Mediation for Commercial Clients

Andrew Fraley

Aled: Hi, everyone. My name is Aled Davies, founder of MediatorAcademy.com, home of the hungry and passionate mediator and a place where new and aspiring mediators come and listen to experienced mediators from around the world tell their story about what has helped them become effective and successful at what they do. What you see and hear on Mediator Academy isn’t something you’d find on a mediation training course. Much of your growth and much of your development will come from experience, and this is what my guests bring. At the very least, you will leave this interview with some clear, actionable steps that you can take to move a step closer to achieving what you want to achieve in this field, improving your effectiveness and being more successful.

I want you to be as inspired as I am after every interview so that you’ll take at least one actionable step. Maybe make a change a week and build your own little success story. Maybe then you’ll come back on to Mediator Academy and tell your story to my audience. You know the drill. The big question for today’s interview is this: Why spend all day in a commercial mediation when you can wrap things up in just a few hours without ever needing to bring the parties together in a joint session? Think about that.

When I introduce my guest today as a full-time mediator, I mean it. He conducts about three or four commercial mediations every week, and has done so for quite some time, now. He's one of the pioneers of commercial mediation in the UK and trained as a mediator in the US back in 1989. He was the Founder and Technical and Training Director of ADR Group, and for seven years, he worked developing and building it. Prior to that, he ran his own computer business and a few other things I’m sure he'll mention. "Legal 500" describes him as possibly the UK’s most experienced and prolific mediator. His style and approach are unique and enormously popular. He is described as refreshingly direct, he quickly builds confidence and rapport, and he presses parties for sensible settlement offers early in the process. He mediates a wide range of disputes from professional indemnity claims, personal injury, employment, to shareholder disputes, you name it. He has also designed and developed the Mediated Settlement Conference at the specific request of lawyers as a cost-effective tool to assist resolving disputes using mediation.

It's a real pleasure to welcome Andrew Fraley onto Mediator Academy. Andrew, welcome.
Andrew: Hi, Aled. It sounds as if you were reading a CV, there. I'll put it down on paper somewhere.

Aled: You do roughly three to four commercial mediations a week. I assume that's not 52 weeks of the year, right?

Andrew: Oh, no, no, no. I do about 100 a year, three a week, 30-odd weeks of the year, so I claim I've been semi-retired for the last 16 years, now. I spend as much time in Spain as I can.

Aled: Living the dream.

Andrew: Living the dream, absolutely.

Aled: So, about 100 mediations a year. Let me do the math, then. 100 mediations a year, what, £1,500 a mediation on average?

Andrew: Yep.

Aled: That's an attractive model.

Andrew: It works for me. I added it up a couple weeks ago. Mediation has been good to me. Sure, the first six or seven years were damn hard work. Richard and I were pounding the streets talking to anybody who would listen, and the money was not good, but the last 15 years, I've earned just over two and a half quarter million. I'm quite happy with that. I could live on 150,000 a year. I've got a clerk, Leslie Dockrell, who takes all the incoming phone calls or emails. That leaves me free to do the mediation. It works very well, funnily enough.

Aled: Fantastic. There are a couple of things going around in my mind, two themes based on what we talked about in the pre-interview which I want to explore. One is for the first part of this interview, and the other is for the second. I'm interested in a couple things, first of all, in how you
got to this stage of doing 100 mediations a year, really, living the dream. We had a chat beforehand. Your lifestyle, I've got to say, I would aspire to have a lifestyle like the one that you're leading. It sounds like you're being nourished in every sense of the word, both in terms of the work that you're doing, but also in interests that you have and the traveling that you're doing. They're wonderful experiences. I'm also interested in the process that you've designed.

Let's focus on the process first of all. Help me understand how this model works. I'll be honest. If I've got four mediations in one week, that's four sets of papers to read. They could run into the evening and they could be spread all over the country. I think I'd be living out of a suitcase, eating pot noodles, and sleeping standing up. How do you do it?

