

## EVALUATIVE MEDIATION – MY EXPERIENCE

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### Introduction

As a UK trained and experienced mediator with Quantity Surveying experience and having done around 70 commercial mediations, I had always used facilitative methods to obtain agreements, having been trained that way.

In facilitative mediation, the mediator structures a process to assist the parties to reach a mutually agreeable resolution. The mediator asks questions; validates the parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analysing options for resolution.

However, for one of those 70 mediations, I “came off the fence” and became evaluative, because it was the right thing to do at that time. Here, I will set out the case before me and how it progressed until it was resolved finally.

### Background

The dispute was between a retired couple and their builder. The couple thought they were getting a retirement dream home, but half way through, they only had a shell and many problems. The husband had sacked the architect and was managing the work; the wife was quietly making changes without telling the husband and the builder was not getting paid. As a consequence, the builder stopped work and shut down the site works, some 6 months earlier to the mediation. The dispute was about how much the builder was owed so that the couple could get a new builder to take over the site and complete the work.

The important thing to keep in mind was that the husband was critically ill; so much so that he was on oxygen and needed replacement lungs, an operation which he underwent some 2 months later, after the mediation. The mediation was held at their house as a consequence of the husband's condition as all his oxygen equipment was there.

## **The Mediation**

We started as per normal (i.e. facilitating); a joint opening session at 9.00am followed by several private caucuses and at around 4.30pm, I brought the parties together and we ran through the account. While we were discussing the various disputed items (and associated costs) and the parties were making their points, I quietly wrote down what I thought was a reasonable settlement figure for each item. When we finished that session, I held one more private caucus with each party to obtain their views. It was then that I realized that a facilitative approach would not work because in spite of discussing the pros and cons of settling/not settling, neither party was willing to compromise.

A key issue for me was that while the husband was very stubborn and would not compromise, his wife, who had been fairly quiet throughout, was more concerned about her husband's health. He could not see that she wanted to settle, because if there was no agreement she may have a court case (with the builder) to worry about as well as his deteriorating health condition. To enable an agreement to be reached, I decided to do something I had never done before as a mediator.

## **The (Evaluative) Approach**

Evaluative mediation is where the mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues.

There are variations to the evaluative approach and I decided to try one I had heard about in a lecture some two weeks earlier.

When we had completed the account discussions, I had arrived at a figure that I thought was appropriate and fair. I put this figure in an envelope. I called the parties' lawyers together and after explaining my reasons for taking this action and setting out some ground rules, I suggested that they went back to their respective parties and discussed their best offer. The idea was that whoever was closest to my figure was to be the sum we would settle at. The lawyers agreed to this proposal as a way forward.

Both lawyers came back and wishing to alter the already agreed ground rules, one wanted to know what my figure was. After a brief discussion with both lawyers, I gave the figure to them and they went away. The builder's lawyer came back and said ok, and, after another discussion between the couple and their lawyer, there was an agreement which was subsequently drafted and signed.

## **Conclusion**

Having done 70 commercial mediations, this was the first one in which I really felt I had made a difference and the one that gave me the most pleasure. For me, the relief on the wife's

face was all the feedback I needed. However, the feedback that came back was appreciated.....

*“... my client was pleased.... Revolutionary method to get the agreement but a drastic method was needed and it worked well...”.*

Having acted in an evaluative way now, I would do it again, but only if the circumstances warranted it, or if it was requested by both parties.