Seminar transcript 28 October 2020: '**Commercial Mediations – Strategies and Tips to Achieve the Best Outcome for Your Client**' Glenn Newton GC, Matthew Hickey, Michael May (Level Twenty Seven Chambers) & Kiri Parr (Kiri Parr Pty Ltd)

Matthew Hickey (MH): Good afternoon everyone and welcome to Level Twenty Seven Chambers, we are very pleased to have you join us. If you are online via Zoom hello, watching us live as we go out to the world. If you happen to be watching us after the fact on YouTube or the like hello to you also. If you happen to be listening to us via our new podcast which is entitled 'Briefed: Commercial Law Updates', available at all good podcast purveyors everywhere, hello also to you but you can't see us, we're all looking magnificent today.

We are joined, we are delighted to say, by our very special guest today Kiri Parr. Kiri would be known to many, many of you. I know the numbers of people joining us today have exceeded our usual average, and I will put that down to you Kiri because it certainly can't be explained by any of us. But for those of you who haven't had the pleasure of meeting Kiri before she spent more than twenty years as a construction lawyer initially in private practice and then fifteen years as the Regional General Counsel for Arup, which is a large international professional consulting company. During that time Kiri was involved in numerous large projects in the region including Airport Link, Gold Coast Light Rail and Mariner Bay Sands. The kinds of things which throw up inevitably, as any construction lawyer would attest, disputes of all kinds. She was on the board of Consult Australia, the industry body for consultants in the built environment for six years and was their President from 2017-19. She was named among Australia's most powerful part-timers by Women's Agenda, as being named numerous occasions by *Doyle's Guide* and in 2020 has seized the opportunity to pivot and is now enjoying a practice in her own consultancy which is called...

Kiri Parr (KP): Kiri Parr

MH: Kiri Parr the eponymous. Welcome to you Kiri, we are really delighted to have you here.

To my immediate right and to your left is Glenn Newton of Queen's Counsel. Glenn has a Masters of Law from the University of Queensland where he was admitted to the Dean's Honour Roll for academic excellence. He's been a Silk for fourteen years during which he's appeared in a vast range of high-profile cases. To name but one he appeared in *Wik* in the High Court. He has appeared in commissions of enquiry and a broad variety of commercial litigation of all kinds and he's now interestingly pivoting also into a greater participation in mediations. In this part of his career he's been named as one of Queensland's leading mediators in *Doyle's Guide* on a number of occasions and of course has been a very dear friend and colleague here in Chambers for the last ten years. All of the juniors in this place will attest he's a great educator so we're delighted to have him join us today.

And finally, in the middle, is Michael May. Michael's among one of my colleagues here at Level Twenty Seven and has a broad commercial and administrative law practice. He's been named in all of the lists but most importantly he's one of the few Junior Counsel in Queensland who's been identified as a leading Junior in Dispute Resolution in *Chambers & Partners* which is a great credit to him and a testament to his real skill and ability.

He's notorious for being a very capable advocate and a very decent human being. Indeed, it gives me great pleasure to finally not be on the receiving end of this identification, he's a great musician. Keep an eye out for Michael, he is appearing with the Lawchestra Big Band in a few weeks time playing the guitar. If you find yourself with a freezer on...Saturday night Michael?

Michael May: Friday night.

MH: Friday night, free Friday night, do Google that and check out Mickey May and all the gang.

We are here today of course to talk about commercial mediations. The subtitle is 'Strategies and Tips to Achieve the Best Outcome for Your Client'.

If I can say something briefly about the rationale. This session appears as the next in a line of sessions we have hosted here at Level Twenty Seven. We are attempting to do something a little bit more interesting than have a boring barrister simply talk at the camera for an hour, but to get a wide variety of perspectives on a particular topic.

Today in talking about mediations, of course, Kiri brings to bare the perspective of having been a long-term solicitor but indeed also having been the client in lots of dispute contexts. Michael is going to talk to the role of acting for parties in mediations and Glenn of course is going to bring to bare his expertise in mediations as the mediator after a long career as a person acting for parties.

DIFFERENCE BETWEEN MEDIATION & LITIGATION

MH: Mediations, of course it goes to say, are not litigations, they are part of it. They are things which need to be approached with a very different mindset.

Glenn, I wonder whether you might kick things off by telling us something about the differences you've observed about the way mediations need to be approached from that which perhaps you might of approached things in the past as a litigator.

Glenn Newton QC (GN): Your perspective is of course different but I think it's really a mindset question for me. Litigation is obviously about advancing entrenched positions. If you want to do that in court, well of course, the court is your forum to do that. Mediation is not about that at all, it's about a proper assessment of the risk involved in proceeding to litigation and perhaps coming to an arrangement to which you would not be able to come to if you went to the court for a solution. That is particularly important if you have, or want to have, a continuing commercial relationship go ahead between the parties. You've got a greater scope for a solution that would permit that to be done whereas a court is very limited to what it can do. It can get a judgement for money or specific performance or whatever it might be but it can't make a nuanced decision that would give effect to a relationship continuing.

I think for me the single most important difference is you've really got to flick the switch out of litigation mode and into mediation mode. You're not there to advance entrenched positions. You're there to try and reach consensus which is a hard thing to do because you really have to persuade a plaintiff to take a discount for certainty and to persuade a defendant to pay a premium for certainty, if you like. But all for a greater good. So, I think it's a mindset question for me. Just flick the switch out of litigation and into mediation mode which I think is the important thing to remember.

MH: Kiri, Glenn mentions entrenched positions. I think you, amongst this panel certainly, have unique insight into how one goes about perhaps preparing people inside the client side to move them away from entrenched positions. Can you tell us something about how you go about that process?