Andrew: That's what the job is. I'm a businessman. I'm in a service industry. I have to give my clients what they want. If they want me in Manchester on a Monday and somebody wants me in Truro on a Tuesday because that is what is convenient to them, then that is what they get. If that means leaving home on a Sunday afternoon, flying over to Essex and staying overnight in a Travelodge, that's what you have to do. A lot of mediators seem to think that if they just put "Mediator" outside their door, people will come hammering on it saying, "I'd like a bit of what you've got for sale." Sorry, it doesn't work like that. It doesn't work like that. You have to pound the streets. It took several years to get ADR Group really off the ground and really working.

You talk about the process. It's the process of selling; it's the process of understanding what people want. We've made a great mistake, and I'm as guilty as everybody else in assuming that because I have this wonderful process called mediation, everybody is going to come running up going, "Ooh, ooh, what a wonderful idea! Let's buy into that." They don't. It's such a widespread process. It can be used in [sub-national 07:58] disputes, in neighborhood disputes, in matrimonial, in commercial, and in workplace. People don't associate the word mediation with any one particular market sector.

What I have to do is create a market sector for myself. You mentioned £1,500 per mediation. Absolutely, that's my market. I deal with cases, probably I haven't done one more than £5 million for ten years. Think about it. If you've got a £100 million dispute, A, there aren't very many of them each year, and you're not going to be using a mediator who is going to be charging £1,500. The ratio of cost to value of dispute is proportionate. If you've got a £100 million dispute, you want a mediator who's going to charge you 40, 50, £60,000 because that's the perceived value. At the other end of the scale, with 100 million at one end and disputes worth nothing at the other
end, there are 100,000 cases where that's going to be nothing. Sorry, but today, I'm not going to be spending £1,500 pounds on a dispute that is worth nothing.

What I try to do is look at the whole market and work out where I ought to be positioned within that market. If a solicitor is talking to his client about a mediation, they don't know whether it's going to settle or not. The client is not going to want to spend £5,000 on a process that may or may not work out. £700, that's a different kettle of fish. They're prepared to invest that sort of money for a case worth 20, 30, £40,000. The solicitor will be saying to them that the cost of the mediator, compared to the cost of the education, is a good value. You really have to think as a business, who am I aiming this at? What is it they want to buy into? Just because I think I've got something I've got something wonderful to sell doesn't mean they want to buy into it.

This whole idea of the Mediated Settlement Conference came about because in '97 when I came back from Australia. There were really only two major competitors in the field at that time, CEDR and the AVR group. To set some distance between me and them, I started out asking the regular users of mediation, the solicitors, the insurance companies, what they liked and what they disliked about mediations. What they liked was the fact that they got settlements, because happy clients tend to pay their bills on time, insurers who close the file and close the file quickly. What they didn't like was sitting around for eight, nine, ten hours with insurance stuff. We could be dealing with five, six, seven, eight cases in the same time.

What I'd also worked out is that the opening session, again, solicitors told me they don't like opening sessions. In two-party cases, they know what the case is about. It seemed to them to be a waste of time and usually causes more problems than it solved because it led to positional arguments across the table. I thought, "Well, what would happen if I took out the mandatory joint session and actually asked people if they wanted one?" I began to find that no, they didn't want one.

Aled: Let me just pause there for a moment. I'm pausing there for a moment because I know I could go and make a cup of tea and you could just do the interview alone, right?

There are a few thoughts going around in my mind, now. I wanted to focus on the commercial side of things in the second half of the interview, but I just want to quickly summarize what you've just said because it's very important. One is thinking of yourself as a businessperson. You have something to sell and in order to make a living and become a full-time mediator, you need to think differently. I think we know that. What you've also done is think about the specific market
that you could maximize your chances of being successful in. In the past, and I've done a number of interviews now, there are a number of different ways you can segment the market.

