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CPD SEMINAR

Judicial Settlement Conferences: Perspectives and Practical Guidance

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The Art of the Deal

Negotiation Tips for Lawyers in JSCs

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Introduction

I agree with Helen. Preparation is hugely important to maximising your chances of success in a JSC. In that sense, JSCs are different to international nuclear disarmament talks. According to President Trump, you do not need to prepare for those.

Once you get to the JSC, you may not want to take a Trumpian approach either. Whilst the President might know within a few moments of meeting someone whether it is all going to work out, most of the rest of us do not have that gift. We need to work constructively with all of those involved, throughout the process, in a considered way, to get to a result.

Lawyers have a difficult job in JSCs. They must be part champion, and part voice of reason. They must be compelling, but also constructive. It is a delicate balance.

What follows is something of a *pot pourri* of negotiation tips for lawyers in JSC's. It is by no means exhaustive, but hopefully it will be of assistance.

Additional Ethical and Legal Factors

Her Honour and Helen have already covered off much of the ethical and legal framework for JSCs. In this context, I just wanted to add a few points.

The conduct of lawyers in JSCs has been a subject of complaints to the LCRO[1]. Issues raised have included competence, lawyers acting discourteously, misleading conduct, and lawyers applying too much pressure on parties to settle. My brief survey of the LCRO cases has not thrown up any examples of any such complaints being upheld. But I think the fact that complaints have been made in these areas is instructive. JSCs are a stressful and challenging environment for clients (and lawyers). There will always be the possibility that some will look back on the process, and/or settlements reached, with regret. So, it is a field in which lawyers should tread carefully.

There was one quote from LCRO 64/2011 that I think is useful to highlight. In that case, there was an allegation of incompetence levelled at a lawyer, relating to their performance at a JSC. The Review Officer stated:

> "The fact that no settlement was achieved is not of itself an indicator of any lack of competence on behalf of the Respondent. The parties themselves must be amenable to a settlement..."[2]

This point may seem an obvious one, but it is important. Often parties should settle, but ultimately it is up to them. Lawyers should not measure the day, or themselves, against settlement as the sole standard.

Lawyers should also bear in mind the following broader points:

a) Ethical issues affecting experts. See Schedule 4 of the High Court Rules. In my view, lawyers have an important role to play in reigning in experts who take an adversarial approach (a

1 See LCRO 64/2011, LCRO 333/2012, LCRO 72/2014, LCRO 130/2016.

2 LCRO 64/2011, p8.

problem touched on by Helen). This is both the right thing to do, and in your client's interest. Adversarial experts are toxic to settlement;

b) Issues around misleading and deceptive conduct. See Rule 12.0 (integrity). See also *Hildred v Strong*[3], where the Court of Appeal took what I think could, with respect, be called a fairly "hands off" approach to allegations of misleading conduct in a mediation, but did leave the door open for such claims. Many of you will also be aware of the recent Court of Appeal decision in *McAlister v Lai*[4], wherein a lawyer was found liable for essentially perpetuating a client's deceptive conduct in negotiations. That was not in a without prejudice context though; and

c) The importance of clearly documenting a settlement. This has always been good practice, and the importance of doing it was emphasised by the 2011 Court of Appeal case, *Sheppard v Specialized Bicycles*[5].

General Tips

Moving to more practical matters, let me start with some general tips for how I think lawyers should approach JSCs on the day. There are no absolutes, and each JSC will be different, but these points will hopefully help:

a) Be strong. Clients rightly expect their lawyer to be a compelling advocate for their cause. Clients will also rightly expect their lawyer to manage aggressive tactics by the other side. Being strong does not mean being unduly aggressive yourself, being snide, shouting, or putting people down. Adoption of those sorts of tactics will either make the lawyer look laughable, or risk bringing the JSC to a premature and unsuccessful end. Be strong in a calm, unflappable, considered, respectful and determined way. I will comment on dealing with difficult people a little later;

b) Acknowledge risks. Every litigant has some risks. Acknowledging some of them to the other side, without giving the farm away, has real benefits. First, it makes what you have said about the strengths of your client's case sound more compelling. Secondly, it sends a signal that your side is going to take a realistic approach to negotiations, which can in turn encourage the other side to do the same;

c) Watch reactions. It is hard in the heat of a JSC, but it is a useful skill to be able to keep an eye on how people are reacting to what is going on. What points seemed to particularly upset them, what do they seem confident about, who defers to who, and so on. Most people are not very poker-faced, and their reactions can tell you a lot about how they view the case;

d) Work with the Judge. Take careful heed of the questions they ask, and any comments they make. Often these will be important indicators of how an objective third party is seeing things;

e) Do not rush to break up and start bargaining. A lot of lawyers want to move to this stage too soon. Avoid this (and there is a good article by Geoff Sharp decrying this trend in mediations[6]).

3 [2008] 2 NZLR 629.

4 [2018] NZCA 141.

5 [2011] 3 NZLR 620.

