HARMAN

Dispute Resolution

NEGOTIATION

Mediation is a process of facilitated and managed negotiation. As such, it is worth considering how negotiation might work.

Negotiation is a discussion aimed at reaching an agreement. Accordingly, before negotiations begin, there should be a commitment to reaching an agreement. This involves all parties coming to the negotiation with a desire, if not a determination, to making the discussion the last discussion that need occur, as there will be an agreement which ends the dispute.

Negotiation can occur in many ways. No matter how negotiation proceeds, it is a means to an end and not a game. There are rules and parameters.

Negotiation is aimed at resolving disputes (by reaching an agreement the dispute is resolved). Thus, an important part of negotiation is preparation. It is difficult to negotiate or resolve a dispute unless there is a common understanding that there is a dispute and a common understanding as to what the dispute is about.

In a property mediation, preparation includes the collaborative completion of a balance sheet. It is difficult to resolve a dispute without knowing what the present legal and equitable interests of the parties are and their value.[1] It might also, and ideally would, involve both parties being clear as to both their starting position (or "opening offer") and the reasons for that offer.

Negotiation Styles

Negotiation styles can vary enormously, from calm and polite, to a bluff and bluster approach that may seem like bullying.

It is important to recognise that a power dynamic exists in every relationship and that there is never an equality of bargaining power in any relationship.

Lawyer assistance can go some way towards compensating for these power imbalances, as can conducting mediation (or negotiation) by shuttle, so that parties (and their respective lawyers) are in separate rooms and the mediator moves between them.

More broadly, there are two theoretical approaches to negotiation – a legalistic or distributive justice model and a principled or interest-based model. The two can co-exist and certainly need not be mutually exclusive. However, each needs to occur within the context of "*Ethical negotiation*".

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[1] See paragraph 37 *Stanford v Stanford* [2012] HCA 52

In mediation or negotiation, there is usually a focus on a legalistic or a ***distributive justice model of negotiation***. This involves the distribution of property between two parties. However, this model produces winners and losers. Each party wants to obtain the best outcome that their legal advice suggests is available[2] ("*to win*"). However, if one party gets their best outcome, the other party gets their worst outcome ("*to lose*"). For both parties to get their best outcome, there would need to be more than 100% of property to "*distribute*" (and, of course, there is not).

The distributive justice approach has the potential to create winners and losers. It also ignores important realities, such as legal costs, the absence of guaranteed outcomes when judicial discretion is involved, the inability to resolve factual controversies and legal advice being absent or inaccurate. It means that decisions are made based on what a court (an instrument of the State) would impose, rather than decisions being made by reference to the party's needs and interests.

An interest-based approach involves identifying the needs and interests of all relevant parties, not just the parties to the dispute, but everyone affected by the outcome (such as children). For many people, these needs include a need to have a settlement that they feel reflects all their effort to the relationship (what many think of as "*a fair settlement*") and a need to house, clothe and feed themselves and their children. And, so, an interest-based approach focuses on achieving these interests, as best as the facts and circumstances of the dispute allow.

The two can co-exist. An interest-based approach can assist in finding better outcomes, even when each party wants to obtain an outcome between the best and worst outcome each might expect if the matter were litigated.

Ethical Negotiation

Irrespective of the style of negotiation adopted, I believe in ethical negotiation. This means that when parties are before the court (or if court proceedings are not yet on foot but are the next step if an agreement can't be reached) they need to be negotiating within a range of outcomes that the court might order.

Whilst it is often suggested that a defining feature of mediation is "*self-determination*",[3] there are fetters upon this. If parties are negotiating "*in the shadow of the law*"[4] and, especially if participating in lawyer assisted mediation or negotiation, the outcome that they are proposing needs to be an outcome that a court might, within a reasonable exercise of discretion, be expected to order. This means that if all agree, for example, that the range of what a court might order is a 45-55% division of the pool of property, then the proposals each party is putting and asking the other party to consider, should be within that range.

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[2] This also assumes that everyone's legal advice is accurate, realistic and pragmatic.

[3] The place of and limitations upon self-determination as a defining feature of mediation are eruditely discussed by Boulle & Field "*Re-appraising Mediation's value of self-determination*" Australasian Dispute resolution Journal Vol 30 No. 2 2020 pp. 96-104

[4] For an excellent discussion of this concept of negotiation being informed by the law even when parties are not involved in court proceedings see Coote, Marks & Mnookin "*Bargaining in the shadow of the law: a testable model of strategic behaviour*" Journal of Legal Studies Vol XI 1982 pp. 225-251