better conversations, better outcomes

Using Mediation in Major Construction Projects

aka

Building and Maintaining a Collaborative Culture and Effective Business Partnerships

24 March 2014

Welcome!!

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better conversations, better outcomes

or

Effective Management of Difficult Situations and Disputes

aka

High Performance Delivery

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or....

"I wish we had had this conversation a year ago…."

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“There are three things certain in life: death, taxes and construction disputes ”

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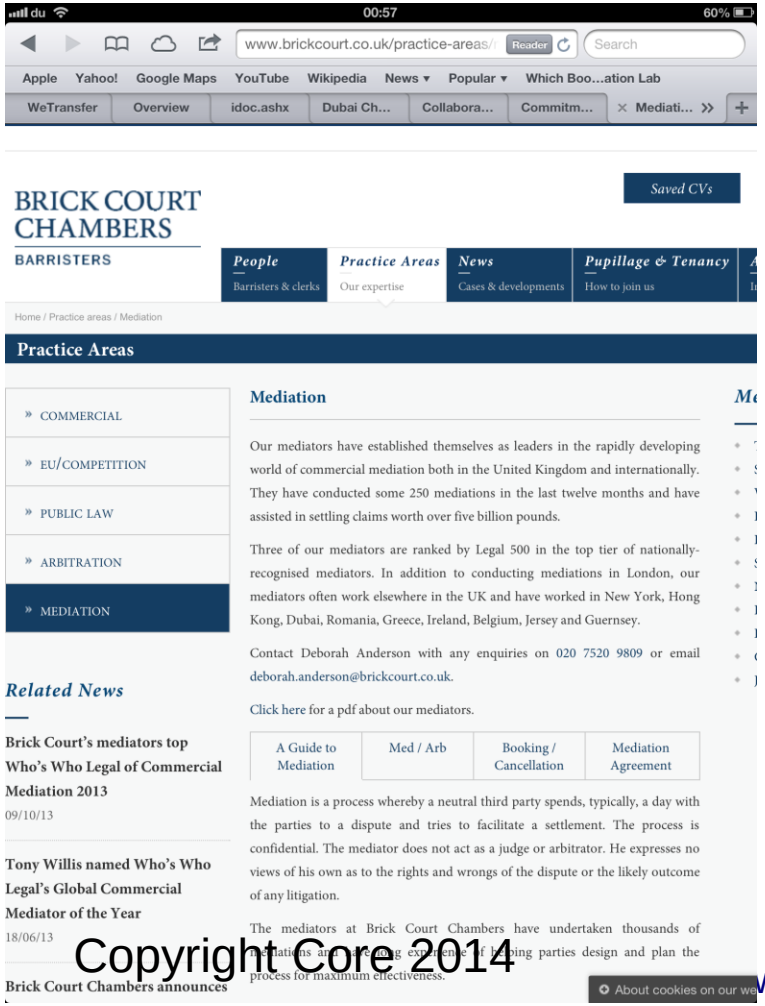
Brick Court Chambers



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Clean the filter …

- we jump to conclusions
- assume that we are right
- but... can often be wrong!

- “90% of errors of thinking are errors of perception”
- tendency to reinforcement shapes our response over-confidence – WWSIATI – missing the obvious
- http://www.youtube.com/watch?v=IGQmdoK_ZfY
- thinking fast and slow
- wisdom of crowds?
- reactive devaluation/ attribution error

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we need to be open to different perspectives, views and ideas –

"they" may be as right as we are?

"In retrospect, everyone is wrong…."!!

Sometimes us…..

Sometimes others…..

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Keep your Filters Clean!

There are two (several?) sides to most stories……..

It just depends on where you are standing…..
or where you start from.....

