Working with ADR in Family Law

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HOWELLS’ LIST

Outline

- Litigation vs ADR processes
- Emerging trends in Family Law
- Conflict Resolution
- Interest based ADR processes (Harvard Model)
- Ethical consideration with respect to negotiation and mediation

Some leading questions

- what skills do we bring to our negotiating outside the court door or to our role as legal representatives in mediations, conciliations or (those very few) arbitrations in family law?
- are they different skills to those for which we were trained or for our role in adversarial litigation?
- do they require a shift in how we interpret disputes and process dispute resolution?
- are these skills necessarily less adversarial since we are in the shadow of the court?
- will the proposed changes to the family law system demand an extended range of operating styles for lawyers?
- are the ethical standards different in ADR?

Curial Determination

- A judicial officer determines the outcome of the dispute by
- weighing up the admissable evidence
- as adduced through documented and oral evidence
- in the context of the legislation
- and the precedent judicial decisions
- within the rules of the court.

and as well…

- This process is rational, objective and fair irrespective of the litigant's culture, creed or mental state.
- The process is transparent with open court proceedings and reported judgements.
- Highly competent advocates present the evidence on behalf of the litigants and advocate for an outcome based on their instructions and best interests subject to their overarching duty to the court and the administration of justice.
- The judge has a raft of experts to inform the court.

Unfortunately . . .

- There are lots and lots of litigants
- There are very long waits in the courts
- There are not enough Judges
- A lot of litigants don't have great advocates and try to do it themselves
- It costs a lot of money

and so the Attorney-General made the decision to overhaul the Family Law system

Alternate Dispute Resolution (ADR)

Facilitative ADR is generally promoted to be:

- a self determinative process – the parties control the dispute
- private
- cost effective
- timely
- confidential
- based on mutuality and good faith
- the parties seek to achieve an outcome that is mutually satisfactory
- a neutral third party may assist the parties to come to an agreement

ISSUES IN FAMILY LAW

Recent and Proposed Changes

- 9 May 2017 PM Turnbull announced a comprehensive review of the Family Law system with an Issues paper released on 14 March 2018.
- Justice Alstergren was appointed as the Chief Judge of the Federal Circuit Court (October 2017), Deputy Chief Justice of the Family Court (December) and Administrative leader of Appeal Division of the Family Court (March 2018)
- November 2017 Justice Alstergren announces a triage process for outstanding family matters in the FCCA with matters to be sent to mediation.
- Part of the Review is the creation of Parenting Management Hearings designed to simplify family law disputes between self represented litigants. This system will be trialled in the Family Court at Parramatta late in 2018 and later at a second court.
- Arbitration “on the papers” with or without submissions being recommended in some regional courts (eg in Wollongong by Judge Harman)

There is now clear evidence that many of the people who approach the family law system for assistance today have complex support needs, including in relation to family violence and other safety concerns for children, and that these disputes often involve a co-occurrence of risk issues, such as drug and alcohol misuse or mental health concerns. In light of this evidence, the ALRC asks what processes, including alternative dispute resolution models and less adversarial decision-making approaches, might be used to assist families with complex needs, as well as how support could be best provided to the parties involved in these matters. The ALRC also asks how misuse of process in family law matters might be prevented.

Concerns about intersecting jurisdictions – Family Violence and Children's Court Family jurisdiction

Family Law Act 1975 – pre trial processes

Part II Non-Court based family services

Division 1 – accreditation of family counsellors, family dispute reolution practitioners and other family service providers

Division 2 – Family Counselling

Division 3 – Family Dispute Resolution

Section 10F Definition of family dispute resolution

Family dispute resolution is a process (other than a judicial process):

(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and

(b) in which the practitioner is independent of all of the parties involved in the process.

Division 4 - Arbitration *(non-curial determination)*

Part III Family Consultants

Part IIIA Obligation to inform people about non-Court based Family Services and Processes

Part III B Court's Powers in relation to Court and Non-Court Based Family Services

CONFLICT RESOLUTION

A different belief system

Conflict can be positive. When conflict is resolved into action (overt) it can bring about positive social change and evolution. Conflict can facilitate the resolution of the legitimate interests of individuals or cultural groups within society. Similarly overt conflict can assist individuals in negotiating rights and interests within family and work structures.

