



Focus on Mediation

What is a Mediator?

*"People have problems
Over the years
Midland Bank
Has very good ears
And it hears
Come and talk
Talk to the Midland
Come and talk
To the listening bank"*

Midland Bank disappeared as a name at the end of the last century when its acquirer, HSBC, phased it out.

Yet I still remember the listening bank, even though I never banked with it, just as I remember that happiness is a cigar called Hamlet, the mild cigar, long after tobacco advertising was banned, even though I never smoked one.

*"People have problems
Over the years
Mediators
Have very good ears
And they hear
Come and talk
Talk to a Mediator
Come and talk
To a listening bank"*



Peter Webster
Principal,
Thea Limited

If HSBC have discarded the Midland jingle, I would like to revive it.

It also sums up perfectly why you should engage a mediator.

People have problems, and their cry for help may not be heard by other people who are a part of those problems. They need to speak to someone who will listen and understand. Ideally, that person should also be able to help them resolve the problem.

Mediation is sometimes confused with meditation. Meditation is very individual focused, and aims for such things as stillness, alignment, connection, mindfulness and presence. Mediation is about relationships, and empowering all the people who are in those relationships to choose ways forward together where problems have arisen.

I am a solicitor and a mediator. People approach me far more often as a solicitor with their problems than as a mediator. There is a simple reason for this. They want to pay me to solve the problem, and to solve it in a way that works for them.

The founding partner of one firm I worked for summed up the solicitor's role as *"making other people do what they do not want to do."*

The mediator's role, by contrast, is to help everyone to find something that they are willing to do, where they are no longer able to do this unaided.

I can do this precisely by being a "listening bank". If I can hear and understand all the perspectives on the problems from all those involved in the relationship or set of relationships, I can then help the parties identify their interests and the options for achieving them. I may then mediate a settlement based upon one of the options.

People have Problems

The message from the banks to people with problems has moved on. Nowadays, the promise is more than just a sympathetic hearing. It is an assurance that in 80-90% of cases, a loan of money will be forthcoming if the bank is approached.

In a mediation I attended recently as a solicitor representing my client, we were given a very similar message from the eminent QC my client and their opponents had paid many thousands of pounds to hire as mediator for the day. 80-90% of cases settle in mediation on the day or very soon afterwards. Statistically, we were almost certain to come away with our problems solved.

Sitting there with my solicitor's hat on, I was less than impressed to be hearing this in a first private session with the mediator after an opening joint session where the parties had been very forthright and direct with each other. The mediator was not only not interested in the detail of the dispute, he was positively dismissive of any attempt to discuss it. Mediation for him seemed to be just an earlier, and less rushed, opportunity to do the sort of horse-trading on settlement figures that he had long been familiar with at the doors of the court. The mediation failed.

Nevertheless, with my mediator's hat on, I would also want to make this claim for mediation. The next time I sit down as the mediator of a commercial dispute, I can reassure the parties that the last six commercial disputes that I have mediated have settled on the day or shortly afterwards. I would do it in the opening joint session, however, not in a private session with one of the parties, as there I would want to show I had heard and understood where they were coming from, and give them the opportunity to say the things that they were not prepared to say in front of their opponents.

Returning to the 80-90% success rate promised by the banks, we do not need to cast our minds back to the last century to remember the economic problems attributed to banks being over eager to lend money. Any solution identified and agreed upon at mediation still has to prove its worth afterwards through voluntary implementation by the parties. The Greek tragic poet Euripides famously put in the mouth of one of his characters the line, "My tongue has sworn, my mind remains unsworn", and his line is still quoted more than 2,400 years later because it was not just characters in ancient Greek tragedy who promised to do things they had no intention of doing in order to obtain something they wanted from someone else.



Peter was part of the 1996 Newick Park Initiative (NPI) Conciliation in Rwanda team.

This is why it is so important to listen to the parties first before trying to get them to sign up to "solutions". The bankers who approved sub-prime mortgages without listening in the way Midland Bank promised to do have guided some of those whose problems they "solved" to financial ruin. Mediators who assume that any "settlement" that they can guide the parties to on the day represents a success risk doing exactly the same.

Mediation is a good process not just because it results in a settlement in 80-90% of cases. This figure actually compares unfavourably to the court process, which will settle every matter properly referred to it – eventually. It is also not very different from the settlement rate achieved through without prejudice negotiations before mediation became fashionable.

The real virtue of the mediation process, in my experience, and what differentiates it completely from the usual alternative of going to court, is that it provides a non-judgmental hearing for the parties. That is not to say that the mediator cannot reality test each party's case by asking searching questions. The parties though have the comfort of knowing that the neutral and impartial mediator that they are engaging with will not give judgment against them at the end of the day because of something they say in the mediation.

The opportunity instead is for the parties and any advisors they have with them to sit in judgment on their own case and their opponent's as the mediator reflects both back to them. The vast majority of the commercial cases that I have mediated have involved parties with solicitors, and some have brought barristers and expert witnesses as well. One of the obvious flaws in the litigation process, from the point of view of the parties, is that their whole team may never engage with the whole team of their opponent until the final trial, by which time substantial costs will have been incurred. Solicitors write letters to solicitors, expert witnesses produce reports and meet to produce joint statements, barristers settle pleadings and exchange skeleton arguments: everyone tangoes with their counterparts and no-one may feel that they have a sufficient grasp of the case to settle the outcome. Mediation provides that same focused time that the trial brings, and can bring it a great deal sooner. The loss of

absolute certainty of a final outcome (subject to appeals) and the chance of total victory is compensated by the removal of personal and cash flow stress, wasted management time, and the risk of an adverse outcome.

The Listening Bank

Banks may listen, but they do so with a view to receiving money, or disbursing it.

Mediators should listen, but they should do so in a way that they can understand the problems that the parties are grappling with, and show that they understand them.

It is the fashion in commercial mediations for there to be just one mediation meeting, which may last well into the night, at which a dispute either settles or it does not. Either way, at the end the mediator is *functus officio* (discharged from his role), and the dispute either disappears or rumbles on. Commercial mediation agreements typically have clauses preventing the mediator being drawn back into the dispute, unless there is a court order to that effect, and substantial further fees are paid.

The approach in family mediation – another area in which I practise – is quite different. Here, the couple normally meet with the mediator in a series of sessions lasting 1-2 hours each. They are rarely accompanied by solicitors or other advisors, and they and the mediator normally stay in the same room the whole time. The aim of the mediation process is not to settle the financial affairs of the couple (including provision for any children and contact arrangements), but merely to formulate a set of proposals which the couple can then take back to their respective advisors. Obviously, as mediator, I will challenge the parties on any proposals which are likely to be vetoed by one or other set of advisors or the court because they are too much at odds with general principles of law, but if there is disagreement in this area, I will ask the parties to seek their own advice between sessions.

Couples who are separating often have difficulties listening to each other. The mediator plugs that gap and ensures that both of them are heard. Parties to commercial contracts whose relationships have broken down often have similar needs.