You can segment the market by industry sector, I suppose, by size of company, by type of company, or by type of organization. It's interesting, the way you've segmented it, actually. Thinking about the £10 million, the £100 million cases, there aren't that many. Therefore, you'd need to be charging, as you said, 40 or £50,000 for a case. I imagine it's a far more competitive market to get those rare cases, whereas if you've gone for volume... What's the sweet spot where there's enough volume for you to be able to not necessarily guarantee, because you said you've got to hit the streets and talk to people, but where you can certainly maximize your chances, be competitive, and stay busy?

And, you've gone looking specifically at what customers like and what customers dislike about what they're currently experiencing in terms of mediation. You've come up with something that meets their needs. Is that a fairly...

Andrew: Yeah.

Aled: Okay. I've got a million and one question to delve into that side of things because I think there are lots, lots more nuggets of useful information in there which I'll come back to. I want to come to the Mediated Settlement Conference itself. In a nutshell, Andrew, what does it look like? What is it?

Andrew: It's what it says it is. It's a mediated settlement conference. The parties are there to settle. This is a conference aimed at settlement. If you define mediation as managed negotiation, as mediator, I am simply the manager of their negotiations because for some reason, they can't do it face to face. I think of myself as a taxi driver. When they get into my cab, what do I want to know? I want to know where they want to go. I don't care how they got to where they are. I just want to know, where do you want to go?

When I know where they want to go, where they want to end up, in other words, what outcome they’re looking for, then I can backtrack to where they are and ask the question, what’s the most efficient way of getting for you what you say you want? It really is as simple as that. Just like a taxi driver, you say, "Where do you want to go?" "London." "Oh, no, no, you don't want to go there,
that's a dreadful place." You can't do that. You just say, "Oh, which route do you want to take, the pretty route, the quick route, the short route, or the expensive route?" There are different ways of getting to the outcome.

The first thing I ask at the mediation, it really is the very first question, I look a client straight in the eye and say, "Damn silly question, I know. What would you like from today?" Depending on the answer will depend on how the mediation moves forward. If that would flush out at that point whether it's a single issue, "I just want money," in which case the next question is, how much? What range are we looking at? If it's more than that, if it's apology for insurance, it's then I will start thinking, "Right, maybe a joint session of some sort at some point is going to be needed in the mix." Until I know what the parties are trying to achieve, I really can't help them.

Some mediations are over very quickly. The quickest one I've settled has been 40 minutes. Normally, I know within about an hour to an hour and a half whether the case is going to settle or not. Frankly, I call it as it is. If you've got a gap of £100,000 between the parties and only 10,000 more to spend go trial, the very dynamic of spending 10,000 to win 100,000 for the plaintiff or spending 10,000 to save a £100,000 hit by an insurer, they're going to be going to trial. What I can do is flag that very early on and let them make an informed decision. Do we continue negotiating or do we call it off?

Aled: How long are these Mediated Settling Conferences, typically?

Andrew: Three hours.

Aled: It's a three-hour meeting.

Andrew: Three or four hours. Some of them go longer. If they're being productive... Again, it's about marketing of the product. 99% of my work is referral. People are coming back to me again and again and again because they know I have a reputation for not lining my [cash box 19:35] at their expense. They pay for an initial three hours. If they haven't settled by the three hours, I simply ask them the question, "Folks, do you want to go on and try and settle this? I'm happy to stay here all day and try and help you. It's your decision."
The very fact that I flag that at the three-hour point tends, if they weren't already negotiating, to focus them back on what it is there, or why they're here to try and do something. There isn't a mediator alive who won't tell you, "I can't understand it. Nothing happens until the last half hour." Fine. Have the last half hour first, and see how you get on. The problem with that "nothing happens until the last half hour" is nobody knows when the last half hour is going to be. Eight hours into the mediation? Nine hours into the mediation? 17 hours into the mediation? Come on.

As mediators, we need to make the process deductive. So many mediators seem to sit around just saying, "Well, tell me about the issues. Explain to me why that's important." Yes, it might be in certain cases, but not in all of them. To gaily apply this one size fits all, and "I, as mediator, need to go through my chattels with A, B, C, D etc. and then that fits that." The more experience you get, you can realize, start at A, or for arguments sake I could shoot straight through to Y. Whoom, case settled.

