

## **NEGOTIATION AT THE COAL FACE - DEALING WITH THE CLAIMANTS**

**ADDRESS BY DAVID MARITZ OF MSM LOSS MANAGEMENT TO THE  
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### **INTRODUCTION**

Having considered the implications of implementing the correct strategy in respect of multi - claimant settlements, the next phase is to put the plan into action. This will usually involve the negotiation of compensation settlements with the claimants with the express intention to avoid any further threat of legal action against the defendant.

Historically, negotiation as a tool for settling multi – claimant settlements has been extremely successful in New Zealand. I would like to focus on the various factors that will influence the negotiation strategy, as well as consider the appropriateness of various negotiation techniques. Finally, I would like to give some attention to the reasons why negotiations fail or are difficult to conclude and the options thereafter.

MSM Loss Management has been involved in a number of multi - claimant negotiations during the past four and a half years, both here and in Australia. We have represented claimants in actions against a common defendant as well as acting for the defendant in multi - claimant actions. Consequently, we have experienced negotiation from both sides of the table.

For the purposes of this address, I will be focusing on the position of the defendant in settlement negotiations as that is the position I would expect most you would represent.

In deciding whom best to conduct settlement negotiations with multiple claimants, it is prudent to consider the subject matter of the negotiation and the nature of the claim.

Claims usually tend to be compensation for physical damage and / or a loss of income, both of which claims professionals, such as loss adjusters and ourselves are well versed in dealing with.

Furthermore, claims professionals have the requisite skill and knowledge in dealing with claims generally, as well as their skill as negotiators, developed from experience.

Although claims professionals often conduct negotiations for these reasons, this is not necessarily always the case.

The defendant itself, lawyers, intermediaries such as brokers, etc can successfully conduct claim settlement negotiations.

In one assignment that we have been involved in, professional property valuers conducted the actual negotiations as the focus of negotiation was about the value of affected properties. Obviously property valuers had the requisite knowledge to negotiate and agree settlement with the claimants.

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The role of insurers in settlement negotiations is critical. It could be that an insurer has settled the primary claim for loss or damage and is seeking recovery from the defendant under a subrogated action, possibly in conjunction with other insurers, or the claimant itself for uninsured losses.

The defendant may have a liability insurer whose policy could respond to the situation, although very often larger companies have high deductibles or are self-insured. However, where there is a valid liability policy on foot, the liability insurer may take over the defence of these claims itself, requiring minimal further involvement from the insured defendant.

In other cases, particularly where the circumstances giving rise to the loss are unclear, liability insurers may have negotiated a deal with the insured defendant, leaving the latter to take charge of the claim settlement process. This may occur where the defendant has commercial considerations that exceed a standard response from a liability policy.

Finally, the negotiation can take many forms.

Perhaps the simplest form of negotiation is the settlement of a claim through a call centre in accordance with a prescribed formula. Based on numbers of claimants, this is often where most small claims are settled and it is for this reason that the importance of a well managed call centre cannot be overlooked particularly where there are a large number of claimants with low value claims.

On the other end of the scale, settlement negotiations can be highly complex, involving professional advisers on both sides agreeing to the settlement of a substantial sum of money and incorporating consideration of the future commercial relationship between the claimant and the defendant.

## **Factors influencing negotiation**

Negotiations can be influenced by several factors, the two most important being the parties involved and the issues involved. Having a comprehensive understanding of these two factors before negotiations are commenced cannot be over-emphasised.

While it is true for any multi-claimant negotiation that some of the issues may only become apparent as the settlement process gets under way, it is incumbent upon the negotiator to try and get as much information on both these factors before setting out to negotiate.

### ***Parties Involved***

In most of the multi-claimant settlements we have been involved in, claimants ranged from private individuals to large corporations. The nature of the event giving rise to the claims is usually a good indicator of the identity of the claimants.

In product or service related claims, where that product or service has a wide range of applications, such as an energy source, it can be expected that there will be a wide range of claimants. However, where the product or service has a limited application to a few users, then one would expect the claimant pool to be more limited.

