I'm A Litigant ... Get Me Out of Here!

KEY TAKEAWAYS

Donna Newman
Stephenson Harwood

- *The outcome of litigation is almost always uncertain.*
- *The prospects of success in a contested case (where there are genuinely opposing views on the merits) are most likely 40-60%.*
- *It is always worth considering "cashing out" or "buying out the risk".*
- *Valuing a claim using a means akin to valuing other financial assets can be a useful tool in considering what a realistic settlement might look like.*

Donna's top tip before signing a settlement agreement:

- *Check the provisions in the settlement agreement on confidentiality. They can be extremely onerous and unworkable from a practical perspective. They are often easy to amend (as amendments are rarely contested) and these amendments can make a real difference to disclosures about the settlement that you need to make down the line for example to auditors etc.*

Karin Melling
ICBC Standard Bank

- *The more complex the institutions involved, the longer it will often take to obtain even the most basic instructions. Factor this into your timings.*
- *Be wary of overplaying your hand: an allegation or threat that one party may be convinced will bring the other to the negotiating table may, in fact, have the opposite effect!*
- *Try to understand the other side: what their position is; what difficulties they may be facing; what outcome they really want (and it may not necessarily be any of the remedies sought in their letter before action or claim form).*
- *Be sensitive to jurisdictional and/or cultural differences in approach to litigation and settlement – you may need to adapt your strategy accordingly.*

Karin's top tip before signing any settlement agreement:

- *Particularly when doing this at the end of a long day's mediation, ensure that the party representatives left actually have the requisite authority to execute the settlement agreement!*

Kate Jackson
Independent Mediators

- *Concede weak points early in a mediation/settlement meeting- it then focuses attention on areas where you are stronger.*
- *The longer you can stay with a rationale for your offers in a mediation negotiation, the better.*

Kate's top tip before signing a settlement agreement:

- Check any tax implications of the settlement- be certain you know who will bear the risk/burden

Julian Cahn
Stephenson Harwood

- *It is never too early to plan for a claim to finish.*
- *Always seek to avoid reaching a situation where your client cannot afford to settle.*
- *In terms of drafting a settlement agreement: if you are the claimant, think about if there are any claims that you don't wish to settle; and if you are a defendant, try to ensure that all claims that can be brought against you have been settled.*

Geoff Carton-Kelly
FRP

- *The importance of managing expectations of your stakeholders (creditors and advisers/funders) when litigating as an office holder to ensure that when you get a offer to settle that you want to accept, you can, and everyone's interests are aligned.*
- *An initial offer to settle does not show weakness.*
- *Retain flexibility as much as possible – redlines are unhelpful but know your genuine bottom line at any settlement level.*

Chris Ross
RPC

- *There is no "right" time to consider settlement, but it is never too early to be thinking about it.*
- *Most cases settle, and exploring ADR is not – or should not be taken to be – a sign of weakness. Getting the first offer in can often "anchor" the debate at your client's end of the range. But if there are concerns about proposing settlement, there are ways that the subject can be introduced under cover of the Court rules.*
- *When drafting the settlement agreement, be very clear on who is giving releases and who has the ability to enforce the agreement: where either party is part of a corporate group, it may be necessary to bind in and/or give the benefit to other entities in the group outside those immediately giving instructions.*