KP: Yeah, absolutely. It's a very good point because mediations they are an opportunity to get off that litigation track that you're on, and I've always been an advocate. If the door is open to get off the track, take it. It's harder than what you think because a whole piece of the litigation is having a whole heap of people spending a lot of time in that entrenched viewpoint and trying to advocate their case. There is a whole range of things that you can do which actually is unpacking that when you're on that client side.

I've got four thoughts here. One of them is, you actually have to spend a lot of time making sure people understand the process, that is what the mediation is. Lawyers are very comfortable with this world, it's their world, they know everything. But actually there is a huge education process that you're always taking non-lawyers through and it does take them by surprise. It can take them by surprise by how long it takes and how much time they might spend in breakout rooms by themselves.

The other thing I've always tried to do is create teams that are willing to challenge themselves, to put their black hats on, to bring independent perspectives into it. The more that I can have a team that doesn't get locked in group think, doesn't get locked into its own positions, is open to being challenged as it's doing its preparation work. I've gone even as far as appointing a second counsel to actually just give a black hat advice to make sure people are actually ready to hear that answer that it's going to go wrong, or it might not go in the way they have planned.

You've got to spend time making people willing to engage because if they are sitting there in that entrenched position, you know, if you're walking into that mediation with the view of "They're never going to change, we're never going to get a deal, why am I even here?" You are starting so far back from your starting blocks.

The other thing you have got to keep in mind is that with clients you've got so many internal stakeholders to take on that journey, and the bigger the claim, the more people you have to take through. Some of them are very close and you can get them a long way down that path and some of them are much further away. They might be overseas, they might be an insurance company and getting them to engage takes a lot more time and thought than some people might think.

MH: Michael, do those kinds of considerations feature into your preparation as counsel who might appear at a mediation when approaching the task?

MM: Absolutely. I think a large part of what you do when you are preparing for a mediation is focused on getting a clear understanding of where the client sits in the litigation, what the risks are, what the prospects are, what evidence problems there are. But in a sense a lot of that is kind of taken for granted, you sort of expect that that knowledge will be there, that work would have been done.

I think another part, that sort of picks up on what Glenn was saying, is where you focus on trying to come up with different options for ways of resolving a matter, so not necessarily just thinking about what the case is about and who's going to win but what are some other ways that you know that we can resolve this situation or create a better relationship between the parties that flows on from this. Part of that I think is also trying to think about what the other side wants, and again not just looking at the sort of the causes of action involved, but the clues that you might get at looking at the steps taken, and the correspondence, positions taken along the way that might give you an indication about what's really driving the other side's position and you know how you can use that kind of information to get the best outcome for your client.

PREPARING FOR A MEDIATION

MH: Glenn, I know you've been a real advocate for trying to educate solicitors and indeed clients about the value in undertaking preparatory steps to ensure the increased chance of settling things at mediation. Given those things that Kiri and Michael have said, from a mediator's perspective, how can you best be assisted to assist the parties to use that information?

GN: Yeah, it's a good question. I think my approach is that the mediation process itself is a little bit under nourished, a little bit under done, and I am really talking about the scope for preparation. Now, preparation is obviously an essential element in every mediation and obviously judgement will determine just how much preparation is required for any particular mediation.

Let's look at it from this perspective in mind. In litigation you have the luxury of time, by which I mean your analytical brain has a lot of time, probably years, if you were to start the action today to switch on. You will have a legal team which will be applying analytical thought to a case and they will be the ones to advocate the entrenched position to advance the client's interest. But you don't have the luxury of time with a mediation, that's why it's such a hard gig. You have probably eight hours on the day to persuade parties who have previously been in entrenched positions to, in the plaintiff's case, give away its case. In the defendant's case to give away its defence of the case. Not have their rights determined in court but to instead to accept perhaps a different allocation of the risk and come to some sort of consensual arrangement. Well that is quite a hard thing and you don't have the

luxury of time in that. That's why the preparation aspect, as Matthew mentions, seems to me to be so important because I think it's fundamentally a hard gig.

The more preparation you do, and how much you do will depend on the case. If it's the BHP takeover you're going to have a lot more. If it's a dispute about whether there was a proper allocation in someone's will well that's a different question.

I think it's very important to recognise the elemental importance of preparation and to recognise the limitation in mediation in that you have to have it settled in a very short period of time and so you've got these warring parties who have to see that it is in their own interest to do that. I think preparation helps. Whether it's by way of position papers or whether it's by way of seeing the mediator in advance, of which I'm a great advocate, I think it's a very beneficial thing, particularly if it's a complicated case.

See the mediator in advance, it's all confidential. Talk to the mediator about things that you think will be trigger points on the day, which will be important on the day. They may be things in which a mediator will not glean from just looking at the pleadings or the contract documents which are colourless documents.

Let me give you two examples, one a little more extreme than the other. Would I as a mediator want to know that in a commercial dispute there is an imperative for the plaintiff to get money because it needs to refinance loans within a short period of time? Absolutely I would want to know that because that will very much identify for me the motivations of the party and its preparedness to settle. I won't understand that from the pleadings, but someone needs to tell me that.

On a more perhaps more controversial level, in a commercial case, would I want to know for example the defendant was having an affair with the plaintiff's wife or husband? Yes I would, not just for prurient interest but because it will tell me emotions have now been triggered, and emotional considerations entirely extraneous to the commercial dispute are now going to impact on this. I am going to have to deal with that in a way that manages to break through and stops the instinctive and emotional thinking and instead engages the analytical thinking about the bigger problem.