Aled: Do you have any contact with the parties before the day?

Andrew: Not normally, but because a lot of my work is referral, the solicitors already know me. What they'll do is simply email me a position statement if they want to, or a copy of the pleadings if they want to. Again, because I know my role is manager of their negotiation, I just need to ask them, "What do you want, chaps?" at the beginning. I don't need to spend hours preparing and going through every piece of paper. That's not my role. They know what's in that pile and they will be able to pull out the bullet points that they will need for me if they need them. A lot of solicitors of some services do still send big files, but that's for their own uphill battle and that of their client, so that they can legitimately say to the client, "I have sent the mediator all the files." It's clients who will be thinking, "I hope this mediator knows what this case is all about." I've changed the game by asking right at the beginning, "What do you want from today? It seems like you might know, but what do you want by 12 o'clock that you haven't got now?" It's a very powerful question.

Aled: You do that independent, separately with the party, is that right?

Andrew: Yes. What I do is I tend to get to a mediation about an hour early so that when they first see me, I'm not running around like a blast fly, I'm cool, calm, collected, smiles on my face. I'm there to welcome them. I am a guest at their dispute, but I am the host of their day. I am there to welcome them, to take them down to the corridor, to sit them in their rooms, to pour them a cup.
of coffee, and to show them where the toilets are. In that casually walking down the corridor, I start what I call my "me, too" brief, which is, "Is this the first mediation for you? I can understand why." And then, I explain to them that this is their day, not mine. I'm not a judge, I'm not an arbitrator, I'm not here to tell them what to do, and I'm not going to give advice or opinions. Obviously, we know whose role that is, don’t we. Solicitors' professional advisors are there to give exactly that, professional advice. It's the client that gets to make an informed decision.

At that point, I ask them how they would like to do this. Do we need to start with a joint session or can I have a private five minutes with you first and then take you on the most efficient use of the time? If I'm feeling such a desire with the one group, I normally say, "Yes, five minutes, that will be fast." I explain confidentiality, and the meet and greet has taken less than two minutes to explain things. I'll sit them down and I'll go back and wait in Reception until the other side aligns. That's it. At the appointed hour, 10 o'clock, 11 o'clock, 10:30, whatever, I'll knock on the door with my pad and a blank sheet of paper, smile sweetly at the client, and say, "Now this is to let me know, what would you like from today?" I let them tell me what they want, and then I say, "I've got a couple of technical questions," that I've made. In terms of the solicitor, and then the technical question come my way, what are their costs to date if we don't settle this? Realistically, how long before it would definitely be brought to the judge? From their experience, how many days of this pay for trial, and what all for that's going to be costs? Then, how is the case being funded? Is it finally funded out of the client’s pocket or is it a CFA? Is it a legal expense insurer?

Once I know what the technical costs are, if they're looking for money and they've given me a range as to what they would like to achieve, £100,000, either they’d be prepared to accept, say 75,000, which I just keep at the back of my mind. When I talk to the other side, I ask them at what level they want to try and get this settled today. If I hear somewhere between ten and 50, then mentally, I know that at worst case, we've got a £25,000 gap. Because I know the forward costs, I can equate the forward costs with the gap. If I find the gap is probably 5,000 and they're going to spend 50,000 to get to trial, most of the discussion will be on commercial allowances as opposed to the issues in the case. However, if we find the gap is half a million, then I'm going to need to know what has caused the gap. Is it liability issues? In other words, once I feel a 90/10 chance of winning for their case and the other side has also given 90/10 for their chance of winning, is it causation issues? Is it quantum issues?

Quite often in clinical negligence cases where, for instance, what you'll find is a gap of £100,000. You then find that the future care is 300,000, and somebody hasn't yet applied for one-third for insurance’s care discount, which magically is 100,000. Oh, golly. That's what's causing the gap. They've actually got their arguments over liability and causation. It's purely a quantum issue.
Aled: When you ask the party, when you do your introduction, "What do you want from today?" do the clients tend to talk? Do the lawyers talk? Do you encourage the clients, the parties themselves, to talk? How does that work?

