The Spedley Mediation from the Inside

Bar News invited MJ Slattery QC to write this article to give the Bar a bird's eye view of the mediation process.

The fatal step in mediation is to say "yes" to the idea in the first place. Mere participation in the process works insidiously over time to suspend, then overcome, much of the detachment of lawyers and the cynicism of their clients. Once hours, days or even months have been spent mediating in a structured environment, human reactions attempt to give all this activity some purpose. The motivation to settle then appears. This was my experience of the Spedley Mediation. Here is how it happened, but first, a little background is necessary.

The Background

The Spedley litigation was three cases being heard together. The principal proceedings were brought by the liquidator of Spedley Securities Limited ("Spedley") against its former directors and ANI ("the main proceedings"). There were also proceedings brought by Standard Chartered Bank of the U.K. and GPI Leisure Corporation Ltd against Spedley and some of its directors ("the Standard Chartered proceedings"). The third set of proceedings were brought by the Spedley liquidator against Priestley & Morris, the auditors of Spedley ("the auditors' proceedings").

This raft of litigation arose out of the sudden collapse in January 1989 of Spedley and its parent, Spedley Holdings Limited. In the main proceedings, the case presented by the Spedley liquidator was that in the years leading up to and after the stockmarket crash Spedley had been a major player in a game of musical balance sheets with, among others, the then high flying Bond Corporation Limited and the merchant bank, Rothwells Limited. It was alleged that Spedley had lubricated a merry-go-round of asset transfers, window dressing and artificial cross balance date transactions to keep some very sick corporations looking stable and profitable. In the main proceedings, the Spedley liquidator was suing Spedley's former managing director Mr Brian Yuill and its three non-executive directors, Messrs Jones, Maher and Gray to recover compensation and damages for breach of fiduciary and statutory duties as directors and for negligence. Mr David Gray, who had also been the Chairman of Spedley during this period, was my client. The allegations against Mr Yuill were considerably wider than those against the non-executive directors.

Spedley also sued Australian National Industries ("ANI") which was said to be vicariously liable for the actions of its full time employees, Messrs Jones and Maher, as directors of Spedley. These two directors had been appointed to the board of Spedley by ANI which held 45% of the shares in Spedley Holdings Limited. Spedley further alleged that by reason of the way ANI had acted in relation to the affairs of Spedley, it should be deemed to be a director of Spedley under s.5 of the Companies Code and liable as such for misfeasance.

In the Standard Chartered proceedings GPI Leisure Corporation Limited (Receiver and Manager Appointed) ("GPIL") and Standard Chartered Bank ("Standard Chartered") were suing ANI, Spedley, Spedley Holdings, Maher and Jones seeking to recover $100 million advanced by Standard Chartered to GPIL early in 1988 to enable GPIL to acquire convertible cumulative redeemable preference shares in Spedley Holdings. GPIL and Standard Chartered alleged that the defendants to those proceedings were guilty of breach of fiduciary duty, fraudulent misrepresentation, misleading and deceptive conduct and breaches of trust.

In the auditors' proceedings, Spedley's liquidator alleged that Priestley and Morris were negligent and in breach of their statutory duties as auditors in approving accounts for the 1983 and 1987 financial years and also in failing to detect or act upon signals as to the poor financial state of Spedley.

The directors, ANI and the auditors denied liability for this phalanx of claims.

After a number of controversial applications to disqualify the judicial officers appointed to hear the proceedings, the three cases were eventually listed to commence before Mr Justice Rolfe on 9 June 1992 in Court 11A. Macfarlan QC opened for the Spedley liquidators. The defendants and assembled journalists drew breath at his $750 million quantification of the total claim. This was made up of some $360 million of losses which principally related to irrecoverable loans made by Spedley at the instance of Mr Yuill. Simple interest brought that sum to $600 million and compound interest to $710 million. An additional claim based on an alleged put and call agreement said to have been executed by some of the directors of Spedley and ANI and dated 30 November 1987, brought the total to about $750 million. The claim against the auditors was a little higher. This was not a claim for the faint-hearted. Until that time it was the largest ever made in the Supreme Court of New South Wales.

Even Court 11A had received a facelift for this gala event. The Bar table had been re-engineered into two rows. The occupants of each became known to the Press and to each other as "the first eleven" and "the second eleven". Once one had mastered the niceties of directing submissions into the backs of one's opponents, the most comfortable place to be was in the back row with the "second eleven". The proceedings were in fact seeking a massive transfer of wealth from the "second eleven" to the "first eleven". Not unnaturally, this fostered a certain defensive camaraderie among the "second eleven".