RECOGNISING EMOTIONAL FACTORS IN MEDIATIONS

MH: Can I interrupt there Glenn. It's an interesting point you raise about the emotional factors that are involved. We talked about this the other day Kiri and I wonder if I can bring you in on this point. This process mediation arises in the context of an inherently black letter process. Litigation is typically that one part of the law that attracts people who like to think of themselves as black letter lawyers. But so much of what Glenn's just said, and indeed the things you said a moment ago, are not at all interested in the black letter part of things and I wonder to what extent do we as lawyers give enough thought to assembling teams that have real capabilities in those emotional tasks.

KP: Yes, I am all about the people, not about the law, and to me it's the integration of those two things where I get results.

I'm sitting here reflecting. One of the hardest things I've had to communicate or explain to senior executives is it is not a rational business thoughtful process. You are often in litigation because there is some very significant human drive that is sitting behind why you've ended up at that place. Someone's reputation can be on the line, their personal bonuses are on the line, there's hubris involved and they are highly emotional. People are sometimes quite surprised that actually the whole process of litigation claims often has an underlying very human behavioural story sitting at its heart. One of the things that you need to be able to do with a mediation is actually unpack why the people are doing what they are doing.

To me, I've always gone into mediations thinking, if I can have my team as emotionally ready as they can to open up their thinking and to challenge their thinking then I will engage in every single ADR process/mediation along the way, because I don't know at what point in time I am going to get the mediator who's capable of breaking through what the people are thinking on the other side. It is as much about their emotional journey as it is about mine. Deals happen when both parties have gotten through that emotional journey.

MH: I wonder whether it's something that you gained insight into by reason of having been in-house, in particular where you have a much greater proximity to the coal face of human beings in a corporate environment rather than lawyers who sit in buildings full of lawyers who don't necessarily have that insight.

KP: Look, I think it's that and I've had the experience. I was at Arup for fifteen years and my first job was negotiating the Airport Link deal so I saw the people and the characters all the whole way through. Once you get that very long way view of why projects progress, you realise it's all about the people. The people drive outcomes in really, really strong ways and the law to me is a tool or a structure I use to get to the outcomes. Sometimes I think the lawyers are thinking the law's the answer, actually no, it's just a tool and for me as the client how do I best use that tool to get to the business outcomes I want to achieve?

USING REMOTE MEDIATION TECHNOLOGY

MH: Naturally we have got some things today we came planned to talk about but I should have mentioned at the outset we are willing to take your questions and indeed we encourage them along the way. We identify that one of the benefits of this interactive style thing, while we are broadcasting to you live, is that you can ask us questions as though you were here with us in the room.

One of the questions we received, so please do feel free to chime in at any time. We're asked whether we can cover the strategies and tips on mediation that is not able to be done in person.

Obviously in 2020 we've all increasingly had to embrace technologies like this because we can't be together face-to-face. Has anybody had any experience they'd like to talk about in that particular realm? Mediations conducted electronically I think is probably the question.

MM: I have to say I haven't yet done one via Zoom or electronically yet. But the people I have spoken to who have have said the dynamic is much different from doing it in person, understandably. We all know that so much of the mediation process is actually sitting in the room all day. You know, people get to three o'clock in the afternoon and start to get to the point where they really would like to just do a deal and get this over and done with. I think to a large extent you lose a bit of that "in the room" feeling and also the direct contact with people, being able to speak to someone in the next room or in the corridor. I think you lose a bit of that.

KP: Maybe Glenn has an example, because there's an exhaustion with being on Zoom all day and that three o'clock factor, everyone's cranky, because you need to stop the walk out. How do you get through that on a Zoom conference?

GN: It's very hard. I've done them where there is both, where you've had people beaming in from remote places as well as having some where the people are in the room in the same mediation and I think there is a distinct advantage to having the people in the room. You seem much more connected with them, they seem much more willing to speak about things, they were accessible, you are accessible. Whereas beaming in from remote locations makes it, by definition, more remote and I think harder, and you begin to lose that intimacy. You do loose that connection, that connection you want to create between the mediator and the parties, to lead to some sort of a breakthrough.

I agree with Michael. There is a distinct disadvantage to mediating remotely, sometimes I accept that it needs to be done. But having seen mediations where they are both in the one, compared to where you have got people there and beaming in remotely, it was a distinct advantage in those cases having the people in the room.

MH: I have participated in mediations electronically, both as an advocate and also as a mediator. I'd agree with that, there's no replacement, there's nothing quite like sitting in a room with people and eye balling them. But sometimes it can't be avoided and 2020 has certainly shown that to us. I for one think we're going to see increasingly, particularly in low quantum mediations where people are in different places, client's insisting upon things happening electronically.

To answer that question directly though, I think if you're somebody who is preparing, particularly parties for mediations to be conducted electronically, it requires us to use skills which typically we've never been obliged to turn our minds to as lawyers. Every person who does this kind of thing has to channel their inner Cecil B DeMille or Penny Williams. You have to think really carefully about the way you are presenting yourself and your client on screen. It seems a bit superficial, it's not something I think lawyers naturally feel comfortable in talking and thinking about, but you have to think about how you frame yourself up, the lighting in the room that your client's

sitting in, what kind of microphone you are using in order that you can be heard effectively because all of these things activate us in very human kinds of ways it seems to me. Maybe you've got some comments for us about that.

GN: Those things, as you pointed out Matthew, ultimately are extra burdens.

MH: They are and require extra preparation.

GN: They do.

KP: And extra energy and you have to be generous that sometimes people forget to turn the microphone on, and that's the number one thing we all say these days "Your mic's not working". If you can be generous around that space, but again the emotional intelligence of your mediator becomes key, because if your capacity to actually read the room and to read the dynamics is diminished you have to spend more time in that space. It's a slower process potentially.