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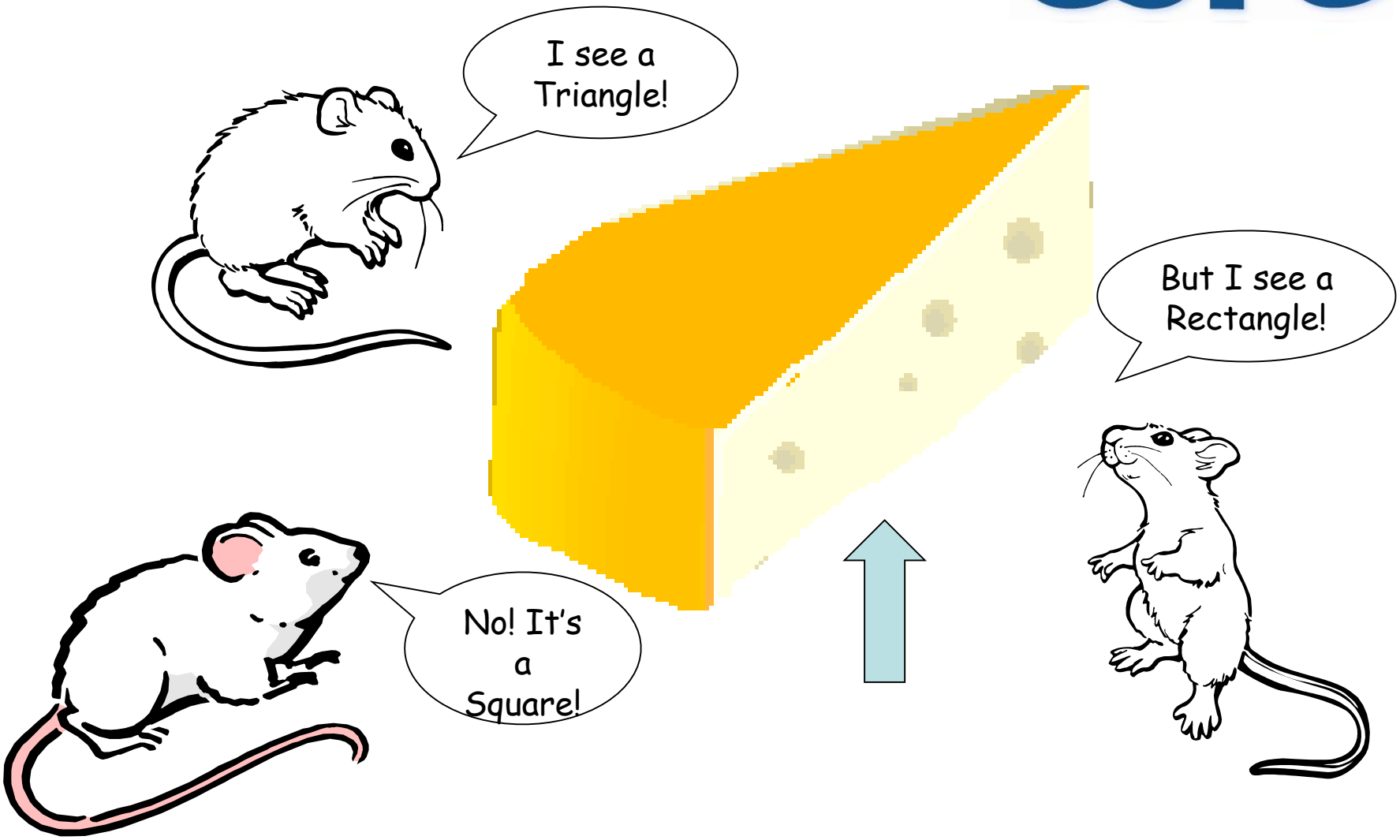