The relationship that the claimants have with the defendant should also be considered, as this will often dictate the nature and direction of the negotiations.

For example, the dynamics of a negotiation with a long standing, highly valued customer of the defendant may differ significantly from the negotiations involving a one off user who has a choice of competitive products or services.

Research into the nature of the commercial relationships the defendant may have with the claimant pool before the negotiations commence is considered an integral part of any negotiation process. In respect of individual claimants, this research may uncover a hidden agenda.

A successful negotiation in a multi-claimant situation means that important commercial relationships are restored and maintained while, at the same time, preserving the integrity of the compensation strategy.

It is all very well to aggressively negotiate settlements with claimants but if that means that the defendant loses long standing high value customers, it is highly unlikely to appreciate your efforts.

### ***Issues Involved***

The issues that should be considered encompass both the subject matter of the claim as well as the event giving rise to the claim.

It is trite, and perhaps a little naïve to say that the subject matter of the claim is a sum of money. While in many cases this may indeed be true, particularly where there is an ongoing commercial relationship between the defendant and the claimant, the subject matter of the claim may go well beyond the sum of money on the table.

A negotiator that focuses on the money may find that there is no settlement or agreement, even though the figures may appear to “stack up”.

A thorough understanding of the events giving rise to the claim is required as this will drive what issues there may be, particularly where there is a large number of claimants or the event has far reaching effects.

It is likely that there will be considerable speculation about what caused the events to occur. In most of the multi-party claims that we have been involved in, the media has played out the events to the fullest extent, often inaccurately.

It is of great benefit to have appropriately qualified technical advisers on hand to assist with highly technical issues.

Very often claimants are much better informed about the issues of the claim and unless the negotiator has someone who is able to advise him on these, he will be at a distinct disadvantage.

## **Negotiation Techniques**

There are as many styles of negotiating as there are negotiators and each negotiation may call for a different style. We will examine what is considered to be the three main negotiation techniques and their applicability in certain scenarios.

Each technique requires its own particular skills, but an experienced negotiator will be able to apply his skills to all techniques.

I emphasise that there is no one correct technique to use as each situation is different. Furthermore, the negotiation technique adopted may change during the negotiation itself, particularly where a number of issues are being negotiated or certain milestones are achieved.

For example, in a multi-claimant situation, the negotiation technique may be more competitive initially but once the claim becomes a negotiation within the parameters of the compensation scheme, the negotiator may adopt a more co-operative approach to achieve settlement.

While this is a technical aspect of negotiation, recognition of the various techniques is helpful as you can assess whether the right technique is being used during a negotiation and what other options there are. It also allows you to recognise the technique that the other party is using.

### ***Competitive Negotiation***

Competitive negotiation is regarded as a power struggle between negotiating parties over shares of the same fixed resources.

Each negotiator tries to undermine the other negotiator's confidence in his or her negotiating position with the aim of convincing the other negotiators to enter into an agreement which gives the greatest advantage to him or her.

Each negotiator is focused on promoting his own interests above those of the others and success is measured in terms of how many wins can be scored at the expense of the other parties by forceful persuasion with minimal disclosure of information to the other parties.

Because the negotiator in a multi-claimant situation is usually bound by a defined compensation strategy, beyond which he or she has no discretion to negotiate, the competitive negotiation technique is often employed to ensure that settlement occurs within the parameters of that compensation strategy. This makes the formulation of the strategy critical so that its integrity can withstand attack.

The negotiator is forced to take a hard line and success is measured by persuading the claimants to negotiate within the parameters of the compensation strategy.

While competitive negotiation may produce a good result for the defendant in that settlements are minimised, this approach has the distinct disadvantage in that it overlooks the importance of preserving any ongoing commercial relationship. There is a risk that this negotiation process can damage the parties' relationship by creating an atmosphere of mistrust.

It can also lead to an increase in animosity between the parties and force the negotiators to take positions and hence escalate the dispute.