ASCERTAINING A MEDIATION STRATEGY

MH: Michael, I wonder if you in preparing to appear at mediations…My experience often in being briefed to turn up to mediations is that you know what the litigation strategy is but you find yourself at a mediation not really understanding what the mediation strategy is. Sometimes you wonder whether anybody has given that any real thought at all. How might those that instruct us, or you in particular, go about improving your ability to appear at mediation by better understanding what the client's imperatives are behind the scenes?

MM: A practice I adopt for pretty much every meditation I'm in, and I think a lot of people also adopt, is before any mediation really, if it hasn't happened already, the client should get some advice about the kinds of things we were talking about before. You know, some idea of what the prospects are, some idea of what the possible outcomes in litigation are. Obviously costs is one of the main reasons why mediation is so successful is because of the cost of the alternative. I think a good process is to send a letter to the client with some information about that in writing so that they can sort of have that with them at the mediation.

Then I think before the mediation it's a good idea to have a conference with the lawyers, with counsel if counsel is briefed to appear at the mediation, to sit down and talk about what the strategy is going to be, what the client wants, what kinds of things the client is looking for, to try and explore those things we were talking about earlier. What kinds of settlement options they might be interested in. Often, the lawyers won't really have a good grasp on that without asking the client. As you say, we know all about the ins and outs of the litigation itself but so often there are other things sitting behind that that drive the decision making and unless you sit down and specifically ask about it you're never going to know those things.

GN: And there also Michael though has to be a way of conveying that to the mediator.

MM: That's right.

GN: You give the mediator information. Information is knowledge and knowledge creates a capacity to influence on the day. You've got to find a way of getting that. A way that seems obvious to me is either doing it electronically, whether its email or a telephone call, or whether it's actually getting together in someone's office or chambers to say these are the things that are going to be influential for us on the day and I suspect mediator that these are the points that are going to be influential on the other side of course. For instance, they need to refinance in three months. You don't know that but I am telling you they will. Bare that in mind, they should be able to use that. You need to arm the mediator in a way that gives the mediator knowledge. Of course, knowledge is a creator of a capacity to influence an outcome.

DEALING WITH SITUATIONS WHERE ONE SIDE IS NOT FORTHCOMING WITH INFORMATION

MH: It's interesting you say that, serendipitously we've just received another question, thank you. It says "Does the panel have experience of and have strategies for dealing with a situation where the other side is not forthcoming with information despite most mediations being conducted on a confidential bases?"

The things we've just discussed really all seem to suggest that candour is a very useful thing in approaching mediation but I mean Glenn do you as a mediator have a sense of whether things are more likely to settle or not if you extract that information and how do you do it?

GN: You can do it by asking questions in private sessions to try to glean a position. Some of it involves a trust in the people who are appearing before you. That doesn't mean they will necessarily relay what is the client's true position. I don't mean because of any deception on their part but because the client won't necessarily confide within the lawyers. I have done mediations where through their counsel, for whom I had the highest regard, told me and I absolutely believed it, that there was absolutely no way that his client was going above a certain amount of money. Now I took him at his word because that's what he had been told and he was someone in whom you'd have absolute faith and in the end because that figure wasn't going to be reached or a figure of advancement was not going to be reached, the mediation came to an end. The party started to leave, well the other side started to leave. They went down the elevator, started to leave the building then this counsel having seen them leave, or his client having seen them leave, came to me and said "I understand the other side is leaving." I said "Yes, it is." He said "Can you get them back? Because my instructions have just changed." The bluff was called and it ultimately had to be met, but the client did not keep his counsel in the loop about what his true position was.

MH: Kiri from your perspective though, particularly on the client's side, were there occasions where for deliberate strategic reasons you withheld things from external lawyers or counsel until a particular point in time, and if so why might you do that?

KP: There can be complexity inside organisations that may or may not be helpful and even inside the organisations you might not know everything that is going on. Especially if it is a large international one and the positions of the subsidiary company can be different to the parent company. There can be some other conversations that are going on that just are separate from what is sitting there in the claim team.

Michael was talking about you have to get together with your client, a letter wouldn't cut it with me I can tell you. We're having a workshop. I am building as much diversity at play and hopefully it's facilitated because I know it's a collaborative diverse process that will actually pull out as much information and help me form the best strategy, that's playing the people game.

I suppose behaviourally I'm always on the side of taking a principled approach into negotiation. I think people who are principled, who are talking from facts and evidence and have a robust view are more likely to get to the right place through the process. I'm very rarely going to be somebody who is going to advocate for some hidden hiding hand sitting behind the scenes.

That said, there are things that are beyond my control that I might not know of. You might have one of the insurers in a tower who is selling their whole portfolio and their number one job is to make sure as little money as possible goes out the door in the next twelve months. That may or may not help things and I may or may not know it and certainly you can have differing opinions between different elements of a business about the right approach. Sometimes you've got to be very careful with that because at the end of the day, it's the person who's closest, it's your executive who is closest to the deal, who is in the room, who is reading the room whose voice you want trusted behind the scenes. I don't tend to like it because to me its inconsistent to being a principled negotiator. But things can happen.

MH: Glenn, if you encounter in a mediation context parties who are reluctant to engage in that way, who are reluctant to explain to you what are the real drivers in the decision making, how do you deal with that?

GN: I suppose if you ask me to identify in a very precise way what mediation is about I would probably say something like it's about ensuring, this is from the mediator's perspective, that the risks have been properly understood and appreciated. It's about risk allocation.