Andrew: It's just a conversation. I look at the clients...

Aled: I'm asking, Andrew, because sometimes in a commercial mediation, the lawyers want to talk on behalf of the clients.

Andrew: I always look at the client first and ask them what they want. If they are confident, they will tell me straight away. If they are slightly less confident, they will look first to that solicitor and say, "Can I tell him?" The solicitor will say, "Of course you can. This is your day." If they're not confident, when I ask the question, they will say, "Oh, Mr. Jones is going to speak for me." Fine. I look at Mr. Jones and I listen for what Mr. Jones is saying. Then, I look back at the client and say, "So, that's it? Nothing more?" At that point, they will either add a little bit more if there is, or they'll say, "No, I'm perfectly comfortable with that." Fine.

I can only deal with the cards that are dealt me on the day. What I can't do is try and change what is actually dealt. If I've got a client that won't speak, I can't force them to do it. Sure, over a period of time and as the rapport goes up, that dynamic may well change and quite often does. They will start by saying, "Mr. Jones is going to speak for me." Three-quarters of an hour later, Mr. Jones has been totally sidelined and the client has taken over completely. That's just the way the whole thing moves forth.

Aled: I did an interview recently on transformative mediation. Your model, your approach seems to me to be on the other end of the spectrum.

Andrew: It is completely on the other end of the spectrum. I sell a mediated settlement conference. Parties are there because nine times out of ten, they are already in litigation. Therefore, I have to ask them the question, "What do you want from today?" If they are next-door neighbors with a boundary problem and neither one of them is going to move... Because if one of them said, "Actually, I'm going to move next week," fine, end of problem. We've managed
the situation. If they're not going to move, then I know that like it or not, they're probably going to have to communicate with each other at some point in the future in some way. What I'm going to have to do over the period of the next couple of hours is try and create or help them develop the strategy that's going to allow that to happen.

What I can't do is, within the framework that they and their solicitors have set up, get them to change. Transformative mediation is perfectly helpful and it's a wonderful process, but it's not what I do. This, I think, is part of the problem with mediation. Because it can be applied in so many different areas and because each one is valid, there's a problem sometimes when one group tries and says another group's mediation is invalid. That, to me, is wrong.

Aled: I can see the value in the process that you're describing. I can see the value for that particular slice of dispute that meet the criteria that you've described. The first question is, how many other people are running mediated settlement conferences? The second question is, where can I go and learn about how to facilitate and become a manager of negotiations?

Andrew: Don't know, don't know, don't know. I don't know the size of the market. What I do know is, as I say, large majority of cases, there was only one case where I previously had not worked with either firm. In something like 70% of cases, I worked with both firms previously. The other 30%, I've worked with one firm and they suggested to the other one that they might want to use me now. Once, at the very beginning, I was told, "Oh, what Fraley does, that's not mediation." Aled, I have no idea whether I am a good, bad, or indifferent mediator. I simply do not know.

What I do know is, whatever it is I am doing seems to be popular because people come back to me again and again and again. I would say this to any young mediator. Not young as in age, but, you know. Take your last ten cases. How many of those ten cases had you worked with the solicitors or clients before? If it's under 50%, sorry, chap, you're doing something wrong. Although the parties may well be saying to you on the day, "Oh, yes, that was very good. Thank you very much," they haven't used you again. Your only real measure of quality is not what people write down on a class room review form, it's whether they ring you up and ask you to do another case.

It can be the only measure, because ours is communication skill. It's like training and accreditation. How the hell do I accredit a communication skill? There will be people looking at this interview saying, "That's absurd." There will be other people who will say, "Fine. Go along. Go
along," and things like that. I never know who I am communicating with well. I can't tell unless they tell me. The only way they can tell me is if they use me again.