Conflict can be approached and resolved in different ways

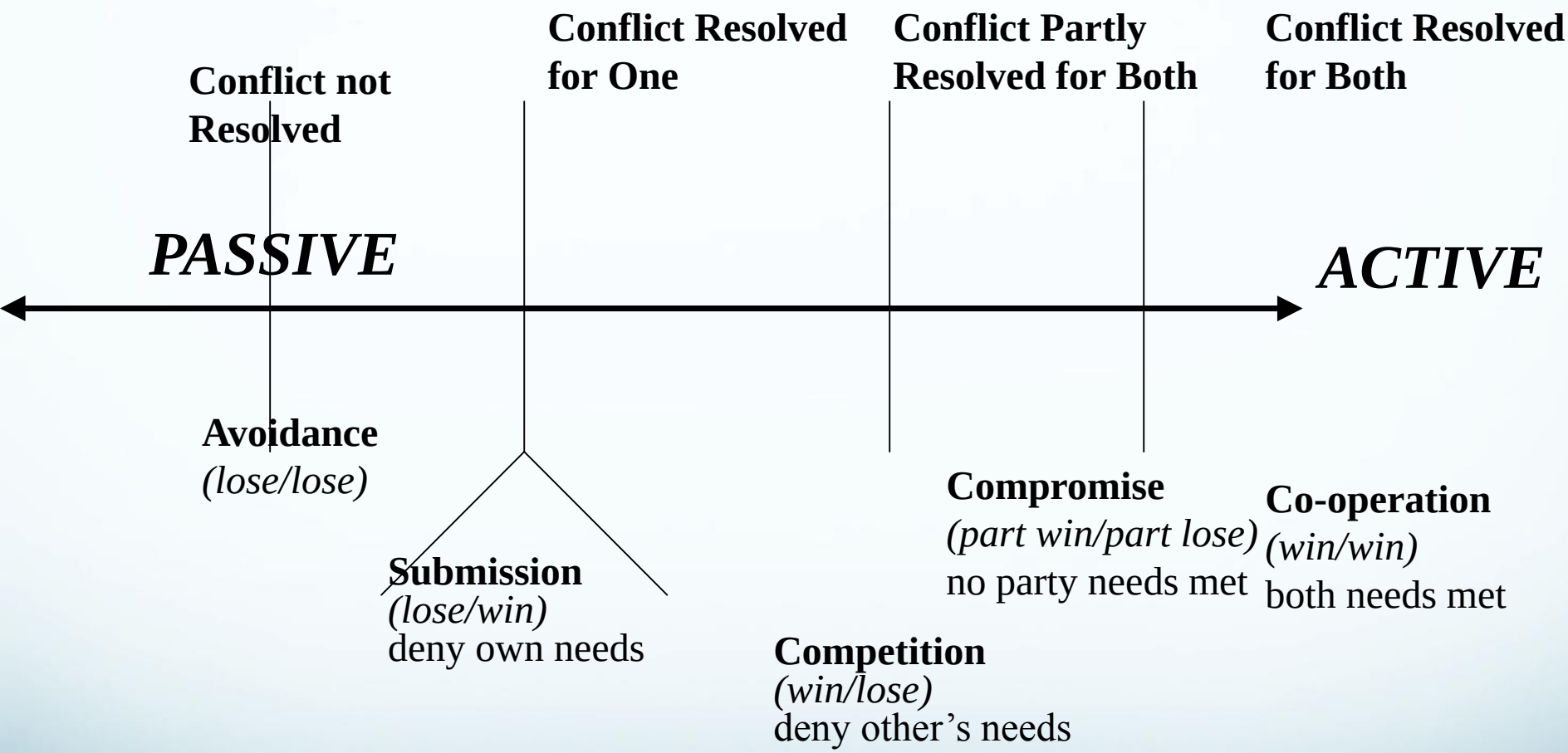
My approach to managing conflict – whether in a formal or informal setting – is always based on open, honest and empathic engagement, through what is described as a transformative or emergent methodology. This approach encourages individuals and organisations to gain clarity about their objectives, their goals and their aspirations. What do they see as blockers to achieving them? What are the critical things needed to break through an impasse? This approach enables peoples to tell their story in a safe and supported environment and to become clear about their choices. Ultimately it's about people feeling empowered to make the right choices for them and being able to fully engage with others in conflict."