Conception of the Idea

Necessity is ever the mother of invention in litigation. The idea of referring the proceedings out for mediation really arose by accident in the quest for an early exit from the proceedings for my client. The case had the potential to cause him financial harm long before the end of the hearing. Alone among the defendants he was uninsured and drawing upon his private financial resources to meet legal expenses. Spedley was relying upon a series of alleged acts of negligence, success on only one of which could have exposed him and all the other

directors to crippling liabilities of between $5 million and $50 million.

It appeared to us that the financial consequences for my client would merely be seen as "collateral damage" by the major combatants. For Spedley, the evidence of the three ex-directors Jones, Maher and Gray was chiefly a means of access into the corporate treasury of ANI. If the directors got hurt in the process that was just bad luck. The other directors, Jones and Maher, had limited protection against this through indemnity agreements with ANI. Gray though had left ANI too early to receive such a benefit. He and they faced this litigious armageddon together.

The conviction that my client would be damaged merely by his presence on this battlefield brought with it the conclusion that the war somehow must be brought to a halt. Speeding up the processes of settlement and specifically the use of mediation was the only ready solution. The specific idea of actually moving the Court for mediation emerged in discussion with my instructing solicitor, David Hill of Minter Ellison Morris Fletcher and our client after about a fortnight of hearing.

The Power to Order Mediation

To lawyers and clients the mere advancing of a proposal for mediation can often suggest weakness. However, as a small party with nothing to lose we felt no psychological qualms about advancing the idea. The initial obstacle however, was formulating an argument to the conclusion that the Court had the power to order mediation.

The then current folklore surrounding the recent decision of Mr Justice Rogers in *AWA Limited v Daniels & Ors*, 24 February 1992 (unreported) was that the Court did have power to order mediation. However, actual scrutiny of the judgment revealed in it the following uncomfortable passage for any proponent of Court-ordered mediation:

> "Ultimately when the question was submitted to serious debate all parties agreed that there is power in a Judge of the Supreme Court of New South Wales to order them to mediation even over the objection of a party. In the light of this concession it is unnecessary for me to examine that question for myself and it may be left to another day should it ever arise."

A combination of ss.23 and 76A of the *Supreme Court Act* together with the inherent power of the Court permitted Mr Justice Rogers on that occasion to act on the concession so made by the parties.

AWA was only one part of a very clouded picture. Only two months previously Mr Justice Giles in *Hooper Bailie Associated Limited v Natcon Group Pty Limited* (1992) 28 NSWLR 194 had looked at *AWA* and confirmed its limitations. *Hooper Bailie* was, though, a positive pointer to a mediation-rich future, as it affirmed the enforceability of precisely drawn mediation clauses. However, neither *AWA* nor *Hooper Bailie* were express authority for a compulsive power to order mediation.

Mr Justice Rolfe was understandably cautious about the great leap forward for which we would be contending. At the time that the motion was first discussed in Court on 29 June 1992, His Honour said:

> "If there is not consent to the proceedings being adjourned to enable the parties to undertake some external method of dispute resolution, I will need to be satisfied that I have jurisdiction to make a direction in terms of paragraph 1 of the Notice of Motion."

This was a sobering warning. It was time for the advocates of mediation to face up to the power question. There was no explicit power to mandate mediation. In most jurisdictions, where Court ordered mediation flourished, explicit power had been sought and obtained by legislative amendment.

The way forward was not to look for a black letter head of power but to point to the fact that for years the Court had in fact exercised jurisdiction to promote the settlement of disputes by a variety of means, including the granting of adjournments. The ends of Court administered justice are as much served in facilitating settlement as they are in bringing proceedings on for early hearing. The Court of Appeal had recognised this in *John Fairfax & Sons Limited v Foord* (1988) 12 NSWLR 706 at 712 per Mahoney JA, where the purposes of case management were described as including, "... the achievement of early resolution of (the proceedings)".

The Motion

The directions and orders sought in the motion for mediation were simple. The motion was filed in the main proceedings and requested the following together with ancillary orders:

"1. Direct that the parties to each of proceedings numbered 50190 of 1991, 50182 of 1991 and 50467 of 1991 undertake mediation with a view to resolution of all proceedings with the assistance of a mediator to be agreed upon among them.
2. Order that these proceedings be adjourned for a period of three days to permit the mediation directed in accordance with direction 1 to take place."

The motion was framed in this manner to focus on the Court's undoubted power to adjourn proceedings as and when it saw fit and to present the issue to the Court as a request for a procedural direction incidental to the granting of such an adjournment.

Finding a mediator was the next step. Sir Laurence Street's stature in the field made him the obvious choice. We ascertained his availability. A range of possible dates for the mediation, together with a short description of the mediation process was included in the affidavit in support of the motion.

