephenson Harwood**

T: +44 20 7809 2275

E: [andrew.myers@shlegal.com](mailto:andrew.myers@shlegal.com)

Julia Andrew is well known as a tenacious litigator who gets results. His "no nonsense" approach cuts to the chase and gets his clients results. He is an experienced tactician, a solicitor advocate. He is an experienced tactician, a solicitor advocate.



### Malcolm Cohen

**Head of the National Contentious Insolvency, BDO**

T: 020 7486 5888 / 020 7893 2223

E: [Malcolm.cohen@bdo.co.uk](mailto:Malcolm.cohen@bdo.co.uk)

Malcolm is a Chartered Accountant and licensed insolvency practitioner who specialises in formal insolvency appointments. Malcolm has built up extensive experience of working on complex international fraud related insolvencies and securing recoveries for creditors. The assignments he works on focus on investigations, asset tracing and litigation, often of a cross border nature.

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