I would normally, when you read the pleadings, you will read the statement of claim for example and you would think, well I can understand why they are complaining. You'll read the defence and you would think hopefully, if it's a properly pleaded defence, I can understand why they are defending. I can see the risks in both. Some things, the more experienced you become, some things you will read and think instinctively well that is never going to get up, just because that's what your

judgement tells you. Part of the role we bring to bare is a role of judgement. I just don't think that's going to get up before a judge.

I think it is really about the risk allocation Matthew. You would want to make sure in private session that you play the devil's advocate and say, look I'm not sure what your position is and you may not want to tell me, but for you I see the risks as being A, B and C. I would always say, look you've been advised by skilled lawyers etc, you should rely upon them because I'm a stranger to it, I've come into it very late, I have a limited knowledge of it, my knowledge is confined to what I have read and what you tell me. Your lawyers would have had a broader scope, they would have been in charge of it for some years perhaps so rely upon them, but have you sufficiently taken into account A, B and C? Because the other side will say A, B and C, you have to factor that in to your risk allocation because you might be wrong about something and of course you do the same for the Defendant. The Plaintiff's case is this, these are the points they are going to run. You might think that is a good point but it might be a bad point, but have you properly assessed the risks and have you taken them into account? Can you afford just to stay loyal to your entrenched position or do you need to think a little more broadly, because you might not be right.

MM: To go back to the question of what do you do when you've got a party who just is not going to give you any information about that, as Glenn says, I think as a starting point you try to explore why. They have come to the mediation for a reason, hopefully they are there to participate in a sort of good faith way. I think you start by trying to sort of call upon those kinds of considerations to say, why waste the day? We are here, let's try and use it productively. If that doesn't work, I think you then start to get to a point where there are a range of different deadlock breaking mechanisms that I think mediators can employ which won't necessarily make the other side give any information but can result in something productive happening for the day.

One of the examples that jumps out is a mediator's bid, where if the parties are at a point in negotiations where they are just too far apart and neither party seems willing to move the mediator can say, what's going to happen is I'll pick a number and I'll tell each side what the number is. If one side is prepared to accept the offer, they will find out whether the other side was prepared to accept the offer or not. That is, the mediator will tell them whether or not the deal was done but if they are not prepared to say yes they won't find out whether the other side was. In a sense, that kind of a technique, and I've seen it get deals done, it's often the case that parties in their offers are sort of moving towards a number and people can often see where that's heading but sometimes the loss of face involved in one side coming down or going up is just too much and this can sort of cut through that. Even if it doesn't cut through it can give you useful information, namely that you know they wouldn't go to that number or wouldn't come up to that number.

GN: I think I didn't answer your question completely enough. I think one thing that occurs to me, if there is going to be a loss of face you have to give the person a justification for the adoption of a different position. Often that will be because of

facts that have been revealed during the mediation which they might not have been aware of before. That is a very easy way of adopting the change of position.

Often when a decision is made in a corporate context it's often made by a nominated person who might then get sign off from the board, but it's that person's decision. If they have to change it and get the board to sign off on a changed position then there needs to be a reason for that.

The other way of making a breakthrough, it seems to me Matthew, is to sometimes wean the clients away from the lawyers, without any disrespect to the lawyers. I've had very many cases where the clients were decent people, it seemed to me as much as you can tell in this sort of remove, decent people. You get them in a room, particularly if they have had a long association, you get them in a room together just as a threesome, just the mediator and the two parties if there are two parties, and it's often the most productive part in the day. I found that it is very true, unless people are just grubby and are liars. With those extreme cases aside, I found that it's very hard for decent people to lie to people that they know well. It just doesn't come naturally I don't think.

So, if you both have been involved in negotiating a deal, "You and I, remember Matthew, had a chat with you on a certain day and remember we discussed what the discount rate should be?" You said "Yeah, we did discuss that. I remember discussing that and what payments we'd make, if a discount had applied, if x amount was paid within 30 days." And you'd say "Yeah I do remember that." People tend to acknowledge the good points, I think, if you get them in the room together. Whereas the lawyers, as I've said without any disrespect, and I would never criticise a litigator, because I've been a litigator for thirty years. But the lawyers I think find it difficult sometimes to get out of that entrenched mien. Whereas the clients have a broader perspective. Their perspective is really, I want to get out of this, I want to get back to running my business, making my widgets, whatever I'm doing. This is not the main game, for me this is a distraction, so if you can get me out of it sensibly well then I'd rather take that option and get back to the main game.

WHETHER TO REVEAL WEAKNESSES IN THE OTHER SIDE'S CASE AT MEDIATION OR KEEP THIS FOR TRIAL

MH: Can I ask the panel the question, given our topic is 'Strategies and Tips to Achieve the Best Outcome for Your Client', assuming that the best outcome for your client is indeed settling it on the day. Something I'm interested in, and I was thinking about it in anticipation of this session. I was preparing for a mediation late last week and one of the things we were considering was the degree to which during the opening session, or indeed throughout the day, we might reveal to the other side things which we considered to be either devastating or fatal to their case. On the one hand we knew if we told them these things it stood perhaps a greater chance of settling the matter. But once the genie was out of the bottle if you like, we lost the forensic advantage of taking them by surprise in cross-examination at trial. Do any of

you have a view about whether or not, given the imperative is to settle, it's better to be entirely candid on a day like that or to leave something reserved to yourself?

KP: The barristers don't want to lose their big bear that they want to plan during trial do they?

MH: Yeah.

KP: Look it would depend on the mediation, but I mean I'm a really simple soul. If you've got a good solid story to tell there is always an advantage in telling that story.