6 http://geoffsharp.co.nz/wp-content/uploads/2010/10/IN-PRAISE-OF-JOINT-SESSIONS.pdf

Make sure that you have made your best points to the other side first, and responded to theirs. Trying to do this after the open session has concluded is less effective;

f) Be there for your client. Appreciate that it will be a stressful day for them, and support them through it. Take a break with them if they look like they need it. Make sure they understand what is going on, and ask them if there is anything that is concerning them, or more that they want said. Take them back through the risk and costs assessments if necessary;

g) Be prepared to justify a settlement offer. A position based on principle will always be more persuasive;

h) Be constructive and imaginative when it comes to settlement. Often it is the lawyers who spot the opportunity for something different to be added into the mix; and

i) Lastly, do not give up. JSCs can get very tiring towards the end, and it can be a very hard day. But often the seemingly intractable can move to settled within the last hour of a JSC, and it is very important to stay the course.

Having covered off those general tips, I want to touch on some more specific issues.

Recalibrating Your Act — Some Differences Between Being an Advocate in a JSC, and an Advocate in Court

There are important differences between a lawyer acting as an advocate in a JSC, and as an advocate in Court. You need to recalibrate your act.

JSCs have a much more fluid communication dynamic than Court. At the outset of a JSC, the lawyers are usually addressing the judge. But, as JSCs progress, this can get looser, with lawyers addressing each other, experts, and sometimes the opposing party. I should note that I think it is proper to check in with the judge before addressing anyone other than her or him. But in my experience judges do allow this, and it is a useful part of the process. These more free-flowing conversations can provide a real opportunity for people to have their say, and for constructive exchanges.

Lawyers need to remember that in a JSC the Court is not the decision-maker. It is the clients who will decide whether, and on what terms, to settle. They are the decision-makers at the end of this particular day. This makes a big difference to how lawyers should approach these conversations. In particular:

a) Avoid over-long openings. The opposing client will stop listening quite early, and over-long openings chew up time that could be much better used in open discussions;

b) Avoid detailed legal submissions. The opposing client will not be convinced by them. They will largely defer to their own lawyer on legal issues, and assume that whatever you say is cause-serving; and

c) Avoid aggressive cross-examinations. There may well be important questions that can and should be asked of witnesses present. But this is not an opportunity to ask twenty carefully crafted questions which are intended to lead to a "ta-dah" moment, where the opposition is embarrassed into caving by your brilliance. Chances are you will not get your "ta-dah" moment. Even if you do, that may well be counter-productive in the settlement context. People who have been humiliated are not generally in an "*ok, let me write you a cheque*" frame of mind. They would prefer to spend their time and money plotting revenge.

Talking Outside the Box

It is also important to remember that a whole host of different things can be discussed in a JSC that are not spoken of in Court. These can include:

a) Litigation risk;

b) Net costs. Net costs analysis is hugely important to a commercial approach to litigation, but often not done well;

c) Emotional and personal factors. These are almost always at play, even in the most ostensibly hard-nosed commercial matters. In a speech on mediation in 2015, Lord Neuberger, President of the UK Supreme Court, cited a UK survey,

> "which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation"[7].

d) Solutions which are outside what a Court can order. For example:

   i. Apologies, statements recognising harm;

   ii. Joint statements;

   iii. Agreements for parties to work further together in the future;

   iv. Licensing arrangements;

   v. Swaps of land, shares, and anything else;

   vi. Territory agreements; and

   vii. Technology transfers.

Lawyers need to prepare for, and be able to deal with, these matters in the JSC. As Helen says, the better prepared you are, the better you will do.

Small Gestures

Again, it is important to remember that it is the clients who are the decision-makers at the end of this particular day. And you want them to be in a frame of mind that enables them to decide to settle. Sometimes small gestures which show respect, empathy, and/or consideration can help with this. Helen has already touched on some of these factors, but in this regard:

a) Be courteous;

b) Be sensitive to cultural factors;

c) Be sensitive to psychological factors. Fear, stress, anxiety, jealousy, and anger are often at play in disputes. Recognising and helping in a genuine way to diffuse them can be invaluable;

d) Remember people's names. I find jotting down names around a seating plan to be helpful; and

e) Look out for other opportunities to set the tone. I am aware of a recent case where a JSC was scheduled and the plaintiff was troubled by the $900 Court fee. The lawyer for the defendant became aware of that, and discussed it with the defendant. At the outset of the JSC, the

7 From address by Lord Neuberger to the Civil Mediation Conference, 12 May 2015, citing:http://www.newlawjournal.co.uk/nli/content/litigation-v-mediation

defendant said that he would pay half of that fee, whether the matter settled or not, in the spirit of compromise. That small gesture made a significant difference to the atmosphere and result of the day.

Dealing with Difficult People

One of the most challenging aspects of any settlement process can be dealing with difficult people. The most common manifestation of "difficult" in this context is unduly aggressive.

There are some who wrongly believe that aggression is a useful negotiating tool. These people have been watching too much American TV, where main characters get what they want by demanding it in a cool way at gunpoint. Real life obviously does not work like that.