The motion was handed out on the afternoon of Friday 26 June, by Helen Brennan of Minter Ellison Morris Fletcher, who instructed me in Court daily. During the proceedings Court 11A was often occupied with single issue debates which concerned only few of the parties. This made for some languid afternoons, made all the more hypnotic by the schools of

electronic fish swimming endlessly across the screen of Bennett QC's portable computer. Friday 26 June was such an afternoon.

The motion was distributed about the two Bar tables in the manner of all the motions, letters and supplementary statements that flowed throughout the Courtroom with the regularity of the daily tides. The reaction was instantaneous. Some of the first eleven turned around and shook their heads in disbelief. Others quietly laughed. Hely QC sent me a note saying: "How much are you putting in?" Bennett QC's fish stopped swimming. The other Spedley directors were delighted and gallantly said, "Great idea. You go first and we'll support you". By Monday 29 June the Plaintiff had expressed its opposition to an adjournment for mediation but most parties required more time to seek instructions. ANI restated the position that it had maintained up until then. Its view was that a formal mediation was unnecessary as negotiations were continuing between the parties in parallel with the hearing. ANI, though, said that it needed further time to get instructions. The motion was adjourned to Friday 3 July for hearing and then, at the request of ANI, until 10 July.

The Argument

Friday 10 July at 10.00am was appointed for argument on the motion. ANI's attitude to mediation was becoming critical to the outcome. In *AWA* Mr Justice Rogers had identified that the number of parties who, to paraphrase John Lennon, wished to "... give mediation a chance" was an important discretionary consideration in the allowing of an adjournment to permit the mediation to occur. All the directors were strongly in favour of mediation. The auditors were willing to participate. Spedley did not consent to an adjournment. GPIL and SCB were neutral at best. Without ANI's support, the numbers were probably not there to carry the day on discretionary grounds.

There was no current signal from ANI. Its last reported position had been opposition. Silence had then descended. It was, however, quietly charting a fresh course. Lack of progress in the other out-of-Court negotiations had forced upon it the conclusion that a mediation may have some value.

At 9.50am outside Court 11A Bennett QC, with unflappable chutzpah, produced to me two utterly inconsistent sets of written submissions. One set supported the power to order mediation and the other denied it. He declared, "Presently, our instructions are to oppose mediation and to argue that the orders you seek are beyond power. We may be able to change our position shortly though. Will you agree to stand the matter down for a short while, so that we can get final instructions to switch sides and support you?" How could we say no? The Court adjourned temporarily. Then the Allen Allen and Hemsley mobile telephones outside the Courtroom scoured the globe to find the final ANI director, whose consent to the change of instructions was necessary. After about an hour he was found, it was said, "on a beach" in Hawaii. Instructions were given and ANI's "volte face" was complete. The pro-mediation forces now had the numbers.

The Judge though had his own surprise in store for the parties. Upon resumption, and before any substantial argument took place, His Honour executed a graceful diplomatic pirouette by announcing that he would temporarily adjourn the proceedings at the conclusion of the Plaintiffs' case, without deciding the power question. After giving some background to the present stage of the litigation, in a short judgment, His Honour wished the parties well. He did so in words that were soon to be echoed by Sir Laurence:

> " It would be a bold person who would give a definite opinion, against the background of the considerations to which I have referred, of the outcome of this complex litigation. It is, of course, for men of commerce to weigh their legal advice against the cost, not only to themselves, but to companies for the control of which they are responsible and to the shareholders and creditors of which they owe a very real duty.
>
> Nothing I have said is novel. It is well recognised that the Courts have often, in encouraging settlement, made reference to some or all of these matters. Mediation provides another dimension in that it is presided over, not in a judicial sense, but rather in a manner calculated to allow the parties to consider the matters to which I have referred in a meaningful way, by a trained mediator. In the present case the mediator suggested is Sir Laurence Street, a former Chief Justice of this Court, whose skill in this field is well recognised.
>
> I have previously stated that I will grant a short adjournment, if all the parties agree, to enable the mediation process to be explored and mediation undertaken or for the parties to undertake any settlement negotiations they may wish outside mediation. Thus, I am prepared, if the parties consent, to allow them to mediate or do whatever they wish in seeking to reach an out of court settlement.
>
> In this case I think it appropriate to adjourn the proceedings for a short period at the conclusion of SSL's case or at 4pm on Thursday 16 July 1992, whichever should first occur, to allow the parties to consider settlement whether through mediation or otherwise. I appreciate SSL does not consent to an adjournment. Notwithstanding its absence of consent I propose to take the course to which I have referred."