One of the things that I think you can do with mediations that's powerful is give the other side a perspective on the event that they possibly haven't heard from their own team. Once the relationship has ended up into a litigation process there's not many opportunities where you are actually sitting down discussing the case that you actually get to build an opportunity to understand or see the world from a different perspective. And that open plenary session where you get to tell your story, if it's a good story, I think that will always allow you to make progress and sometimes that can be the first time the senior executives on the other side are hearing the world from a different lens and it is a very, very powerful thing to do.

But again, if you're sitting there going, it's a very complex process and your allowing the lawyers to really dive into their entrenched position and it becomes all about the big case they have created and to really lock their side into a big number that they've really ended up being stuck around. Because as soon as we put numbers around we psychologically get hooked to them and if a client's hooked to a really large number, you've got to spend a lot of time unhooking them from there, and from the other side it's hard to do, but that opening session to me it's the starting of that conversation.

GN: I think that segways into a slightly different topic and that may be the significance of the merits intruding in a mediation. Again, that to me is a judgment call. Having being a litigator for thirty years as I said you have some points that you will regard instinctively as being good and some that you will regard as being instinctively bad and that's a judgement call. I think merits do intrude a little and if they are going to intrude you can make them in that opening presentation. They only need to intrude enough to identify them as a reasonable risk that for the other side hasn't been taken into account. These are the points we want to run, we think they are serious etc. so please take them into account in your risk assessment. I think it's useful from that perspective.

As you said Kiri, it may be that the people who turn up on the day as the client's reps may be very senior people who have not heard the case put in that very brief and capsulated way and it sometimes gets a shocked reaction.

KP: Absolutely, and I see it plays out most on some of those very large corporate claims which are global in nature, hundreds of millions of dollars and actually they might have a genuine claim. It might really only be for ten million dollars but because they have spent so much time convincing themselves of their hundred million dollar position. To me when those dynamics are at play I think you have to

start with the merit conversation because until I move the goal posts closer together I don't even think we can start having a conversation about where we might land up. If you start with a hundred million dollars and every lawyer will say you got to allow something, let's give it 30% merit, that takes you to a number that just is not a reasonable number for the valid claim. So sometimes your first job is to move goal posts and then you can start negotiating.

ARE THERE COMMON LITIGATOR TACTICS WHICH ARE COUNTERPRODUCTIVE IN MEDIATION?

MH: We're asked a question, and its interesting. Each of the questions we're taking are ones that are occurring to me on the way through so I think we're communicating to the audience beautifully today.

Something that occurred to me when we were talking before, and something Kiri said, that I wanted to ask you Glenn. You spent, and you have mentioned you have had a very long career as a litigator, and I think developed a reputation for being particularly tough, which is a very important quality in a litigator. But the process of mediation is different and the question that is asked is "are there any common tactics used by lawyers in mediation that are particularly counterproductive to dispute resolution and why?"

What I want to ask you, because you and I are friends. I know you have spent a lot of time thinking about how differently one approaches mediations, particularly as a mediator, and I wanted to know whether there are things you would have done instinctively as a litigator which you see people bring to mediation now as a mediator which are unhelpful?

GN: Yes, I find it very offensive now, but a good friend of mine who's a very experienced litigation lawyer, and an aggressive one, when he knew I was, and this was some years ago, that I departed into mediation. He said "You're not a mediator, you're a litigator". "Yes I understand that but I'm now going to be a mediator."

You do have to bring a different mindset to it and again I hark back to the entrenched position mindset. If you come and say, "we think we have got a case and we are going to win at trial." I understand that, of course that's how you think, but we're here to discard that possibility a little bit. Legitimately, you must assess the risks and see whether you can sufficiently allow for those risks today that we can compromise.

Let's test it in this way, would you ever have, whether it's a barrister or a solicitor it doesn't matter, would you ever have a barrister or solicitor sign off an advice to the client that guaranteed a victory in litigation? Of course you would not, no one is going to do that. It would be stupid and negligent to do that. You'd CC it immediately to all claims and to our insurers if you did that. There are too many variables, witnesses go bad in the box, not because they are being dishonest but just because they might be nervous or for whatever reason or the judge doesn't like

them perhaps unfairly, documents are produced later and disclosure which put a different perspective on things, the judge just doesn't like you for some reason. These are things you cannot control and the litigation process is compulsory. You have to engage in it, once you engage in it you can't opt out of it. There are processes for which you have to engage. So I think again Matthew it's the mindset of entrenched position, you have to flick the switch. Flick the switch out of litigation mode into mediation mode. Properly assess the risks and consider you might be wrong and put the black hat on as Kiri said and test it. Test your case.

MH: What I have in mind is perhaps something like tone though. We've all had those experiences, I certainly have one firmly in mind, where you go along to a mediation and you hear the person on the other side of the table make a very bellicose and offensive opening statement. Presumably upon instruction and it immediately puts everybody on the back board.

GN: It does.

MH: It sets a tone for the discussion which is not productive.

GN: I think, and again this is the judgement call about opening sessions sometimes. I have had counsel, aggressive counsel, who have said to me prior to the session stating "This is a fraud case and we are going to accuse him of being a fraudster". Well that's not going to work well. I mean you are either then going to exercise some judgement and say well look I'm not going to have an opening session because I think that will be a disadvantage. But at least let your client know that the other side is going to react badly if you accuse them of being a fraud, for all sorts of reasons. If that is what you want to do, then alright you'll do it no doubt in your quiet moments but it might be to the disadvantage of the outcome. Of course, you're never going to let people abuse people under the pretext of having an opening session, that doesn't happen, so you've got to control it. I think you are right Kiri, those sorts of super aggressive positions can be a big disadvantage.

KP: I've had two thoughts since you've said these things. Behaviorally, I've always disliked the walk out. I'm sitting here thinking I'm here to engage. I've spent a lot of money, I'm going to stay here and be open to the conversation until we agree that we have taken it as far as we can. The walk out stunt I think is eminently unhelpful.