As for the size of the market, sorry, I have no idea. As to training courses, there are no training courses that focus on distributive, single-issue, money-only cases. They are all on win-win, integrative bargaining scenario, Fisher and Ury, expand-upon type cases. This is perfectly valid training. There's nothing wrong with the training at all, it's just that I don't believe there are that number of cases in the market. What we might be saying is, "Ah, but there should be. It's such a wonderful process, everybody should be using it. There should be more cases." Yes, but there aren't.

What I've done is flipped it and said, "Okay, well, where are the cases? You've got me going. Let's see if I can tap into that." Look at Martin Plowman over in Ipswich. He now does probably more cases than me at AVF. Alastair Sharp is doing a lot of cases. Good mediators, Phillip Howell-Richardson, Andrew Paton, the names in the industry, Andrew and Jonathan Lloyd Jones. Different markets meet. They are well established, highly-respected lawyers, and I'm damned whether they deal with anything less than that. They certainly have cautious behavior, I'd be very surprised if they do.

Aled: Coming back onto this, it's slightly different, but if the mediated settlement conference is a model that works with the, what was the distributive...

Andrew: It's a negotiation term of art called the Distributive Bargaining System. You'll see it in Fisher and Ury. It puts a negotiation as a continuum, a line. On one end, we've got win-lose, on the other side, you've got the win-win, so that's the line. What they call the win-lose is the Distributive Bargaining System. It's distributing a fixed quantity between two people.

Aled: Fixed-pie mediation.

Andrew: Fixed-pie mediation, exactly. The integrative, or integrated end of the bargain is just a commercial end. The Integrative Bargaining System looks at A, expanding the pie before you start carving it up or looking at it in a different way, and it's the old orange example, the skin and the juice, that commercial end of the market, very much the business end, getting disputed before they are disputes and helping parties expand the business opportunity so it's real win-win.
Aled: Is the win-win an unrealistic ideal for commercial mediation cases that are in litigation?

Andrew: It’s very unlikely to put cases that are in litigation back into win-win because the business relationship has already soured. If you could get in very early, at the point that there is a problem and a problem needs to be solved, because again, that win-win is all about problem solving. It’s the problem-solving agenda. Unfortunately, British business tends to think that it can solve its own problems and it doesn’t need an outsider, thank you very much. It just doesn’t appreciate that. It doesn’t go and talk to its legal team. That’s all we are. It’s just a problem that has been dealt with by a manager. If it isn’t settled, then it gets bounced one level up and one level up, and then somebody bounces it out to the lawyers. If somebody could get hold of the problem at this managerial level and apply problem-solving techniques, then there would be a big market for mediation. I’m not sure that that’s ever really going to come about. We don’t know what we don’t know.

Aled: A question for another time, a concern that I’ve got around the training of mediators is, there seems to be all the Harvard Negotiation Project and that model of win-win being taught everywhere. Actually, it doesn’t seem to be... I’ve interviewed quite a few US mediators. Interestingly, by the way, some of the US mediators I haven’t interviewed yet, but I interviewed Matt Rushton. He’s running...

Andrew: Is he from JAMS?

Aled: Yes, JAMS. He was telling me that there are JAMS mediators in the US earning in excess of three or $4 million US as a fee for one mediation.

Andrew: A question. How many of those cases do they do in a year? When you said to me that I’ve gone for volume, you’re right. I’ve gone for high-volume, low-value cases. The other end of the spectrum is high-value, low-volume cases.

Aled: I was digressing with that because I almost fell off my chair when I heard about that. If I look at the trend of mediation in the US, for example, there’s a definite trend towards evaluative mediation.
Andrew: Evaluative of what?

Aled: What I'm saying is, there doesn't seem to be the ideal model of mediation, the win-win model of mediation, the self-determination. I see it being used in particular types of cases, maybe family mediation, relationship mediation, workplace mediation, matrimonial mediation, and so on, but I don't see it a lot in commercial mediation.