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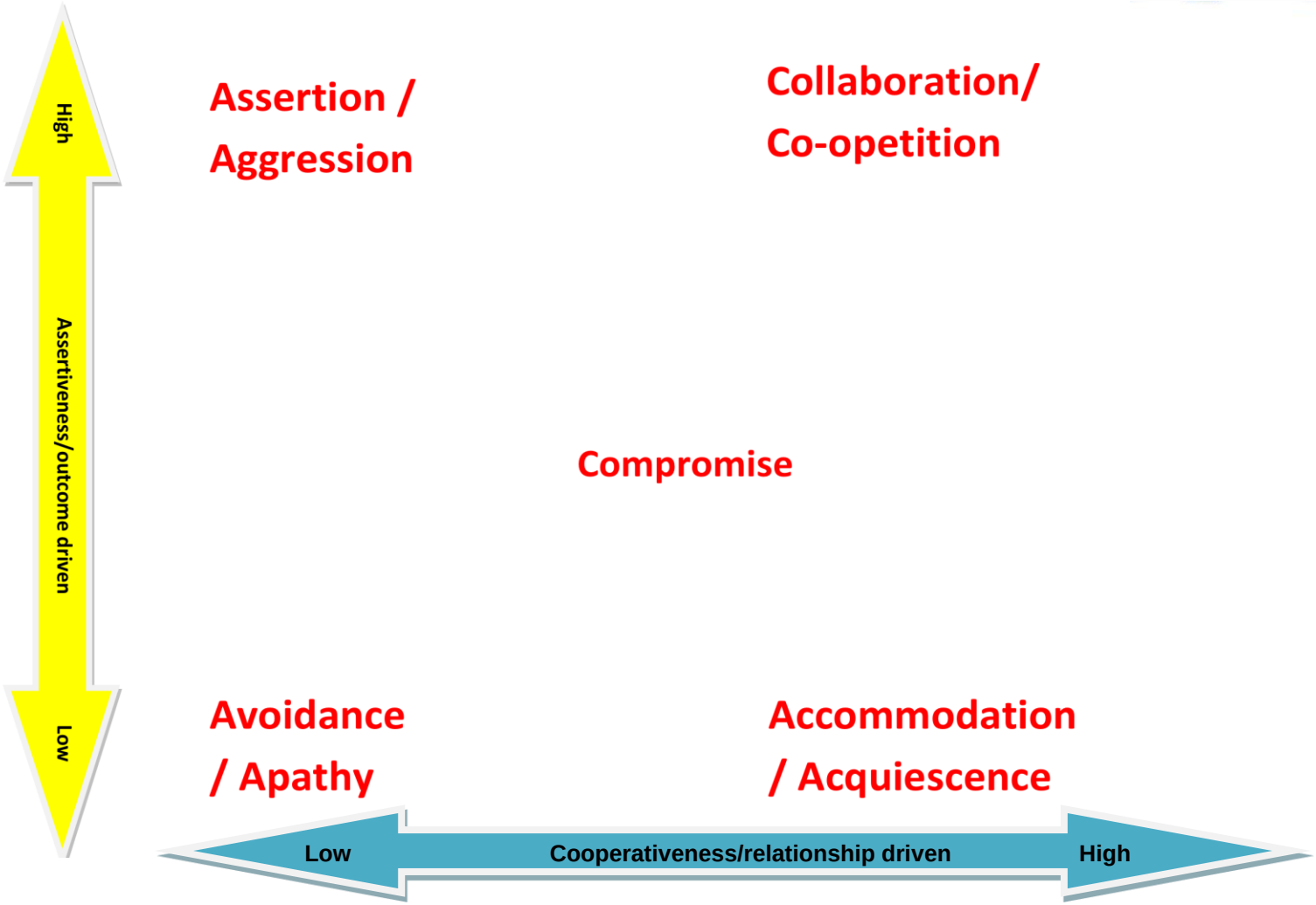

