COMMENTARY

To those of you who attended the mediation seminar at Level Twenty Seven Chambers last week: thank you. I enjoyed giving it; and I hope you enjoyed participating; though, next time, we should have more of a chat afterwards.

So, what were the points I sought to make?

First, **we need to recognise and distinguish between our instinctive and analytical thought processes**. The former is fast, instinctive; sometimes emotional and lazy; and often employs heuristics – "a rule of thumb is good enough" approach to problem solving. The latter is slower and more calculating; it also expends more energy and, so, undertakes a harder approach to problem solving.

For a more elaborate analysis – and an interesting read – have a look at "Thinking, Fast and Slow" by Professor Daniel Kahneman, a Nobel prize winning economist.

Why is it important, in the mediation atmospheric, to recognise this distinction? Well, the best answer requires an understanding of the immediate distinction between litigation and mediation: litigation has the luxury of time – by which I mean that if an action were to be instituted today, it would – in the usual case – take two years to come on for trial in the Supreme Court. And there is ample time for an analytical, rather than a merely instinctive, approach to the case. That cannot be said in the case of a mediation – which calls for a resolution within, say, eight hours or so on the day.

Eight hours is not a lot of time to persuade the parties to abandon their right to have a judge determine the merits; and, instead, to persuade a plaintiff to take a discount and a defendant to pay a premium (as each would see it) for certainty. So, as timing is of the essence in a mediation, it is critical to recognise as soon as possible what is instinctive thinking and what is analytical thinking – including in ourselves – because the former may lead us astray. And if your opponent is thinking instinctively, that may be a shortcoming which can work to your advantage in the mediation. On the other hand, it may work to the disadvantage of a reasoned outcome. But, the sooner we know this the better.

The point is to ensure that our thinking process has facilitated – and not hindered – a proper assessment of the risk inherent in the litigation if it were to continue. And it is an important function of the mediator to bring about the former and disavow the latter – including by challenging the assumptions to which the parties may be wedded. And there can be many reasons why our thought processes fail, including because of a failure to recognise that a literal truth can, nonetheless, be misleading due to the false assumption on which it is premised. And I cited an easy example: "Rafa Nadal has never beaten me in tennis." Whereas our instinctive brain will respond by saying "wow, you must be really good"; our analytical brain will ask the relevant question: "have you two ever played?" – to which the answer is "no."

Another reason for challenging the assumptions on which we act is because of the "halo" effect we attribute to some people; and this may be due to the "aura" that surrounds those people for a variety of reasons: think of our friends or those who we know to be particularly talented; but

think, also, of JFK during his debates with Nixon in the lead-up to the 1960 Presidential election. Kennedy was young, intelligent, charismatic and good looking; and from a family which was one of the wealthiest in the country. Nixon, on the other hand, appeared to sweat under the studio lights, was slightly unkempt and had a permanent 5 o'clock shadow. Evidently, the live studio and TV audiences thought JFK was a clear winner; whereas the radio listeners gave the debate to Nixon. The halo effect in operation? Very likely. And its effect may also extend to the charismatic psychopath – think of Hannibal Lecter – who, although having a compelling aura, is not an ideal role model: his agenda is likely to be very different.

So, remember to challenge the assumptions on which we operate – otherwise we may suffer the fate of Inspector Clouseau in The Pink Panther Strikes Again: "That is not my dog."

Secondly, **we need to recognise what a mediation actually involves**; and, to do that, we need to flick the switch out of litigation mode and into mediation mode. Mediation:

(i) most importantly calls for a proper assessment of the risks inherent in the litigation *for all parties*. And those risks might include:

- witnesses not coming up to proof – whether as a consequence of making unexpected concessions or stage fright;
- the late disclosure of previously unseen documents which puts a different complexion on the case;
- the judge – perhaps unfairly – taking an adverse view of a witness;

(ii) is not a determination on the merits - although the merits can intrude to an extent. To what extent, experience and judgment will determine;

(iii) is not merely a day out of court, away from the tribulations of admissible evidence and the foibles of judges;

(iv) is, in my view, no place for an attitude that says "Ah, if it settles, well and good", as though a settlement would be entirely inadvertent.

Instead, mediation should be a collaboration between the mediator, the practitioners and the clients in order to maximise the prospects of settling. And that involves preparation – hopefully for a good cause.

So, begin by choosing your mediator carefully; and, I suggest, incline towards someone who will read the material and make a contribution. And do not assume that the "badge" of a retired judge will answer all of your mediation prayers: there are too many illustrations of retired judges:

(i) not being prepared to do the necessary work, including by getting into the arena – which is an alien concept to a judge;

(ii) opining on the merits in joint session, even to the extent of identifying which party will win, and which party will lose, the litigation. In such a case, the mediation is over.

Let me identify some steps which can be very helpful:

(i) a conference between the mediator, the practitioners and the parties well in advance of the mediation – not merely on the day. This provides the parties with an opportunity to inform the mediator of relevant matters. It also provides the mediator with an opportunity to assess the players and their personalities. And knowledge provides the mediator with ammunition and a capacity to influence an outcome. Conferring in advance is a highly valuable tool;

(ii) providing position papers, including a "private" position paper "for the mediator's eyes only" if necessary. The latter might identify trigger points on which your opponent is vulnerable, and which may be entirely extraneous to the issues raised on the pleadings. An easy example is where one of the parties has to re-finance within a short period of time and is likely to make an allowance for that imperative in the mediation. Unless the mediator has been made aware of this fact, its capacity to influence is lost.