Andrew: I'd go along with that. The interesting thing is, back at, I think around Christmas time, there was a discussion on one of the forums. An American mediator made a comment along the lines of, "My golly, you Brits aren't still using that outdated model, are you?" which is the everybody around the table to start with. It went a long, long time ago in the US. There is also this evaluative mediation, but evaluation on what? If it's evaluation on the content of the case, like, "Sorry, chum, I think you've got a really weak case," because, because, because, if that's what they mean by evaluative, that is totally wrong and should never happen. If it does, the mediator is going to be in big trouble at some point.

However, an evaluation of the process, that's totally different. When somebody says to you, "I'll go in there and tell them if they don't do this, I'll do that." I do feel free to at least ask the question, "Do you think that is going to be helpful in getting this sorted?" Because I ask the technical questions right at the very beginning, the cost of today and the type of trial, I can work out very quickly the cost/benefit ratio for the parties. If I find that by going to trial, they could win 1.5 million and it's only going to cost 15,000 to go to trial, come on, Aled, that's a good deal. I wouldn't mind investing 15,000 to win 1.5 million.

The evaluation of the dynamics of the case are very different from an evaluation of the merits of the case. When people say to me, "Oh, well, I don't like evaluative mediators," provided they are talking about evaluation of the merits, I agree with them 100%. Evaluation of the dynamics, that's something very different.

Aled: That's very interesting. Just coming back to this three-hour mediated settlement conference, that's an interesting... It has got me thinking about the expectations that we unwittingly set for parties when we say, "Okay, it's going to take a day. We're going to spend the morning flushing out the issues and the interests. By lunchtime, we should have gotten an agenda
for the afternoon, then we'll focus on prioritizing the issues, then we'll go through each issue. By late afternoon, you should be in the negotiation phase. By five o'clock, you should be shaking hands." If you set that expectation, that's what people are going to expect. If you say, "By ten o'clock, you'll know whether it's worth staying here or not."

Andrew: Take it back a step. You've neatly gone through all of the phases that a mediator knows or ought to know are going to happen. He has asked the question right at the very beginning, "What do you want from today?" and they tell you, and then you think, "Oh, well, negotiation. So, chaps, I'm interested. How quickly would you like to get into the negotiation phase?" If they say, "Do it right away, if you don't mind." "Really? Let me go and have a chat with the other side. Just a quick question for you. How quickly would you like to get into a negotiation phase?" "Do it right away." "Okay."

Now we know they've jumped because they wanted to do it. We, as the managers, asked the question, "When would you like to do it?" We now know that certain negotiation [tactics 49:06] are going to come into play. Which set of tactics are they going to play? Are they going to play the market-trader model? We start here and we start here, and we inch towards each other in thick or thin slices? Are we going to try the "You show me yours and I'll show you mine," "No, I asked first," "No, you show me yours," when nothing gets put on the table for hours? Are we going to get up a "watch my lips" merchants? "No, Aled, I'll give you one big up, watch my lips." Because we can anticipate the tactics that negotiators use, again, we can check with them. "Which set of negotiation tactics are you most comfortable with?" Again, when you, as mediator, know that, then if the other party says, "No, no, no, I'm not doing that. No, no, no, no. I'm going to give you one figure. One figure." I can answer the question, "The other side, I suspect they're going to do this and this and this. How do you want to play?" "Okay, so what we'll do, we'll give them two figures. It will be the same figure, but we'll give it to them twice." We laugh.

As managers of the efficient process, surely we need to be the ones that can anticipate the phases that they are going to go through and ask them, "Do you want to do this? Do you want it?" If they say yes, "Yes, I want to sit around for eight or nine hours, please. I want to bottom out over the issue, and I want my solicitor who abides by the law, and my accountant who abides by the client's tax position." Fine. It's their negotiation. It's their ball.

Aled: The Mediated Settlement Conference is about settlement, it's about efficiency, and it's about a cost-effective way of...
Andrew: Settlement and efficiency.

Aled: Settlement and efficiency.