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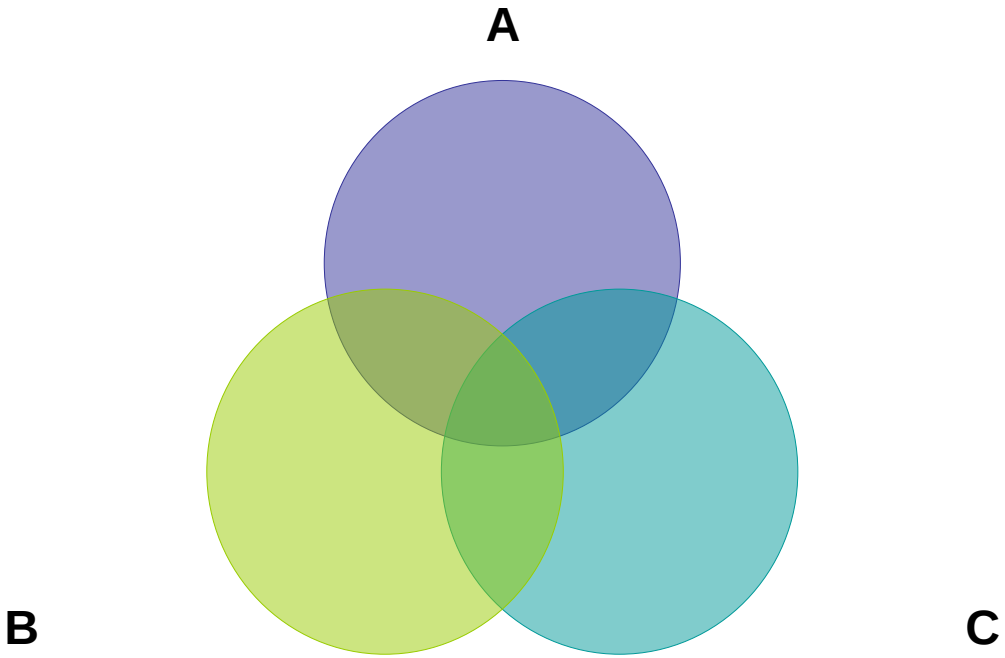
The need: to find and build the common ground



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Problems?

- lack of clarity on (common) objectives / values / risks
- different perceptions of what happened and cause
- presence of emotion, silos, baggage, loss of face
- ego, exaggeration, pressures from client* / outside stakeholders
- lack/loss of trust: “like life……..”
- taking positions - short term v long term interests
- lack of clarification and verification on key details
- lack of effective decision-making structure under pressure
- rights/claims v integration/alignment
- time pressures
- desire for revenge – Tit for Tat

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…unhelpful language and poor communication….

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"I know you believe you *understand* what you think I said.

But I am not sure you realise that what you ***heard*** is not what I meant"

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The Communication Chasm

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"It's not our differences that divide us. It's our judgments about each other that do."

Meg Wheatley

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Under the surface….

- The dispute is often not about what it's about!

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It's costly…..

- **Financially**
- **Damaged relationships**
- **Loss of reputation**
- **Demotivation**
- **Lower productivity**
- **Distraction from main goals**
- **Opportunities lost**
- **Uncertainty**
- **Loss of confidence**

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"We are used to thinking about competitions in which there is only one winner....But the world is rarely like that...The key to doing well lies not in overcoming others, but in eliciting their cooperation."

Robert Axelrod

The Gain-Gain Paradox….

..a paradigm shift?

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Nelson Mandela

- "I never sought to undermine Mr de Klerk, for the practical reason that the weaker he was, the weaker the negotiations process. To make peace with an enemy one must work with that enemy, and the enemy must become one's partner."

- *Irreconcilable confrontation gave way to peaceful co-operation. Only through effective negotiation could both sides hope to meet their needs. Neither side could win without the other*.

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Gain:Gain

- co-operation tends to produce best result
- aggression tends to be ineffective
- need to focus on maximising gains, not losses
- if you gain, not matter if other “side” gains also
- other “side” needs to gain too!
- enlightened self interest… alignment of goals and interests – new way to manage risk and reward

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Principled v Positional Negotiators

- use good communication skills
- know that relationships vital
- separate people from the problem
- seek options for mutual gain
- focus on interests, future
- are open to new ideas
- make concessions to gain
- look for creative outcome
- add value, save time

- *threatening*
- *aggressive*
- *emotional*
- *haggle*
- *focus on positions, blame*
- *conceal information*
- *concede little*
- *achieve compromise? zero sum*
- *add cost, delay, uncertainty*

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"Just as important as the outcome is that we now understand where you guys are coming from."