Aggression is also often a manifestation of fear on the part of the aggressor. Clients, lawyers and experts may all be fearful of failure or embarrassment. They may also be fearful of other participants in the JSC.

Wherever it comes from, aggression is best diffused if possible. People cannot shout their way to "I agree". Sometimes aggression may best be dealt with in kind. But in my observation that generally leaves everyone wounded. There are other strategies, including:

a) Careful use of active listening skills. Helen earlier mentioned the concept of active listening. Sometimes active listening can be a useful tool in dealing with difficult people who are being aggressive. Let them have their say, get the aggression out of their system, feel heard, and move on. I recently heard negotiation guru Professor William Ury speak about the peace-building work he had done in Venezuela. He described his first meeting with then-President Chavez. The meeting occurred late at night in the Presidential Palace, in a smoky room full of generals. President Chavez started the meeting by asking Professor Ury what he thought President Chavez should do about the opposition. Professor Ury said that he thought President Chavez should talk to them. President Chavez was deeply unimpressed with this suggestion. For half an hour he stood in Professor Ury's face and lectured him on the wretchedness of the opposition. Professor Ury did not react or argue, much as felt tempted to do so. Finally, at the end of the lecture, President Chavez stopped, paused, and said 'how should I talk to them"?

b) "Naming the pain". By this I mean acknowledging the emotion, and why the person feels it. That might involve saying something like:

> "I understand that you are angry and why. You have lost a lot of money because of what has happened, and you think that is unfair.
>
> We see liability differently on this side of the table, but we acknowledge how vexing your situation must be."

c) Re-focussing the conversation on the problem rather than the people. That might involve a response like:

> "You are angry about the building defects that you say my client is responsible for. Let's look at what the experts say about those defects, and where the differences lie."

d) Appealing to self-interest. This could be as blunt as saying:

> "We appreciate that you are angry. But both parties want to try and settle this, and we are not going to get there by yelling at each other. We need to focus on the issues, and what we can do to settle them."

e) Taking a break. Very often, in my experience, a break will diffuse an angry situation; and

f) Deferring to the Judge. One of the benefits of a JSC over other forms of ADR is the presence of a Judge. Despite the consensual nature of a JSC, Judges, via their position and mana, are in a better position to "referee" conversations, and control errant behaviour.

Of course, there are some difficult people with whom it might at times be impossible to negotiate...

> "You have people that are mentally ill. And they're gonna come through the cracks. And they're gonna do things that people will not even believe are possible."
>
> Donald Trump, Meet the Press, 4/10/15

Bridging the Final Gap

Many JSCs hit a point where settlement seems unlikely. The parties are too far apart, not moving, and vexed with the process. It is at this point that walk-out threats are most common. Deadlock. But lawyers can be pro-active on this.

What follows are some options and strategies for deadlock-breaking:

a) As Don Draper famously said in Mad Men, "*if you don't like what's being said, change the conversation*". Typically, in commercial disputes, the snag gets hit in the dollar haggle. Start talking about something else for a while, such as another aspect of settlement (e.g. payment terms, assignment of a claim). No one will forget about the dollars, but the change gives people a chance to reassess, and perhaps something to justify a new number a little further down the track;

b) Look at other settlement options – "growing the pie". Is there something else that can go into the mix, or another way of settling? I mediated a weathertightness claim where the original vendor bought the house back from the plaintiff, with financial support from another party;

c) Bracketing – if A will drop by X, will B come up by Y?

d) Range bargaining – If A will come into the 500s, will B come into the 300s?

e) Look at bringing other ADR techniques into play, e.g.:

   i. An expert determination on a disputed technical point, or a legal opinion on a disputed legal point. Could be binding/non-binding. I was involved in a settlement that had provision for a non-binding expert determination on a misuse of confidential information claim;

   ii. Last offer arbitration;

f) Change who is talking/calling a short lineout. Get the lawyers, or the parties, together separately;

g) "Call a friend" – see if there is someone outside of the JSC who can add something. Sometimes a conversation will need to be had with an insurer, or a business partner, to look at extending delegated authorities/contributions. Obviously, this needs to be done appropriately in terms

of the privilege restrictions applying to the JSC. Phone calls late in the piece to help bridge gaps are quite common though;

h) Blind bidding;

i) Chance options – toss a coin, or put options in a hat and draw one out; and/or

j) Split the difference.

The main thing is to stay positive, and keep trying. The parties are there because they want to settle. Give them the best possible shot at achieving that.

Ultimately though, not all cases are settleable. And that is fine too. Generally, even if the JSC does not result in a settlement of the case, it will have helped the parties. They will have had their say. And the issues will likely have been refined. This may still result in a settlement a bit further down the track. It may also mean that if the matter goes to trial, the parties are better able to address the key issues in an efficient way.

Whatever happens, do look to end the day with a handshake. That is one of the many topics on which I would suggest not taking the advice of the current POTUS:

> "The concept of shaking hands is absolutely terrible, and statistically I've been proven right."
>
> Donald Trump, Playboy, 2004