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BAR ASSOCIATION OF QUEENSLAND

Commonwealth Lawyers Association

PNGAus Partnership

**PNG CONTINUING LEGAL EDUCATION FOR MEDIATION & COMMERCIAL LAW**

PAPUA NEW GUINEA LAW SOCIETY

5TH SEPTEMBER 3.30 - 7.20 PM

## Advocacy Skills in Mediation

Presented by Andrew Crowe KC

5 September 2023 – 5.30 pm – 6.50 pm

- (1) V Pty Ltd and P Pty Ltd entered into a business sale agreement (BSA). V Pty Ltd was a middle level company in a particular industry whereas P Pty Ltd is a very large publicly listed company in that same industry. Under the BSA, P Pty Ltd is acquiring all the assets of V Pty Ltd. As often occurs in BSA's of this nature, there was settlement with an upfront payment by way of an initial purchase price to be followed by ongoing assessment and analysis to ascertain whether any further payments were required to be paid pursuant to complex contractual provisions.

- (2) There was a dispute between the parties as to an amount sought by V Pty Ltd under the BSA in addition to the initial purchase price. Under the terms of the BSA this dispute went to expert determination. The result of the expert determination was that P Pty Ltd was required to pay a further \$1.5 million to V Pty Ltd. This expert determination has not been challenged by P Pty Ltd.
- (3) P Pty Ltd however has not paid the amount determined by the expert. As a result, V Pty Ltd instituted a proceeding in the Supreme Court of Queensland. In that proceeding P Pty Ltd has brought a counterclaim asserting that various payments comprising part of the initial settlement sum should not have been paid. P Pty Ltd's counterclaim totals \$3 million.

- (4) As V Pty Ltd has, in effect, stripped itself of all of its assets by selling them to P Pty Ltd this resulted in P Pty Ltd successfully applying for security for costs. Security in an amount of \$200,000 has been paid into court by V Pty Ltd.
- (5) The parties have agreed to mediate. As at the date of the mediation each has spent \$400,000 on legal fees.
- (6) In light of the anticipated length of the trial (which will be complex because it will involve complex legal arguments as to the proper construction of contractual terms and conflicting and complex expert accountancy evidence) each party will be spending in the vicinity of a further \$500,000 on legal fees.

- (7) You are representing V Pty Ltd. Its director and shareholder Mr Jones has funded the litigation to date from his personal assets. Mr Jones has also funded the payment of \$200,000 by way of security for costs.
- (8) You have provided advice as to the strength of the claim and counterclaim. That advice is that there is no defence to the expert determination amount of \$1.5 million except to the extent there is any set-off based on the counterclaim. Your advice is that P Pty Ltd has reasonable prospects of establishing approximately \$750,000 on its counterclaim.

(9) You have calculated your BATNA as follows:

- The amount determined by the expert: \$1.5m

- Less part of the counterclaim: \$750,000

Therefore, a net: \$750,000

- Plus, Interest: \$50,000

- Plus, Recoverable costs (60% of 900,000): \$540,000

Therefore, a net: \$750,000 plus \$50,000 plus \$540,000

\$1.34m

- Less the difference between the total actual and recoverable costs (\$900,000 - \$540,000): \$360,000

Therefore, a net: \$980,000

(10) The calculation of the BATNA takes into account that your client will be spending another \$500,000 in legal fees. How do you use the BATNA in calculating what a reasonable settlement would be now?

(11) You take your client through the following calculation:

• Claim	\$1.5m
• less part counterclaim	\$750,000
Net	\$750,000
• Plus, interest to date of mediation	\$ 35,000
• Plus, recoverable costs now (60% of \$400,000)	
	<u>\$240,000</u>
	<u>\$1,025,000</u>

(12) Your advice as to the extent to which the counterclaim might be successful is qualified. The advice is based on a contractual construction which you consider to be the correct construction. You acknowledge that in respect of a number of contractual provisions P Pty Ltd is advancing a very different construction. Your advice is also based on the experts who will be giving evidence for V Pty Ltd being accepted. There is a direct conflict between that expert evidence and the expert evidence relied upon by P Pty Ltd. You have advised that should your opinion as to the proper construction of the contract be rejected and should the evidence of the expert for P Pty Ltd be accepted then the counterclaim will succeed to at least the amount of the claim of \$1.5m.