We have observed many occasions where a claimant refuses to accept the compensation guidelines and insists in claiming beyond the framework. As negotiators, we do not have the discretion to consider these claims and are forced to take a position. In our experience, it is these claims that account for most of those that failed to reach a negotiated settlement.

### ***Co-operative negotiation***

Similar to competitive negotiation, this process assumes a distribution of fixed resources.

However, unlike competitive negotiation where each party strives to gain as much of the resource as it can, co-operative negotiation is a more accommodating viewpoint. It is considered in the best interests of each party to achieve a fair settlement without undermining the position of the other.

This process relies heavily on the use of concessions from all parties, with a view to reaching a mutually acceptable compromise.

While this technique has the ability to preserve vital relationships, it can still lead to a feeling of dissatisfaction by one party who may feel that it has given away more than the other party or parties. Generally, people do not like to compromise, but will often do so simply to reach a resolution.

Although this may avoid the blatant position taking in competitive negotiation, the prospect of increasing resentment on behalf of the aggrieved party may well be terminal to the relationship in the long term.

This technique is most suitable where the issue is largely about the money, with no other issues. In such cases, the only commercial relationship between the parties is a one – off purchase of the defendant’s product.

### ***Principled Negotiation***

Principled negotiation is referred to as interest based negotiation or co-operative problem solving. It is described as a win - win process and seen as a way of satisfying the needs of both parties and avoids the financial and human costs of a confrontational negotiation process.

As stated earlier, one would only expect to use this technique in highly complex negotiations where there is usually an established commercial relationship between the claimant and the defendant. In a multi - party claim situation, this may only be relevant to a small number of claims. However, these do tend to be the high value claims and those more commercially important to the defendant.

In order for this technique to work, there should be more on the table than just a sum of money. I stress this because, while academics and writers favour this approach, it is not always applicable in every situation.

This approach has three key elements. These are:

1. Separating the people from the problem. This process considers that negotiators are people first and negotiators second and that it is essential to acknowledge the human element within the negotiating itself. The process of separating people from the problem addresses these issues on two levels:

*Perceptions* - in a multi-claimant situation, the claimant's perception of the situation should be understood. It is therefore critical that the negotiator is able to see the situation from the other party's perspective.

Claimants' perceptions differ and can be manipulated by a number of factors, one of the most important being their perception of the defendant itself. Many claimants, particularly individuals, perceive particularly large multi-national corporations as ruthless entities with large financial reserves.

As this entity has now caused the claimant some form of loss, it is very unlikely that the claimant will have the same level of sympathy for the defendant's position as would have been the case had the defendant been simply another individual.

As mentioned earlier, these situations often become a feeding frenzy for the media, who will usually portray the defendant in a negative light. This will also have a negative impact on the claimant's perception of the defendant, therefore entrenching the claimant's position at the negotiating table as the claimant may be seeking to "punish" the defendant.

It is for this reason that most multi-party negotiations are not conducted by the defendant itself but rather by an intermediary, as claimants are less likely to vent their spleen on the intermediary than a representative of the defendant is. However, I can tell you from personal experience that in some cases claimants do not care to make this distinction.

*Emotions* - The second element of separating people from the problem is to deal with emotions, although this will largely depend on who the claimant is.

Emotions tend to be a bigger factor when dealing with individuals or small businesses owned and operated by one or two people. This is not surprising, as the lives of the individuals have often been seriously disrupted as a result of the event.

There is usually less emotion when dealing with large corporations, but that is not to say that this should be overlooked. In these cases the emotion may be driven by the need to "look good" or to play "CYA"

A good negotiator will anticipate that people will become emotional during the negotiations and will know how to deal with it.

Emotions need to be made explicit and be acknowledged as legitimate. In some cases, parties must be allowed to ventilate these and have their concerns heard. This process should be carefully managed so that this does not become the focus of the negotiation, but is rather a basis of understanding the other parties' position.

