



## **The most obvious solution is often the most difficult to embrace.**

My father always advised me to first look for the most obvious solution when I was confronted by something which did not work.

If it was an electrical appliance he would say “have you checked that the plug is connected or that the power point is switched on?”

“Always look for the most obvious” he would say.

As an impatient and distracted youth I would often (more times than I care to admit) find that his advice was opportune.

And so it is with litigation.

If disputing parties would only take a moment to dispassionately reflect on what they are doing. If they would only look objectively at their involvement in a process which is:

- Stressful
- Expensive
- Time consuming
- Uncertain

They may see that the obvious solution is to look outside that process.

Mediation provides an alternative solution.

Mediation involves suspending emotion, as far as that is possible, and entertaining the concept of settlement. That does not mean settlement at any costs. But it will entail a willingness to listen. It will require a willingness to entertain the possibility that the other party may have a legitimate or arguable case.

If you cannot accept that possibility then at least recognise the possibility that the Court or Tribunal may accept the legitimacy or validity of your opponent’s case.

If you cannot accept that possibility you may recognise the variables which accompany any trial or hearing. Those variables include:

- The reliability of the evidence presented by your witnesses
- The credibility (under cross examination) of your witnesses
- The quality of your legal representation
- The quality of your opponents legal representation
- The ability of the decision maker to appreciate your case
- The uncertainty of the law

Despite the uncertainty created by these variables, if you still retain a complete and unshakable confidence in your case you must take into account the likelihood of enforcing a judgement against your opponent. Or, in other words, you must reflect upon the likelihood of “cashing in your chips” or “collecting your winnings” after obtaining a Court victory.

The gambling analogy is apt as litigation is somewhat of a lottery.

In fact it is worse than a lottery as you can practically guarantee that a lottery ticket will be honoured by Tattersalls! However a judgement may not be successfully enforced as your opponent may become insolvent. Or your opponent may simply refuse to pay – resulting in more expense on your part as you seek to coerce your opponent into paying by adopting a variety of costly legal enforcement remedies.

As any experienced litigation lawyer will advise...the prospects of obtaining payment are directly related to the degree of respect your opponent has for the rule of law.

*No respect will often equate to no payment.*

Finally there is always the possibility of your opponent appealing your Court victory. That appeal may be based upon a genuine desire for the truth or it may be based upon a strategy of enabling your opponent to divest himself of assets.

Mediation is everything litigation is not. It is the antithesis of litigation.

It allows parties to achieve certainty by empowering them to control the outcome of their dispute.

They can have their say “ahead of trial” and within the confines of a confidential forum.

With the assistance of a mediator they can bring an end to the dispute and its attendant expense, stress and uncertainty. They can move forward on the basis of a mediated settlement which may or may not entail a continuation of their relationship with their opponent.

By choosing mediation the parties choose to take control of the dispute instead of surrendering control to the litigation process.

Now that is an obvious solution worth embracing.

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