…a choice….

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Effective Management of Difficult Situations and Disputes

How can we do it better?

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Effective Management of Difficult Situations and Disputes

Enhance our Negotiation Competency

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Effective Management of Difficult Situations and Disputes

Sometimes negotiation needs help…

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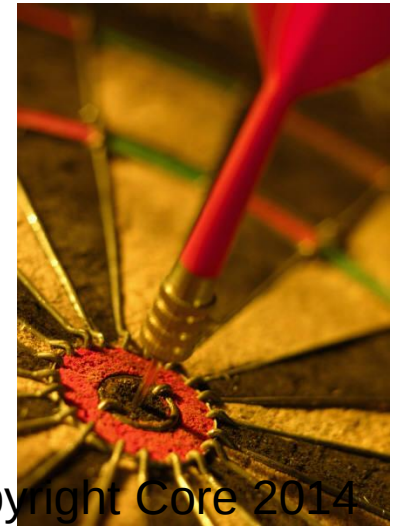
Effective Management of Difficult Situations and Disputes

Mediation…



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Mediation

- prevention
- management
- containment
- resolution
- reconciliation
- restoration

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When to use mediation

- ***at every stage*** in a dispute / difference / deal
- ***early*** - manage costs, monitor progress, defuse anger, avoid escalation
- ***middle*** - when going gets tough
- ***eve of*** or ***during*** litigation / formal procedure - a last opportunity to resolve
- **ASAP but preparation important**

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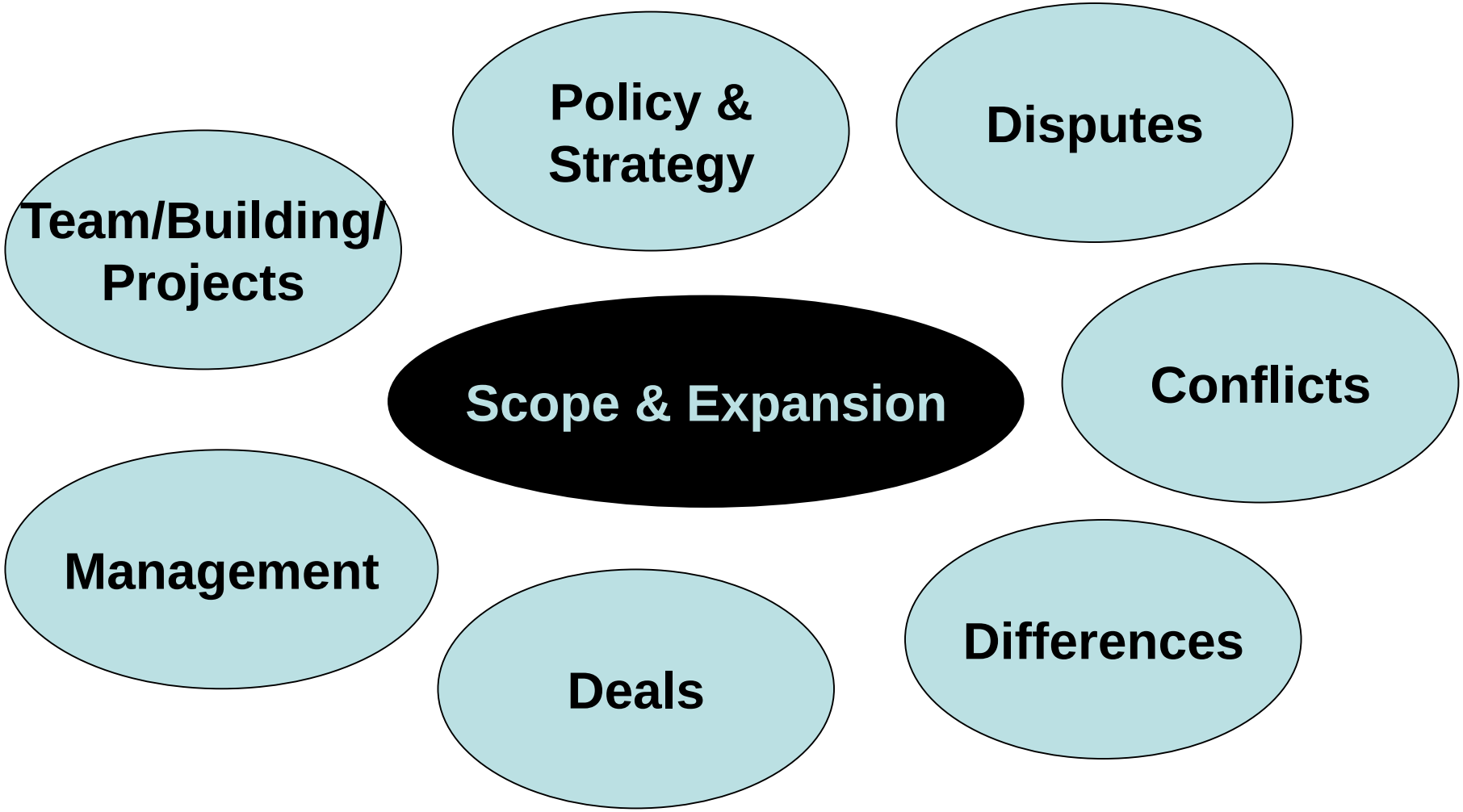