It worked. Spedley was temporarily deprived of a hearing. At the close of its case there was nothing else to do but to accept the parties' invitation to come to the mediation ball. All the major players now had their entree cards and were ready to have Sir Laurence's magic worked upon them.

The Reaction

The next day, *The Weekend Australian* rather cutely reported the event as though cumulative lawyers' fees had exhausted available client reserves and led to this result. Under the headline "Main Spedley Case Goes to Mediation - Overwhelming Costs Bring Move" Sir Laurence's photograph

looked out from the text. In a pose reminiscent of Rodin's "Le Penseur", Sir Laurence appeared to be contemplating an abstract and elusive Spedley consensus.

The following Monday, July 13, the stockmarket's judgment was decisive. Negative sentiment forced ANI's share price down sharply. This, though, was not a disaster for ANI. Its shares had been meandering north and south like a drunken sailor ever since the name "Spedley" first became synonymous with corporate misfortune. Now the market seemed to draw the simple bearish conclusion that anything taking place behind closed doors, like mediation, was bound to be bad for ANI. Before this there had been security from the very public battle taking place in Court 11A, where ANI was saying "never say die" through its indefatigable champion, Hughes QC. As usual though, the market had overreacted. Much of ANI's lost value soon reappeared, once financial journalists returned to their routine preoccupation with the balance of payments and national debt.

The Preliminaries

Sir Laurence Street moved swiftly after 10 July to set the processes of the mediation in train and to raise expectations of a positive outcome.

At an informal meeting with him early in the following week representatives of the parties were requested to produce their "best case" and "worst case" scenarios for the final outcome of the litigation. They were also asked to identify any obstacles they perceived to settlement of their part in the case.

Friday 17 July was devoted to a series of conclaves held between Sir Laurence, each of the parties and their legal representatives. These gatherings had an air of clerical mystery to them. Indeed, upon his release that afternoon from the ANI conclave, Hughes QC was overhead to say, "I feel like I've just been to confession". Whatever corporate or individual sins Sir Laurence heard and even absolved have ever since remained under the seal of his confessional. Under the same seal of confidentiality though, each party was encouraged to name the issues or persons who were perceived to be creating obstacles to the settlement process. The parties spoke freely. By the following morning Sir Laurence had a grasp of what, and particularly who, would be (in mediationspeak) the "dealbreakers".

The First Plenary Session

The mediation opened on Saturday 18 July in the Allens boardroom with the customary plenary session and individual statements of position.

Sir Laurence's opening statement went straight for the jugular. Friday's confessions had no doubt convinced him that the main obstacles to an early resolution of the proceedings came dressed as lawyers. Reaching out to parties directly was the only solution. He did more than that. He drove a subtle wedge of self interest directly between client and lawyer. Delivered with appropriate judicial gravitas, this is a paraphrase of what he said:

> "From all my experience in the law I am certain that this litigation will settle at some time rather than be finally determined by a Court. That settlement may happen in three months or three years but it will happen. It may be after a first instance hearing, a Court of Appeal or a High Court hearing or a retrial, but the case will settle. There is so much at stake that no one party can afford to lose. Granted that, we might as well take advantage of the present mediation, grasp the inevitable and save the prodigious direct and indirect cost of further running this case."

The subsequent making of the parties' well-rehearsed position statements showed no immediate recognition of the mediator's wise counsel. In fact, all the posturing, grimacing and growling which followed would have done the All Blacks proud as the "Haka" before a Bledisloe Cup rugby international. The general theme of each party's presentation was, "We are terrific. You have underestimated us. Your case is misconceived. We will win".

The three most contentious issues between Spedley and ANI were covered by their position statements: the nature, if any, of ANI's vicarious liability for its employee-directors of Spedley; whether any contributory negligence of Spedley was a defence available to ANI; and whether Spedley's damages claim of $700 million involved double counting.

At the end of all this machismo Sir Laurence was breathless with dismay. To the mirth of the assembly he could only observe, in understatement, that he had just heard "an interesting diversity of views". He then again stretched out directly to the clients. Reminding them of their hip pockets, he said in paraphrase:

> "I am amazed that such confident advice could be given. It is impossible that all these contradictory lawyers' views can be correct. One of them will be proven wrong and some client unfortunately will pay for it."

The first plenary session then broke up for the individual negotiations to start. If expectations were initially high they rapidly descended. Each party was allocated a room at Allens. There we waited and waited and waited whilst nothing happened, or so it seemed.