Jim Cyngler

Understanding Disputes

- Conflict as a positive or negative
- Motivations for conflict
  - Perception
  - Feelings
  - Actions
- Identifying motivations of the conflict/dispute
- Linking interventions/solutions to motivations

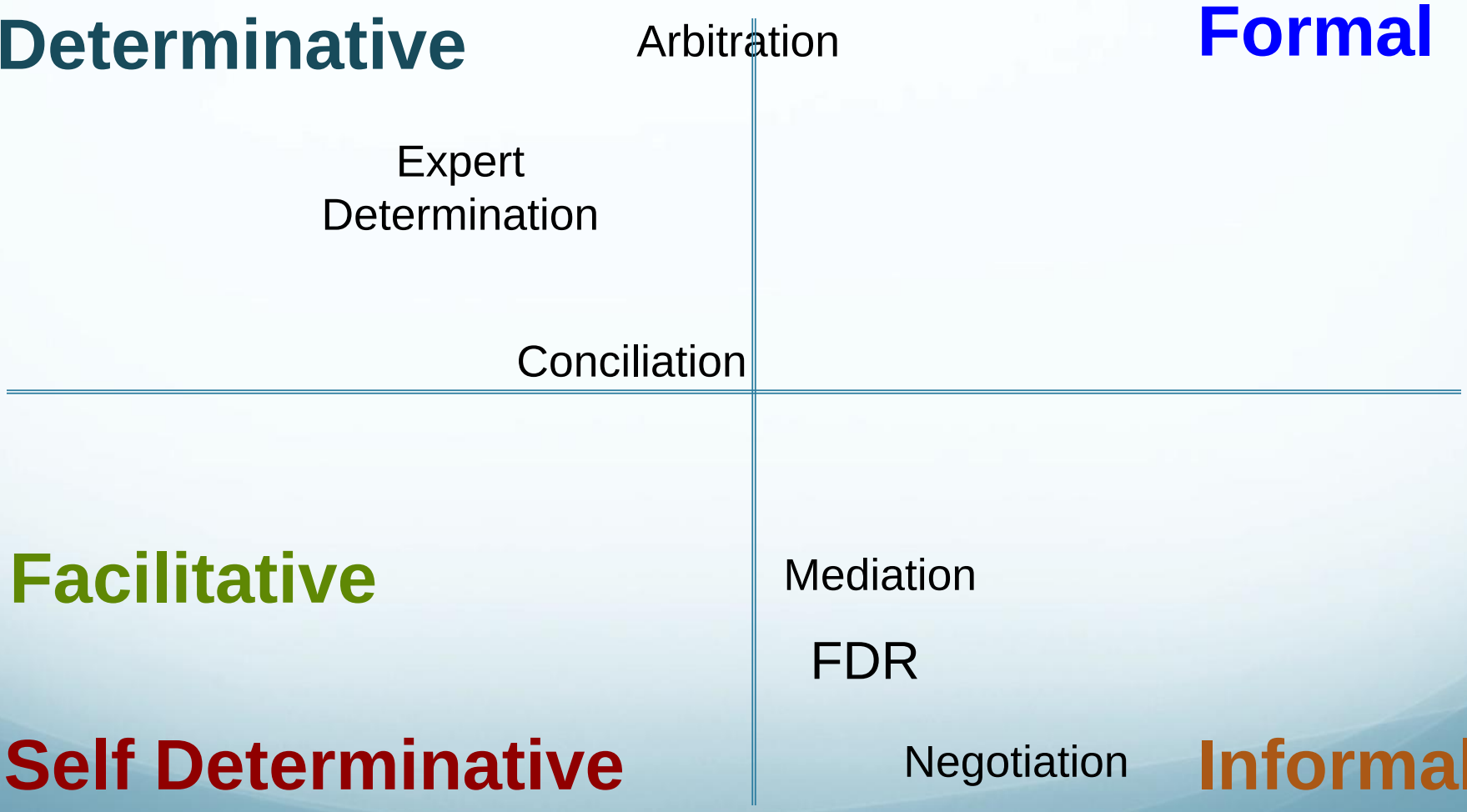
Approaches to Resolving Conflict



Kenneth Thomas (1983)

ADR PROCESSES

Types of ADR


Determinative
Arbitration
Formal
Expert
Determination
Conciliation
Facilitative
Mediation
FDR
Self Determinative
Negotiation
Informal

Negotiation

A verbal negotiation between two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and in which they seek as far as possible to preserve their own interests but to adjust their views and positions in a joint effort to achieve an agreement.

Models of Negotiation

- Adversarial Negotiations
- Integrative Negotiations
- Distributive Negotiations
- Principled Negotiations*

(*Roger Fisher and William Ury: *Getting to Yes)*

Mediation

- Mediation is a process where parties to a dispute, with the assistance of a neutral third party, identify the options in a dispute, consider alternatives and endeavour to reach an agreement that encompasses the underlying needs and interests of the parties.
- Shuttle mediation involves the parties not meeting face to face but being located in different rooms while the mediator shuttles between them.