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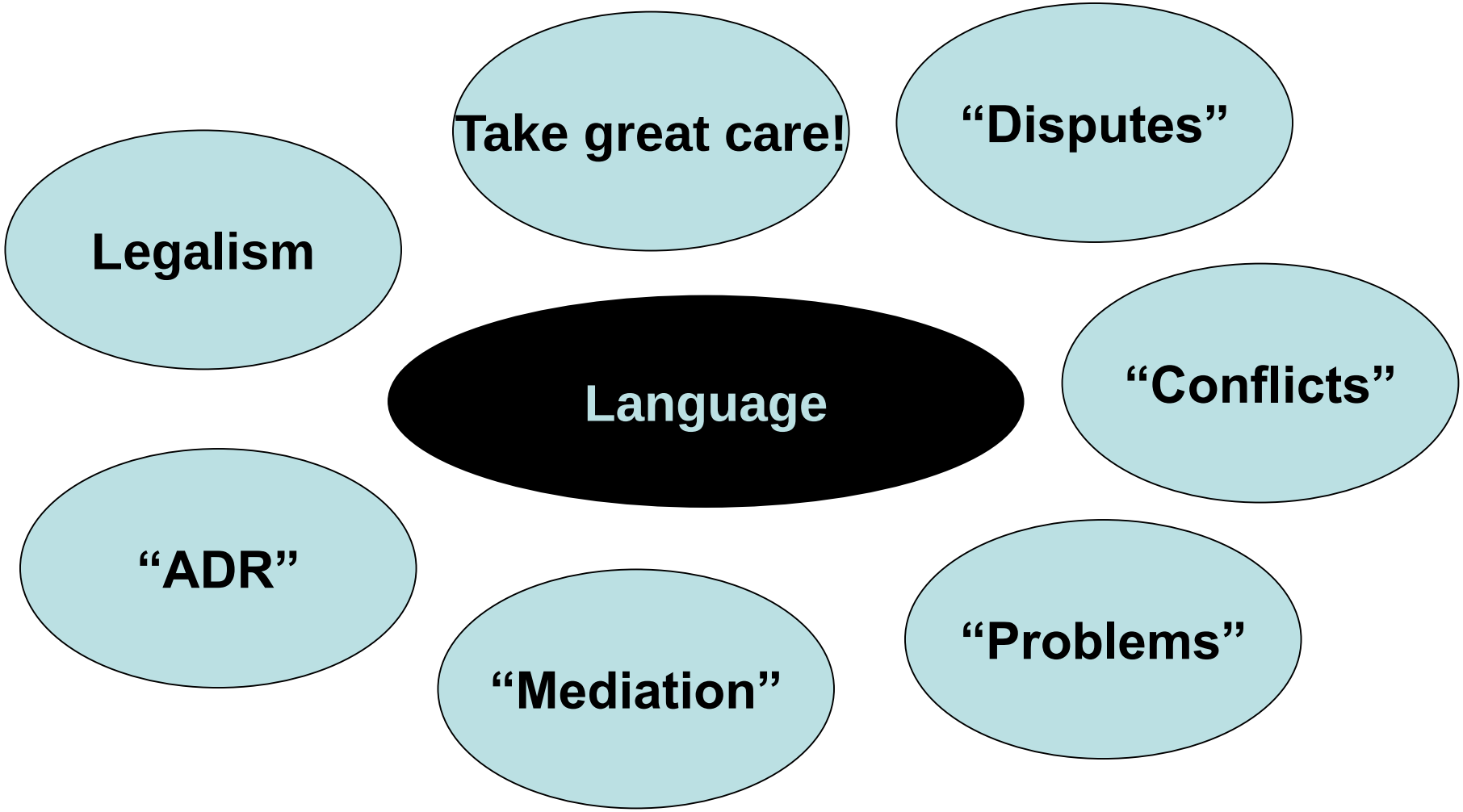