2. Focus on interests not positions. Positions are the demands made and indicate the manner in which the parties believe the conflict should be resolved. Interests are the factors that underlie and motivate these positions, including the party's needs and concerns, which drive the demands.

In interest based negotiations, the parties need to be encouraged to look forward and not backward and each party's interests must be acknowledged so that each party can have a clear understanding of the interests and reasoning which underlie the problem before considering any possible options for a solution.

In many such negotiations, we have found that the actual monetary settlement may be a very small part of the larger issues at stake between the claimant and the defendant.

Although, in multi-party negotiations it is not our place to get involved in issues that go beyond the settlement of the claim, drawing out and establishing the other party's interests and feeding these back to the defendant and involving them in subsequent negotiations, could easily pave the way to a very satisfactory outcome for both the claimant and the defendant.

In many cases we have seen claimants and defendants simply taking a position on the settlement and it is only once their underlying interests have been explored and addressed, that settlement can occur.

3. Inventing options to expand available resources. Once the interests of both parties have been identified, the next stage in the negotiating process is to develop options. This involves thinking beyond the narrow legal remedies to the imaginative use of resources and incorporating future interests. This may pertain to one claimant, or a group of them.

To borrow a cliché, sometimes “thinking outside the square” is required to resolve a situation. This calls for flexibility on the part of the defendant, its legal advisers and negotiators, as well as the claimants themselves. In many instances, the problem only manifests itself during the negotiation process.

We can cite two examples where this creativity has led to successful outcomes.

The first instance was during the Mercury Energy Power crisis where an impasse occurred between Mercury and a number of major landlords in Auckland, who controlled the supply of electricity to tenants within a building or a complex of buildings.

In other words the landlords were technically the suppliers of electricity to their tenants, not Mercury.

The way the compensation package was structured, meant that there was a legal possibility that landlords signing a waiver or further claims against Mercury could prejudice the legal rights of their non – customer tenants to pursue Mercury for their own losses. This effectively stalled negotiations between Mercury and the major landlords.

However, a workable solution was negotiated with Mercury's advisers that did not prejudice Mercury's carefully defended position but still allowed compensation to trickle down through landlords to their non-customer tenants, who were not part of the compensation scheme.

This problem arose midway during the compensation negotiation process and is a classic example of where some creativity and flexibility was drawn in to facilitate settlement. Not only did it allow a large number of landlords to settle with Mercury, but also had the bonus of getting a number of non – customer tenants signing a waiver of further claims against Mercury as well.

In a more recent example, crew members on fishing vessels were exposed to a loss of catch entitlement, being a percentage of the catch, as they did not have a direct relationship with the defendant in a loss of revenue claim by the owner of the vessel.

Once again, this was causing some negotiations to falter on the basis that the claimants refused to accept compensation that effectively excluded their crewmember for losses that were beyond their control. A concern was that if crew entitlements were paid as part of the claim, the claimant could keep this money and thereby benefit from the situation.

A solution was found whereby the crew's entitlement would be included in the settlement provided the claimant and the crew signed a joint undertaking that the crew would be paid as if the revenue had not been lost. If a crewmember had since disappeared, then his entitlement would be regarded as a saving in the claim and would not be paid to the owner.

### **Stumbling blocks to a negotiated settlement.**

Having discussed the various negotiation techniques, I would like to consider the reasons why they do not always work. In our experience, multi-claimant negotiations have been extremely successful, sometimes achieving 100% settlement.

However, some negotiations do not achieve a settlement, while others can be extremely difficult to resolve. The success or otherwise of any negotiation is ultimately dependent upon the skill of the negotiator.

A skilful negotiator will know which techniques to employ and when and be able to steer the negotiation to an outcome that both parties feel is fair and reasonable.

It is therefore important in a multi-claimant negotiation for the defendant to appoint representatives who are experienced in the type of negotiation required and have the requisite skills. Obviously, where the subject of a negotiation is straightforward and the amount involved not significant, an operator in a call centre can conduct the negotiation.