Dressed to Mediate

Perhaps the most revealing indication of the parties' attitudes on the day of the plenary session was the way that they and their lawyers dressed. Out of the rigid confines of Court dress, and on a sunny Saturday morning, one would have expected a degree of sartorial diversity to break out. Not so. Dress was stern and in most cases semi-formal. Here was a sign of the generalised angst felt by all about the negotiations.

With two exceptions among the major players, no one wished to be caught looking any more informal or relaxed about the mediation than anyone else. The two principal exceptions were Bennett QC and Peter Allen, the Spedley liquidator. With a certain studied nonchalance Bennett QC

turned up in an open necked shirt. He was clearly the lawyer most philosophically committed to mediation and his shirt said so. Perhaps though, the greatest surprise to the assembly was presented by Peter Allen who came dressed in a bright checked flannel shirt, looking for all the world like a Canadian lumberjack. Although he did not have his axe with him, the cutting implications of his dress were not lost upon his opponents.

During the conduct of the proceedings in court more than one woman in a flight of fancy had used the sobriquet "Placido" to describe Mr John Harkness, the other Spedley liquidator. This was no doubt because of his uncanny resemblance to a certain handsome tenor. He surprised us that Saturday by arriving clothed like all the other mere mortals. Expectations of Placido coming dressed as Otello, Macbeth or a gondolier were dashed.

At the centre of the melee but dressed to differ, Sir Laurence maintained his clerical theme in a charcoal suit. Though too Saville Row to be convincingly clerical, it continued to complement the mediator's role of inspiring trust and confidence.

Interestingly, the women present that day adapted far more quickly to the informality of mediation than the men. Chanel suits, shoulder pads, high heels and all the other accoutrements of "power dressing" were left at home. The look was distinctly "Country Road". The men, in contrast, looked as though they had started to dress for Court but became confused in the process.

This was the pinnacle of the mediation's dress formality. Fear of underdressing soon disappeared. As negotiations progressed over the next ten weeks, the parties and their representatives slowly relaxed with one another and peeled off the extra layers of defensive clothing. Out came the Lacoste and the Ralph Lauren. At the end, negotiations were being conducted in a dress more appropriate for an Australian backyard barbeque.

Although "recession dressing" never appeared there were occasional touches of what could only be described as "grunge". On the final day one member of the junior bar, in as much an act of defiance as anything else, turned up in a T-shirt and football shorts. No doubt this helped to achieve a better price for his client.

The First Week

In retrospect, the expectations of that first weekend were inflated. It took everyone a long time to appreciate that this congress of parties would not follow the normal conventions of mediation. The standard formula of negotiating continuously until a deal is done or is ruled out, was impossible in Spedley. The issues were too complex, the parties too diverse and the numbers too big.

By the end of the first weekend, ANI and the Spedley liquidators had been locked in a room for two days trying to reach the core of a settlement, whilst the other parties waited. Sir Laurence explained to us impatient outsiders that once a basic number had been struck between ANI and the Spedley liquidator, we would be approached for our contribution.

No approach was made to us that weekend. In fact, after the plenary session, the only excitement for the small parties in the whole two days was a fireworks display over Darling Harbour on the Sunday evening. It would have been a relief to have had our arms twisted and asked for some money then and there but instead we just waited.

The Court was due to resume on Wednesday 22 July. When that date arrived the Spedley liquidators and ANI were still number crunching without apparent agreement. The Spedley lawyers applied to go on in Court. The defendants resisted. Another adjournment of a few days was allowed.

In the absence of any positive news from the mediation no further adjournments were possible. The proceedings then cranked back into life.

Progress of the Mediation

For the next six weeks the parties led a Jekyll and Hyde existence. By day we fought. At night we mediated. After the resumption in Court, confidence in a settlement all but disappeared. The second eleven became depressed. We had Sir Laurence's assurance that it was "looking good" but it certainly did not feel that way. When we asked him how we could keep settlement hopes alive when in Court, Sir Laurence rather quaintly said "Try not to be too controversial". That did not come easily to any of us.

Within about ten days of the resumption, the first major bloodletting of the case began. The Second Defendant, Mr Neil Jones, decided to give evidence. Jones had been Chairman of ANI at the time in question as well as a director of Spedley. He admitted to Hughes QC in cross-examination that through his non-disclosure of material facts to the Board of ANI, approval had been procured for substantial advances by ANI to Spedley. Further, to answer the Plaintiffs' case he adopted a novel defence. He denied being able to read a balance sheet and professed not to know what bills of exchange or options were. The cross-examiners pounded away at Jones for about two weeks. Each day, as a result, the Plaintiffs' cases advanced a little.