Elements of Mediation

- Use of a *neutral* facilitator - consensual
- Co-operative rather than competitive
- Self-determinative
- Confidential
- Private and Cost effective
- Mediator in control of process and relationship – rather than content
- Parties in control of content and decision
- Moves parties from past to the future

Family Dispute Resolution

- seeks to be non-judgemental (separate people from the problem)
- concerned firstly with rights of the child
- safety for the parties and the child is paramount
- suspends belief (or disbelief) and accepts stories at face value
- Is less interventionist that some other forms of mediation
- Is a court court-sanctioned gateway to litigation
- FDRPs are nationally registered and not necessarily legally trained
- the centres are well supported financially and well connected to other agencies

Collaborative Practice

- Involves a multi-disciplinary approach to the conflict resolution of family law parties
- May involve lawyers, social workers, psychologists, accountants/financial planners who work together to provide a holistic approach to family disputes
- It supports consensual rather than adversarial decision making
- It has been a growing field in Australia since at least 2006 when there was a report by the Family Law Council to the AG
- https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/CollaborativeLaw
- In part collaborative decision making underpins the Parenting Management Hearings (which is curial not consensual)
- Many lawyers (including Chief Justice Pascoe) are “greatly troubled” by this move to involve psychologist and social workers in decision-making :

With respect these panel member will not have the knowledge or the expertise to determine these matters in a way that is consistent with established jurisprudence by the binding decisions being made by social workers and psychologists” in a legal context.

Features of Principled Negotiation/ Mediation

- Interests not positions (needs, motivations & concerns as outlined in parties' statements)
- Win/win not win/lose
- Clarity about the agenda or issues
- Options
- Alternatives (BATNA /WATNA)
- Using Objective Criteria
- Communication
- Relationship (separate from dispute)

Commitment (and workability)

The Process

- Intake processes
- Introduction (mediator)
- Party statements and mediator summaries
- Creating an Agenda
- Exploratory negotiation
- Individual sessions
- Brainstorming options
- Negotiating outcomes
- Agreement
- Implementation and Review

What to expect from a mediator

- Neutrality
- Procedural fairness
- Control of the process
- Assists parties to communicate and see both points of view
- Mediator is not determinative
- Checks workability – reality testing
- Facilitates parties' agreement

How to assist negotiation/mediation

- Negotiate in good faith
- Be co-operative rather than competitive
- Negotiate creatively
- If the matter stalls work with mediator to find new directions
- Help your client identify their interests and alternatives - their BATNA and WATNA
- Manage time – don’t settle too quickly
- Have models for settlement on hand – be ready to write up agreements

Working with Difficult or High Conflict People Types of Personality Disorders

- Borderline
- Narcissistic
- Anti-social
- Histrionic

Bill Eddy (2008) *High Conflict People*

Ethical considerations

Pressure to settle: what are our responsibilities in representing our clients?

Studer v Boettcher [2000] NSWCA 263

Mr Studer claimed he had 'capitulated' and agreed to settle a case after 10 hours of mediation; he was "like a zombie. He sued his solicitor who he claimed had exerted undue and improper pressure.

Per Fitzgerald JA

The lawyer is entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempt at persuasion undertaken by the lawyer undertaken by the lawyer, must be devoid of self-interest.

Per Sheller JA (agreed) "it is never the function of the legal advisor to coerce the client into settlement

Goddard Elliot (a firm)v Fritsch [2012] VSC 87

Mr Fritsch compromised his family law claim outside the door of the Family Court. When his lawyer sued for fees, Mr fritsch counterclaimed for damages against his solicitor and counsel. He claimed he was not in a fit state mentally to give instructions and he had been coerced into compromise. He had been diagnosed with depression and Post traumatic stress disorder

“A great deal will turn on th capacity of the client” (Studer)

Bell J found in the circumstances of the case Mr Fritsch had not been competent and his lawyers had been negligent.

(lawyers conduct was covered by advocate’s immunity – which would not apply with mediation)

Negotiation in Good Faith

Participation “in good faith” is central to negotiation and mediation:

‘Lawyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute’

(Law Council of Australia ‘Guidelines for Lawyers in Mediations’ 2.2)

What does it mean to act in ‘good faith’

How it is to be assessed? By conduct or intention?

How can one assess if another’s participation genuine?

United Group Rail Services v Rail Corporation [2009] NSWCA 177

Per Allsop P :

[The parties] “have promised to undertake negotiations in a genuine and good faith manner… As a matter of language, the phrase “genuine and good faith” in this context needs little explication: it connotes an honest and genuine approach to the task.”

“These are not empty obligations; nor do they represent empty rhetoric.”

“The business people here chose words to describe the kind of negotiations they wanted to undertake, “genuine and good faith negotiations”, meaning here honest and genuine with a fidelity to the bargain. That should be enforced.”

Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268

The Court, again in a judgement delivered by Allsop P, summarised the case law;

"The usual content of the obligation of good faith … is as follows:
(a) obligations to act honestly and with a fidelity to the bargain;
(b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
(c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

Duties to Other Parties

Legal Services Commissioner v Mullins [2006] LPT 012 is authority for the proposition that allowing the other party to continue to rely on information (at a mediation) which has been previously provided by your client which is no longer accurate, can constitute misleading or deceptive conduct as well as professional misconduct.

Mr Mullins is a barrister in Queensland. His client Mr White had been rendered quadriplegic in a car accident. The action was for damages against Suncorp Metway which was to be mediated.

Three days before mediation Mr White disclosed to Mr Mullins and Mr Garrett his instructing solicitor that he was about to undertake chemotherapy treatment

Mr Mullins advice was that Mr White was not obliged to disclose the diagnosis.

The claim settled but had Suncorp been informed of the cancer facts they would not have agreed to the compromise

Misconduct was found to warrant public reprimand and $20,000 fine

Legal Services Commissioner v Garrett [2009] LPT 12

Several years later the Qld Legal Services Commissioner followed up its success against Mr Mullins and brought proceedings against Mr Garret arising out of his role as Mr White's solicitor in the same mediation.

Mr Mullins had provided written advice to Mr Goddrad which the latter wrongly accepted as correct.

The misconduct was also found to warrant a public reprimand and $15,000 fine.

LPCC v Fleming [2006] WASAT 352

The Court found:

Where the client's instructions run counter to normal ethical principles and a practitioner's own personal standards, he or she should decline to act on those instructions.

A practitioner is not a mere agent or mouthpiece for his client, but a professional exercising independent judgement and providing independent advice.

Practitioners who engage in misleading conduct or sharp practice can hardly expect to receive the trust and respect of their colleagues (much less of the Court). Yet such trust and respect is a fundamental requirement of a practitioner's practice if he or she is properly to play his or her part in the administration of justice and adequately to serve the interests of his or her client.

In seeking to settle a matter pursuant to his client's instructions or the procedures of the Court, the practitioner, in some senses, gives up his "adversary" role in favour of a "negotiating" role.

Williams & Ors v Commonwealth Bank of Australia [1999] NSWCA 345 – Appeal before Supreme Court of Appeal

A dispute rose out of CBA's attempts to enforce a settlement reached some years earlier at a mediation.

The original mediation had been ordered in the course of previous litigation between a farming family and its banker. In preparation for that mediation the bank provided a statement by the relevant branch manager Mr Neale. The statement was unsigned as were a number of the other statements provided. What was not disclosed was that Mr.Neale had been asked to sign the statement but had refused.

The Williams family alleged that they had greatly compromised that earlier claim at mediation because a number of significant matters important to their claim had not been included in Mr Neale's statement. The question was whether it was misrepresentation.

The court held that the provision of the unsigned statement of Mr. Neale was …' capable of establishing the making by the bank of each of the representations on which the Williams' rely'.

Is conduct and communication in mediation (and negotiation) confidential?

It will depend on the source conferring the confidentiality: eg *The Family Law Act 1975* Sections 10 H and 10J

But generally YES.

The common law position is outlined in ***Farm Assist Limited (In Liquidation) v Secretary of State Environment, Food and Rural Affairs [2009]*** EWHC 1102, a UK decision of the High Court – Queens Bench in 2009. In that matter an agreement had been executed at mediation some 6 years previously. One party then sought to have it set aside due to it having been entered into under 'economic duress'. At an interlocutory stage, one of the parties sought to have the mediator called to give evidence, and the other party agreed. The mediator resisted this application, relying on the terms of the mediation agreement which stated that she could not be called as a witness in any future litigation…in relation to the dispute. The Court said:

"Confidentiality: even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality ***but where it is in the interests of justice for evidence to be given of confidential matters***, the Courts will order that evidence to be given or produced."

Early Management of Disputes

a) Try to draft agreements documents and letters in a manner that is clear, not open to multiple interpretation, will not incite legal action and includes dispute resolution clauses.

b) Educate clients about dispute resolution and the realities of litigation.

c) Identify potential clients who are HCP and avoid them leading you into unnecessary disputes.

d) Take time to analyse disputes and identify interest and needs as well as actions leading to the dispute.

e) Work with legal and ADR colleagues in a less adversarial way.

f) Approach a negotiation (or mediation) in a structured way and ensure that the agreement has been reality tested.

g) Encourage your clients to think about the other party's motivations and needs.

h) Understand your ethical obligations