- (13) Before interest and costs, you calculate the ZOPA as being in the range of a payment to your client of about \$750,000 to a settlement on the basis of each party bearing their own costs. Although the counterclaim exceeds the claim by \$1.5m it is not controversial that V Pty Ltd has no assets.
- (14) Mr Jones has instructed you to seek settlement in the range of \$750,000 to \$1m plus release of the \$200,000 paid by way of security for costs.
- (15) The BSA was negotiated between Mr Jones and a Mr Smith (in-house counsel for P Pty Ltd), but Mr Smith is not attending the mediation. Mr Green is attending. The lawyers for P Pty Ltd have advised you and the mediator that Mr Green has authority to settle.

- (16) No offers are made during the joint session. During the joint session the lawyers for P Pty Ltd have advised that it will be seeking an order that the amount of security for costs be substantially increased to take into account the likely trial costs. Such an application will succeed the only issue will be how much more security will be ordered. The joint session does not throw up any new legal or factual issues not already known to the parties. The mediator has asked that V Pty Ltd being the Plaintiff make the first offer. Pursuant to your negotiation plan you make the first offer of \$1,242,500 calculated as follows:

Claim	\$1,500,000
Plus, interest up until now	\$ 35,000
Plus, recoverable costs (60% of \$400K)	<u>\$ 240,000</u>
<u>\$1,775,000</u> less 30% (\$532,500) =	\$1,242,500

(17) You use the mediator by asking her to confirm to P Pty Ltd that your client is of no worth. This is not a contentious point. It was the basis upon which P Pty Ltd succeeded in obtaining an order for security for costs. You also ask the mediator to convey that no settlement will involve V Pty Ltd paying any moneys to P Pty Ltd. The mediator informs the other room of these matters and of the first offer and how it is calculated.

(18) P Pty Ltd counter-offers as follows:

Counterclaim	\$3,000,000
Less expert determination amount	<u>\$1,500,000</u>
Net	\$1,500,000
Plus interest	\$ 35,000
Plus recoverable costs	<u>\$ 240,000</u>
\$1,775,000 less 30% (\$532,500) =	\$1,242,500

- (19) The mediator is troubled by this counter-offer. It ignores that V Pty Ltd is of no worth and seems to be a tit-for-tat offer matching V Pty Ltd's offer by a counter-offer in the same amount. Nevertheless the counter-offer is made in that amount.
- (20) When the mediator conveys the counter-offer to V Pty Ltd's room Mr Jones is incensed and threatens to walk out of the mediation. He has an unchallenged expert determination and V Pty Ltd is judgment proof. The counter-offer is in his view intended to be provocative.

(21) As the lawyer for V Pty Ltd what do you do? You need to give some time for Mr Jones to calm down. You are in no hurry to respond. The other side must have known that the counter-offer would be inflammatory in light of the insolvency of V Pty Ltd. You go downstairs with Mr Jones for a coffee break. You have all day to settle the matter. You explain that the other side knows that V Pty Ltd has no money. You explain that although Mr Jones is funding the claim by V Pty Ltd he has no personal liability should P Pty Ltd succeed on its counterclaim in any amount exceeding \$1.5m. You remind him of your advice on prospects. You persuade Mr Jones to stay and to make a further offer in the amount of \$1m. The mediator conveys this second offer to the other side.

(22) While waiting for a response you advise Mr Jones that P Pty Ltd is probably positioning itself to make an offer that each party walk away but that hopefully that is not their final position. It makes no sense for P Pty Ltd to spend a further \$500,000 on legal fees if a reasonable settlement is possible. You have explained this before. Mr Jones now tells you for the first time that the monies paid to V Pty Ltd upon the sale of its assets have been utilised for a divorce settlement (in an amount much larger than he had anticipated) - and in buying a dream home for him and his new partner. He is all but out of funds and does not have \$500,000 to fund the litigation to trial. To have the \$200,000 security released would be very beneficial at this time. Plus, he wants some money from P Pty Ltd.