There was also a growing prospect before the case reached a long-scheduled three week adjournment starting on 31 August, that the Third Defendant, Mr John Maher, might give evidence. As ANI's financial controller at the relevant time, his evidence would be crucial for Plaintiffs and Defendants. A certain greater urgency crept into the work of the negotiator.

In this atmosphere confidence in settlement was scarce. Sir Laurence's task was daunting. How could he possibly convince the smaller parties such as my client that settlement was on the cards, when the major parties were still negotiating privately, not yet asking us for money and trying to destroy us in Court.

Sir Laurence's solution was to feed the parties with a judiciously mixed cocktail of early morning meetings and discreetly placed information. Rumour and exaggeration which spread rapidly among the parties did the rest.

Suddenly, about mid-August, a draft deed recording a consensus between some of the major parties was mysteriously distributed to the negotiators. Produced on the Allen's word processor, it was first hand evidence of a deal between the majors. The effect was electric. Confidence immediately rose. The smaller Defendants began to speculate about the unspeakably large demands that were bound to be made by the Plaintiffs. We were not disappointed. The real argy-bargy sessions with individual small Defendants began.

By 31 August, when the pre-scheduled break in the proceedings began, John Maher had not been called and the draft settlement deed had already gone through a few editions. A fragile consensus on some of the main principles had been reached. Over the three week break more of the detail was negotiated. The original draft deed produced a litter of little deeds that struggled along like ducklings a few editions behind the drafting of the mother deed.

Upon resumption in Court on 21 September the parties asked the Court for a week's further adjournment which was granted. The whole of that week was spent negotiating and drafting in the Allen's boardroom. Progress was painfully slow. ANI's annual results were due to be announced in a press conference on Sunday 27 September. Everything had to be done by then.

The mediation had now become very lawyer driven. Some clients became exasperated by the Byzantine debates between lawyers on drafting issues. This lawyer domination was brought home starkly to one ANI executive. He recalled with amusement that at one stage when there were more than 50 people in the room Sir Laurence called for the lawyers to leave so he could have some discussions with the parties. Only six people remained behind.

Saturday Night Fever

Saturday 26 September was the most intense day of drafting and negotiation of the whole mediation. For most it started at 9.00am. The wordsmiths worked furiously all day and into the evening and signed off with amendments to the penultimate draft at about 2.45am on Sunday.

To the relief of some, Edition 13 of the main draft deed came and went early that day. The prospect of signing off on such an unlucky number caused superstitious types to propose amendments quickly.

The Allen's kitchens kept producing sandwiches all day until about 7.00pm. From then on the negotiators grazed over the same placid sandwiches and soggy chips into the early hours of Sunday morning. Until this day, the mediation had generally been "dry". About 10.00pm the first cold beer appeared on the boardroom table. Even the most iron-willed of the negotiators began to make concessions. A momentum was developing. Parties who up till then had argued interminably began to cooperate. Most lawyer-client conventions broke down. Barristers and opposing clients negotiated with each other directly.

One group of negotiators began to enforce reasonable standards of behaviour by awarding yellow cards on soccer penalty principles. The display of a yellow card was a warning to an opponent who was taking absurdly negative positions in the bargaining process. Fortunately, no red cards were dispensed. The production of a red card would, no doubt though, have seen a grant of relief against forfeiture by the mediator.

Macfarlan QC had not been seen at the mediation since the opening plenary session. His arrival about midnight that night was the firmest sign to the non-Spedley parties that the prospect of the case restarting on the following Monday was a fiction. A telling sign of where the mediation was heading was that that night even he turned up in a leather bomber jacket. Sir Laurence's was still the only coat and tie in the room and that night even the coat came off. Removal of the tie was, of course, unthinkable.

Even at this late stage of the negotiations and despite the goodwill glowing from some parties there was still a residue of suspicion among others. This led to Sir Laurence taking on an additional role as a stakeholder for some parties until settlement deeds were signed and all title deeds could be handed over.

Grand Finale

At about 8.00am on 27 September the first of the previous evening's hungover negotiators began to struggle into Allen's. Edition 16 of the draft deed was available for checking. A further negotiating session was due to commence at 9.00 am. By that time, the few who were gathered in the Allen's boardroom were intently discussing the prospects for that afternoon's football. By 10.00am several bilateral negotiations on aspects of the deed had sprung up but prospects for a signing in Canberra for a 4.00pm ANI press conference were already looking grim.

I had always planned to go to the Rugby League Grand Final on that Sunday. By the time I left the Allen's boardroom at about 11.45am tensions were rising. Compromises on drafting issues which only the day before would have resulted in hours of debate were being solved in less than five minutes. An angry insistent tone was finding its way into many voices. Anything that looked like causing an obstacle to the momentum for settlement was pounced on.