However, the same operator is unlikely to be competent to successfully negotiate a large complex claim, possibly involving the claimant and its insurer. An experienced negotiator will be aware of the stumbling blocks that can cause the process to falter and deal with them appropriately.

Some of these stumbling blocks are:

1. In virtually every multi-claimant situation, there are going to be those claimants who simply do not want to settle or decide to take ridiculous positions and refuse to negotiate.

In most cases the refusal to negotiate is followed by threats of legal action, media exposure, etc. While the negotiator should not be intimidated by such actions, at the same time subtle attempts should be made to defuse the situation. It is surprising how many seemingly vexatious claimants ultimately do settle their claims.

2. Among the most frustrating claimants to deal with are those that have been badly or incorrectly advised.

It is understandable that a claimant will turn to its professional advisers, such as accountants or lawyers to seek advice on how to handle the claim. Unfortunately, this sometimes leads to an unrealistic expectation of the claimant's entitlements. The claimant then locks on to this figure and it is always difficult to get them to see past it.

Another source of mis-information can emanate from the defendant itself. While this may sound surprising, it often occurs in practice where the defendant's marketing department in an effort to retain customers, may make rash promises about compensation that ultimately cannot be delivered. It is then up to the negotiator to navigate around these issues.

While it is preferable that an effective disaster recovery plan avoids such conflicting representations, in large organisations this may be difficult to control.

3. In many cases, we have found that negotiation becomes difficult where the claimant does not understand the principles of economic loss quantification, if that is part of the settlement negotiation.

For example, a perennial problem is that of internal labour. Claimants often do not understand that even though a salaried employee was diverted from normal duties to assist with recovery from the loss, they cannot claim the cost of this labour if no direct overtime or other additional payment has been made as a direct consequence of the loss.

Another aspect that is often misunderstood is that of savings on the expenses of running the business. We find many claimants are more than eager to claim loss of revenue and increased costs, but do not understand why savings in normal operating expenses that reduced as a consequence of the event should be deducted from the claim.

4. A problem that is encountered, particularly with important regular clients or customers of the defendant, is that these claimants will use their perceived commercial strength and influence with the defendant to demand an unrealistic settlement.

Where there has been a well - defined compensation strategy formulated, one of the key principles is that each and every claimant is treated equally.

While the negotiator may not have any discretion to go beyond the parameters of the compensation scheme, a hard intransigent approach may well cost the defendant an important client, for which the negotiator may be blamed. A skilled negotiator, using the principled negotiation, should try to come up with a solution that is workable for both the claimant and the defendant, while still adhering to the terms and conditions of the compensation strategy.

5. Similarly, some claimants may have hidden agendas that have nothing to do with the claim itself. A claimant may be thinking of changing its supplier from the defendant to a competitor and may cite its rejection of the settlement offer as a reason why it changed supplier. Meanwhile, if the truth were known, it had been planning to change supplier anyway and simply used the allegedly inadequate settlement as an excuse.

With good research, a skilled negotiator will be able to identify these hidden agendas and deal with them appropriately.

6. In virtually every multi-claimant situation, informal or formal pressure groups are formed, which are usually led by one or more claimants. While a well formulated and negotiated compensation strategy, if effectively executed, will ultimately remove the reason for existence of these pressure groups, dealing with the leaders as individuals is often problematic.

The reason being is that in order to drum up support, these leaders are frequently quoted in the media and at public forums, usually taking a very hard line against the defendant. Even though the negotiated offer of settlement may be attractive to these claimants in their private capacities, acceptance could be construed as undermining their public position.

Consequently, it may be necessary for the negotiator to deal with these individuals slightly differently so that they do not appear to lose face but, at the same time, are able to accept a settlement and therefore discharge the defendant from any further actions.

Therefore, thorough research is necessary before entering the negotiating arena so that the negotiator and his or her team are aware of who these individuals are and what their stated public position is, before the negotiation is commenced.