(23) The mediator comes back with a counter-offer. She has worked hard in the other room focusing on the fact that V Pty Ltd has no assets.

The counter-offer is each party walk away with the \$200,000 security being released to V Pty Ltd.

The offer comes with the message that P Pty Ltd will not be paying any money to V Pty Ltd. The offer is conveyed as their final offer.

## The End Game/Closing the Negotiation

(24) P Pty Ltd has made what it says to be its final offer. What are your options?

You discuss these with the mediator:

- you decide that you should convey an offer of \$500,000 (being a substantial reduction on your previous offer of \$1m) plus release of the security. This figure corresponds to the further amount which P Pty Ltd will spend going to trial. They can pay it to V Pty Ltd and obtain a result today and avoid the risk of not succeeding at trial.
- you are told by the mediator that there is no point making this offer to Mr Green. Mr Jones again becomes very angry as he has been told that Mr Green has authority to settle. The mediator explains that he does have authority – to settle on the basis that each party walk away with the security being released.



- you raise with the mediator the possibility of Mr Jones (with the mediator present) speaking to Mr Smith on the phone to try to resolve the dispute. The mediator has already thought of this and Mr Smith has refused to speak to Mr Jones for two reasons: first he feels that P Pty Ltd paid too much for the business; secondly Mr Jones against the views of Mr Smith had negotiated a restraint of trade period of 12 months under the BSA (applying to him) rather than the 3 years sought by Mr Smith on behalf of P Pty Ltd.
- you end your private session with the mediator on the basis that she will put your offer of \$500,000 to Mr Green but asking that the mediator speak to Mr Smith on the phone in the presence of everyone in the other room to discuss the offer. She tells you that \$500,000 will be too high given Mr Smith's position to date but rationally P Pty Ltd should be prepared to pay something.

- (25) While the mediator is away you look at your options. You had not acted in the negotiation leading to the BSA. You discuss with Mr Jones why it was important to him to negotiate only a 12-month restraint. He tells you that at the time he wanted to keep his options open to possibly going back into the industry but that is no longer something that he wishes to pursue. Mr Smith doesn't know this.
- (26) It occurs to you that Mr Smith's conduct is somewhat unusual. How is he going to report to the board of a publicly listed company that \$500,000 is to be spent on legal fees in all the circumstances. It occurs to you that by offering to increase the restraint period to 3 years will give Mr Smith a face-saving reason to settle. Mr Jones agrees to make this offer.

(27) The mediator returns. Her conversation with Mr Smith did not go well. He will not agree to pay anything. You tell the mediator what Mr Jones is prepared to do about the restraint. She likes this – it is something of apparent worth to P Pty Ltd, but even with this it is her strong view that to link an offer of the extended restraint to the existing \$500,000 will not be well received.

(28) You ask the mediator for advice. You decide to let her know Mr Jones's financial position. The mediator goes away for some time and then returns informing you that she will be making a mediator's bid as follows:

- the restraint be extended from 12 months to 3 years
- P Pty Ltd paying V Pty Ltd \$400,000. This she will sell on the basis that it is the amount that V Pty Ltd has spent on legal fees – i.e., a net zero result plus the pain of the concession in respect of the restraint period
- the release of the \$200,000 security
- subject to a deed of settlement
- the mediator's bid to remain open for 7 days

The mediator explains that it is her strong view that Mr Smith will not be changing his mind today. The bid needs to give P Pty Ltd enough time to properly consider whether the offer of an extended restraint changes its position. Further the mediator explains that in her view any settlement approved by Mr Smith will have to be a settlement on terms proposed by him. Hence her bid is for a payment of \$400,000 but made anticipating that Mr Smith might come back with a lower figure.

- any rejection of the bid before the 7 days expires does not cancel it i.e., a party can change its mind and accept the bid at any time until it expires. The mediator explains that she expects Mr Smith to reject it at least initially. She is not confident, but she feels there is some chance that Mr Smith (or those above him in management) will settle if given time.

(29) The mediator makes the mediator's bid and the mediation is adjourned for 7 days.

# **NORTHBANK**

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