And then I think the mediator really has a responsibility to set the tone. I've walked into a mediation where the mediator was reading the newspaper and he opened where "this is going to cost you a lot of money, you better settle". It was like going, I don't know what you are hoping to achieve with us or what impact your wanting to happen but you've set the wrong conversation for the entire day. That is so frustrating.

GN: I don't think playing the cost card is a novel point anymore, it may have been once but I think we already know that.

KP: Yeah, don't thump the table, but yeah it was still extraordinary. It was so disappointing.

MH: I bet it cast a pall over the day.

KP: Absolutely, it cast a pall over the day. The energy you bring into the day and that personal connection you can make and get people engaged in that conversation in a genuine way. it's hard.

THE PROACTIVE MEDIATOR

GN: Look it is an interesting question between being a proactive mediator intruding too much. My view about it is that you should get into the arena. This is the difference between someone who is a judge and someone who is a mediator. That's why I think the badge of a retired judge is not always a good one because they were never permitted to get into the arena. That's totally novel to a judge, you can't do that. As a mediator you've got to get into the arena, you're talking to everyone confidentially to try to bring about a resolution, so the training is entirely different.

KP: You've got to work out why is this person ticking in this way? Why are they thinking this way? Why are they holding this specific position? And if it is genuine and flawed you've got really a big problem. But if they're engaging genuinely, and you need to test their thinking, you are so well placed as the mediator to unpack their thinking and to get them to shift. Even if they don't shift on the day it still adds value. I need that emotional engagement.

GN: Well that's right. It's this "the fish rots from the head" thing. It goes along from the top, because it's up to the mediator to exercise some judgement. I was for a party recently in a mediation where the very skilled mediator, and I won't embarrass her by identifying her, she brought a party back five times, they were walking out, five times. We had to wait I should say.

Everyone: *Laughs*

GN: She managed to bring them back and ultimately after a very long two-day session and weeks of negotiation after the event it settled. But you do have to be, I think, you do have to get into the arena and do the job. You're paid a lot of money to do it, so do it.

KP: I on the other side respect that mediator for the hard work that they have put in, because it's really, really hard work. Which is why also, my position is you never leave until you have got to the very, very end.

GN: Absolutely.

KP: Because you never know what's going to move the other party.

GN: No.

MEDIATION VS COURT ROOM TACTICS

MM: I think that's right. I really want to agree with what you say about the tactic side of things. Sometimes you see things like the walk out or things like that, but it is just sort of unproductive and you wonder why people do it. The fact that you won't do it doesn't mean they won't engage in it, but you can't really control that. I've never seen it create an outcome that's been better than it would've been otherwise.

MH: This is what's so interesting about it I think. If you think about it, mediation still has a relatively short history, at least in this jurisdiction, and there is an increasing level of sophistication about the process. I think in the early days, at least as I understand it from things people have said anecdotally, there was a lot of that kind of gamesmanship, and I use the word man deliberately, because typically it was blokes who did it, I think. And that sort of thinking that people were impressed by storming out or making heavy handed speeches in opening sessions. But there's a degree of sophistication I think which is now intruding in the mediation process, and I'm really interested about the fact that much of this discussion has been about things psychological and emotional and human and not at all about legal tactics or forensic strategy and I think that's something that is worth remarking upon and I think it's something that we're all in heated agreement about.

KP: And I don't think lawyers are particularly trained in this. Over the years, I mean I know in your paper you refer to Cartman's work, I read through that this year, you talk about group think and optimism bias and halo effects and how we get locked to numbers. This is what really is going on, you've got to connect legal theory with social behavioral science. Behavioral sciences, if you can unpack that, you can start doing it.

GN: You asked "why is somebody thinking that way?" and the answer might be that they might not have their analytical brain switched on, they've got their emotional instinctive brain switched on. That's understandable in the mediation context because it's such an abbreviated process, in terms of time you only have eight hours. Of course people are going to be upset at some stage. Whereas with litigation you've got the luxury of time to switch from that to analytical.

MM: I think the key thing, Kiri sort of touched upon it earlier, is the integration between the technical legal thinking, which as I said earlier is sort of taken for granted. You sort of have to have that covered but it's by no means the point of which it can stop. You have to deal with the personal side of it, that's where all the magic happens in mediation.

KP: Yeah, if you can have someone who can sit and bring that legal piece, what those business goals are, what the people are doing, you'll get to a better place.

GN: There will often be a compelling legal point perhaps in a case but often the legal points that people want to make in mediation I would just describe as advocate's points, you can make them when you go to court. But we have got to take a broader approach here. You might be right and the only way you'll find out if you're right is if you go to court and a judge will tell you. But if you want to avoid that

then stop saying that. I understand the point but let's see what we can do with the broader dispute.

MH: I think there's some education that needs to go on about that though because for me as an advocate, often when I turn up for mediations, I feel very comfortable in recognising and trying to address that human side of things but you still feel as though there's an expectation by your instructors and by their clients that you're going to beat your chest and say sort of bellicose kinds of things.

GN: That's why I think it's terribly important for the mediation process to be collaborative. It should be a collaboration between the mediator and the lawyers and the clients to try to bring about a resolution. Whether you do that, obviously you do it on the day, but I think there's a great opportunity to do it in advance of the mediation. So if you can work out as a mediator who is influential in this, who is making the decisions, is this person timid, are they genuine, are they here to settle are they not, are they just difficult, you get to form a view about people which if you do on the day for the first time, you've wasted half the day perhaps.