7. Class actions have been mentioned in the previous address. While class actions do not exist as a legal option in New Zealand, a representative action can still be brought in Court. To some litigious claimants, this may appear to be an attractive proposition. In our experience in New Zealand, most of these quasi class - actions never gather the momentum intended and eventually fizzle out.
8. Particularly where the claimant is a regular customer of the defendant, the negotiation may be hindered by the Claimant's refusal to accept the process as separate from its normal interface with the defendant. One of the more common responses that we have experienced is the refusal to pay invoices rendered by the defendant in the normal course of its business until the matter is settled.

In this situation, the negotiator cannot get drawn into this argument and should insist that the two issues be treated separately.

9. In every multi-claimant negotiation, there are always those claimants who submit fraudulent or dishonest claims. Fortunately, in our experience, we have found that most claimants are honest, even if a little optimistic in their expectations. If the claim is overstated, this is usually as a result of ignorance of the correct way to calculate the claim and not fraudulent or dishonest intent.

Fraudulent claims are usually detected as a result of thorough investigation of the claim and the supporting documentation. A skilled and experienced negotiator will usually develop a gut feel when interviewing a claimant as to the propensity for the claim to be fraudulent, dishonest or simply exaggerated.

Very often where there is a high volume of claims, it may not be possible to conduct a thorough investigation into every claim. It is in situations like these that experienced negotiators can focus on those claims that do not appear to stack up, based on their own intuition.

10. Finally, there are those claims that fall outside the parameters of the compensation scheme. Choosing suitable criteria can be extremely difficult and there are always some claimants or some parts of their claims, that falls just outside the scope of compensation. The only way the negotiator is going to know this is by having a thorough understanding of the terms, conditions and limitations of the compensation scheme and its ultimate goal.

Qualifying criteria need to be thoroughly tested to ensure that a particular claim does cross the threshold. It is a complete waste of time negotiating a complex claim only to discover when doing the paperwork that the claimant has no entitlement to claim at all.

### **Does it work?**

Is negotiation is a useful medium to effect multi claimant settlements? From our experience in these matters, we would have to answer that question with a resounding yes.

From our experience, over 95% of claims have been satisfactorily settled by negotiation only. While we may like to take the credit for this, we believe that there is more to it than that.

We are of the view that one of the main reasons for this high success rate is the Kiwi mentality. Unlike their American and even Australian counterparts, New Zealanders prefer to settle claims, often for substantially less than their actual losses and get on with life. Let's hope that this pragmatic approach endures.

During settlement negotiations in the Auckland Power Crisis with a large Australian company that had interests in New Zealand, the Sydney based CEO expressed his amazement at the way in which these claims were being settled without any notice of litigation. His comment was that this would probably be the only country in the world where this would occur. I am not sure whether he meant that as a compliment to New Zealanders?

The other contributor to the high success rate of negotiations is the concept known as BATNA or the Best Alternative To a Negotiated Agreement. This is an evaluation of the various alternatives should agreement or settlement not be reached during negotiations.

The attractiveness of these alternatives therefore determines the party's commitment to reaching a negotiated agreement.

We have seen on many occasions that initially claimants may vigorously object to and complain vociferously about the offer of settlement, only to later quieten down and sign the acceptance.

A question then arises as to what these alternatives are. Some of these are:

1. To simply do nothing. While this sounds ludicrous, it very often is what happens when a claimant refuses to accept a settlement. Despite threats of litigation, public exposure etc, we note that the passage of time takes the heat out of the situation and in many cases the claimant finds that it is left with nothing and that it is too late to revert to the defendant. Alternatively, pride gets in the way and while the defendant may have an unhappy customer, that is the last anyone hears of that claim.
2. Mediation. I will not address this further as you will hear more about it after tea.
3. Disputes Tribunal
4. Litigation.

### **Conclusion**

In conclusion, I trust that I have left you with some helpful thoughts on the negotiation process in multi-claimant settlements. Negotiation can be frustrating at times but as a claim professional, I find it extremely rewarding to conclude a complex negotiation with a difficult claimant, knowing that a fair and reasonable settlement has been reached.

Thank you for your time.

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