There was little I could do now. All the amendments required by my client had been incorporated into the deed. A caretaking role was still required to see the deed through to signature.

I said goodbye to David Gray, Helen Brennan and David Hill and headed off for the Sydney Football Stadium.

As I left the worst shouting match of the mediation was developing between one of the major parties and one of the minor parties. An execution problem had arisen with a power of attorney which, if not resolved, would abort the whole signing. Temperatures were rising rapidly. A meltdown looked possible. I left because there was nothing I could do but to hope that, like all the other myriad issues in this mediation, this one too would solve itself. After I left that problem was solved. The account of what follows for the balance of that day

is only hearsay. It is, however, as reliable as every lawyer in the room with whom I checked it.

By about 11.45am edition 17 of the principal deed, the final version, was coming out of the laser printer. Some of the little deeds were still on their way. The couriers were well short of leaving for the airport. One major party shouted at his minor party opponent, "Unless this deed is signed in Canberra by 12.00 noon the deal is off". As it was then 11.45am the threat had an instantly hollow ring to it. This demand, like perhaps the whole debate itself, was a product of lack of sleep, which is best known to deal makers and new parents. Although Sir Laurence was both of those, his voice never lost its calm. After midday successive execution deadlines were raised and passed.

Eventually, just before the Grand Final started, the couriers left for Kingsford-Smith Airport, where an aircraft waited with engines warming on the tarmac. It was from here on that an element of high farce began to creep into the proceedings. The two couriers were to take the documents to the offices of Mallesons Stephen Jaques in Canberra and then execute them as attorneys to each of the parties. This was all supposed to be done by a nominal 3.00pm deadline, well before the ANI press conference which was scheduled for 4.00pm at the Ritz-Carlton Hotel in Double Bay. In fact, one of the little deeds was not ready and missed the plane. The amended plan was to fax it down to Canberra for the signing that afternoon as soon as it was ready.

For some time Sir Laurence has acted as an appeal tribunal from the Rugby League judiciary. He adjudicates upon high tackles and punches and the other principal ingredients of first grade Rugby League. In this capacity, he too was due to attend the Sydney Football Stadium that afternoon. He felt sufficiently confident that all was arranged to leave for the Grand Final about 2.30pm. Upon his arrival at the football Sir Laurence instantly became one of that day's more unusually equipped football fans. As stakeholder, in his inside coat pocket were the deeds to a fortune in real and personal property, including an elegant Georgian mansion in Chelsea. Sir Laurence, though, did not get to see the end of the match that day. Back at the Allen's boardroom a major problem was developing. Just before half time he was summoned back from the game on the mobile phone.

The half-time score was Brisbane 6, St George 4. The tension on centre-field was barely a fraction of that in the Allen's boardroom. About 3.45pm, during half time, I used a public telephone from the football stadium to find out what was happening back at Allen's. My instructing solicitor, Helen Brennan, told me some wonderfully reassuring fibs. I was informed that everything was proceeding smoothly towards the 4.00pm press conference.

The reality was otherwise. Genuine delays and last minute amendments meant that the deed to be faxed to Canberra was not ready for execution by 4.00pm. Those negotiators not concerned with this deed were gathered in Paddy Jones' office watching the Grand Final. Former sworn enemies in the litigation were swapping football stories and issuing regular time calls for the 4.00pm press conference, "10 minutes to Armageddon...", "5 minutes to Armageddon...". Armageddon in fact passed and the press conference was put back to 4.30pm, to try and save the deal. Those concerned with the extant deed were still arguing and refining its contents in another room.

About 4.15pm an agreed version of the extant deed finally emerged from the scrum of negotiators and was slowly faxed to Canberra. It was only a little over an hour since the couriers had left Sydney. They too had not yet arrived at Mallesons in Canberra.

Shortly before 4.30pm the ANI executives at the Ritz-Carlton were on one phone line to Tim L'Estrange in the Allen's boardroom, asking for clearance to start the press conference, whilst on the other telephone line Sir Laurence was talking to the proposed signatories in Canberra.

All the negotiators were now assembled anxiously in the boardroom. Sir Laurence relaying progress reports from Canberra. His bulletin, "They've (the couriers) arrived" was greeted with cheers. "One complete big deed now signed." More cheers. A few minutes went by. "The little deed arriving on the fax now." From the Ritz-Carlton came the ANI question, "Can we start now? We must keep to our 4.30 deadline". Sir Laurence reconsulted Canberra. It was just after 4.30. He must have been told at that point that the signatories were in the process of reading the faxed deed. Sir Laurence, one of New South Wales' most eminent equity judges, was then heard to say down the telephone, "Don't read it. Just sign it!" One of the parties who was standing close to Sir Laurence was startled by this and asked his lawyers "Wasn't that how we got into this mess in the first place?" The instruction was carried out and the signing was completed as the cameras started to roll at the Ritz-Carlton.