MM: I think part of it is just explaining it to the client that, as you said, you've got to explain what the processes are about and how it works. I think if the client understands what the process is they'll understand that there isn't much point in trying to persuade the other side of your excellent legal point because that's what the court is for. This is all about trying to best maneuver to get the best kind of agreement you can get and that's a completely different beast and needs a completely different approach.

GN: How often have we read, if you're the plaintiff, you've got your own wonderful statement of claim and you read the defence and you think yeah well okay they might be right about a couple of things but if it's not arguably good on its face it will be struck out. If it's going to survive that it's good on its face and it must make you at least pause for thought.

KP: It's very straight forward what stories win out.

THE FUTURE OF MEDIATION

MH: I'm conscious of the time and we're getting closer and closer to the end of our allocated hour. I wanted to talk briefly about the future of mediation and I mentioned there seems to be an increase in sophistication around this process. What are the things that each of you in your perspectives foreshadow might be areas for growth in the future and ways the process might be done better to achieve better outcomes for clients ultimately?

KP: Well, we've been having the conversation about the emotional intelligence of mediators and the emerging behavioral science. I think mediators are going to get better and better at their jobs when they engage in the real people dynamics that are surrounding that role. My hope is maybe we can have some kind of process that has that happen earlier, maybe even before litigation has kicked off and we've

gotten entrenched in the extreme positions that litigation tends to take you to before you start narrowing and converging again as parties. So, can we have some ADR, some really good quality ADR with properly explored claims before we've filed pleadings, that would be delightful.

GN: What I regard as a big advantage with mediation is that it has the luxury of immediacy, it's an opportunity immediately to settle something on a given day, within a space of eight hours. I don't mean by that there isn't going to be some days of preparation for the parties, obviously there will be, but it's the immediacy, the capacity to settle this very acrimonious dispute in eight hours. I think it is terribly compelling. Totally different scenario to litigation which is just banting and transpositions that will take years to come on in the usual course, then there will be subjects to appeal and all the rest of it.

Even if you compare mediations to the arbitration process the only things, it seems to me, that they have in common is the fact that you can choose your own panel, and of course you can choose your own mediator, so you've got that familiarity. The other similar feature is it's confidential. Otherwise they are just totally different processes because arbitration was always said to be, well it was very cost effective, but it's not cost effective at all it's very expensive as we now all know. It was very good in terms of timing, you can get it on quickly, well that's not true either. I've had parties that have waited for years to get things done and determined. You don't have those advantages, you only have the advantages of it being confidential and you can choose your panel but it's the immediacy thing with mediation which I think is so compelling. This is a real opportunity to put this dispute to bed. Can we take it or not?

MM: I was just going to add to that the only sort of future perspective I've thought about was something that came up with the earlier questions about the use of technology in mediations. We're all getting more and more used to doing everything by Zoom at the moment and I think more and more we're going to have to get used to doing mediations by Zoom. I think it's really just up to the profession I guess to keep abreast of the changes that are there, at the moment Zoom and those kinds of things are the technology. I imagine there will be developments in how those technologies work in a mediation context, you know, ways you can mirror the in person experience a little better, break out rooms and things like, that I know there are mirrors of that in the technology at the moment. I suppose the point is that technology is going to keep developing, we sort of have to keep developing along with it.

MH: I think that's right, that's a very helpful jumping off point Michael to one of the questions I have received that hasn't been answered and we can now answer it because it's the appropriate time. The question was asked about whether there have been any concerns about security or legality around using technologies for mediation. Obviously we can't answer that at length in the short time we have available even if we discussed it for the whole hour but can I say this, perhaps as the most technologically advanced member of Level Twenty Seven Chambers, that's not saying much I accept, there are technologies which are safe and secure.

There's encryption available, end-to-end encryption which means that unless you are trading White House secrets you can rest assured this is safe. Obviously, you need to do your homework behind the scenes but in terms of legality, certainly from my perspective, there's been no difficulty about that.

One other question we've had which I think I'll answer myself in order of the interest in time is "are there benefits in attempting to build rapport between representatives of the parties to the mediations?" I think any advocate worth their salt would recognise whether it's a mediation or litigation fundamental to your role is to build report with whomever it is necessary to build rapport in order to advance your client's interest. I personally have never seen a better outcome from a client brought about by an advocate who was not attempting to build rapport with his or her or their opponent, it's fundamental to the task.

We've had a very broad ranging discussion over the course of the last hour for which I'm personally grateful. It's been great fun to have you all here in my room across this lunch hour. Can I, first of all, thank Kiri for joining us here today.

KP: Pleasure.

MH: We're so fortunate to have you here with us and you can come back at any time. It's just an absolute delight.

Michael May and Glenn, who are frequent visitors to my room, it's lovely to have you here in this formal setting.

Can I say, we invite you to continue the conversation with us. I know each of us are on LinkedIn. Kiri certainly is on LinkedIn, you can make contact with her there, I know she'd love to hear from you. Glenn similarly is prolific on LinkedIn and would be very pleased to continue the discussion with you. Michael May, who is one of those voyeuristic types who pretends to be on LinkedIn, will probably ignore your messages. Level Twenty Seven of course is on Twitter, come visit us there. This will be on YouTube in due course. It won't be immediately available but we'll send you an email as soon as that goes online. We'll also send you an email with some very interesting papers that I know Glenn's written, and I've had the benefit of reading and I know Kiri has too ahead of this session. I can commend those to you.

Thanks very much for joining us. Again, if you're watching us via Zoom live, we hope you enjoy the rest of day. It's looking a bit grim here in Brisbane. If you're on YouTube hi, hello. If you're listening to us while driving along or commuting with the podcast, thanks so much for joining us. And we look forward to seeing you when next we convene here at Level Twenty Seven. Thanks very much.