The principal deed in its final form looked just like what it was, the tortured product of six weeks of drafting compromises by over 50 lawyers. It had 18 parties, was 69 pages long with over 100 pages of annexures. It had several hundred sub-clauses and umpteen conditions precedent. The other deeds were nearly as bad.

The parties owe a special debt to the hospitality of Tim L'Estrange and Allen Allen & Hemsley who endured and even fed a three month debate in their boardroom. John Halley, then at Allens and now of the Bar, managed to publish and deliver each new edition of the draft deeds on time and with graceful acceptance of what were at times ridiculous drafting requests. Tony Bannon, for the Spedley liquidators, drove the final negotiations with relentless vigour, simultaneously settling terms with up to a dozen parties.

The Sequel

The following Monday, 28 September, the proceedings were mentioned and adjourned to January 1993 when all the conditions precedent in the Deed of Settlement would have an opportunity to be fulfilled. The settlement meant a return of at least 51 cents in the dollar to unsecured creditors of Spedley. As events have turned out, Spedley has been spectacularly more successful in its preference recovery claims than had

been anticipated and the return to unsecured creditors will probably be 69 cents in the dollar. The settlement was a triumph of commercial common sense and of mediation techniques.

Conclusions

What though is mediation? It looks like the latest of a long series of games developed by societies for the safe discharge of their internal tensions. Our institutions of Parliament and the Courts utilise game theory with roughly agreed rules, teams, a referee, and an audience to appreciate the contest. To play any of the games offered by these institutions involves a commitment to achieve a result according to the rules and thereby an acceptance of the outcome. Mediation uses the same theory. Players participate to win the best outcome for themselves but a result is achieved because the participants begin to believe that the game has a purpose of its own. ❑

Individuality

(An extract from the occasional address delivered by Justice Matthews at the Graduation Ceremony at the University of Wollongong on 8 October 1993)

It was not until I went to the Bar, in 1969, that I first realised what a disadvantage being a woman can be. It is not my intention to talk to you today about the actual difficulties we women suffered. Suffice it to say that they affected every level of our professional existence. My reaction at the time was to rail against the misfortune which had me born female. I envied men, because they had a wealth of choices, and they would never have to face the ignominy of rejection which confronted us at every turn. I resented that my career path would never be the same as theirs, just because of an accident of birth. I believed that what we women needed was complete integration into the legal community - to be treated, in effect, as honorary chaps. So I refused to join the Women Lawyers Association, believing that it was counterproductive to have a separate group based on gender.

It didn't take me very long to realise that this was a fallacious approach. Equality, I then realised, was the goal to which we women must aspire, not absorption. Our intellectual capacities were no different from those of men and there was no reason why we should not take an equal place beside them. But until we achieved our goal we needed the support of organisations such as the Women Lawyers Association. I found it difficult to field questions about whether we women, with our perceived qualities of intuitiveness and sensitivity, might not actually be better as lawyers; and I tended to refute the proposition. After all, just to achieve equality seemed a near impossibility. How could we dare to claim superiority?

It took me some further time to realise that this approach also was fundamentally flawed. For a start, and most importantly, it is not a question of superiority. It is a question of diversity. And it is a question of having confidence and pride in our differences - of being able to use them positively rather than allowing ourselves to be diminished by them. For if we cannot do this, we are never going to realise our own individual potential.

I know it is all very easy for me to say this, and that the reality is not nearly so easy. It takes a great deal of strength and self confidence to be proud of the things that make us different. Indeed the greater the differences, the more profound the difficulty. If you have spent much of your life being denied jobs or refused entry to hotels simply because you happen to be black it's difficult to be proud of your skin colour. Similarly if you've been taunted with insulting epithets - and sometimes physical abuse - because you happen to be homosexual. Or even - as most of us women have encountered - if you've been fondly treated as someone who is excellently suited to cater for the needs of others, but not really able to be trusted in a position of responsibility.

This might seem to be overstating the stereotypes, but they still exist to this day. The complaints received by the Anti Discrimination Board are ample testimony to this.

And this brings me to the subject of stereotyping. It is something which we all do at some time, no matter how hard we try not to. The important thing is to be conscious of it, and to pull ourselves up when we find ourselves doing it. Because when we judge people according to the group they belong to, rather than for their own qualities, we are not only diminishing them as individuals, but we are also serving to perpetuate the problem. ❑