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What is Mediation?

- assisted negotiation - extends and enhances the negotiation process
- using independent third party facilitator: “good faith go-between”
- helps parties to communicate - bridge and buffer
- seeks to enable **parties** to reach a creative, forward-looking solution by consensus – interests, not just legal remedies and rights
- private, confidential and voluntary
- flexible, quick and cost effective
- *contrast facilitation and evaluation*

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Using mediation to add value

- deadlock in negotiations
- non-legal remedy appropriate
- costs of fighting disproportionate
- quick solution helpful
- complex factual or expert issues
- several parties, cultural mixes, geographic spread
- publicity not desirable
- continuing relationship important
- communication delays

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What can mediation do?

- Facilitate better negotiations
- Manage and improve relationships
- Resolve underlying differences
- Reduce unnecessary conflict cost
- Increase collaboration and maintain control
- Manage risk
- Narrow issues
- Prevent escalation: Nip it in the Bud
- Focus on shared interests
- Protect reputations
- Enhance joint ventures
- (Re-) Build communication

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A word about using experts

- essential in many cases**
- advising, preparing, advocating, assessing risk
- use / act carefully – can be very helpful role
- retain independence
- preparation is key
- exchange information in advance
- use collaborative techniques – eg “Scott schedules”
- assess where differ, why and relevance

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A word about legal advisers

- essential in most cases
- advising, preparing, advocating, assessing risk, drafting, sounding board
- use / act carefully
- retain independence?
- preparation is key – risk analysis, objectives, big picture
- exchange information in advance
- use collaborative techniques – Getting to Yes!
- work with mediator

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Assume that people are trying their best….

The person with the greatest flexibility of thinking and behaviour is likely to have the greatest influence

Try it…..!

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Effective Management of Difficult Situation and Disputes

What *will* you do differently?

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A Protocol for Effective Management of Difficult Situation and Disputes?

8 Commitments?

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"We agree that it is in the interests of our business, organisation, employees, and those with whom we contract and do business, that all communications are conducted civilly and with dignity. Therefore, we agree to:

- listen carefully to all points of view and seek fully to understand what concerns and motivates those with differing views from our own;
- acknowledge that there are many points of view and that these have validity alongside our own;
- show respect and courtesy to all individuals and organisations with which we have dealings;
- express our own views clearly and honestly with transparency about our motives and our interests;
- use language carefully and avoid personal or other remarks which might cause unnecessary offence;
- ask questions if we do not understand what others are saying or proposing;
- respond to questions asked of us with clarity and openness;
- support what we say with clear and credible information wherever that is available."

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Respectful Dialogue?

www.collaborativescotland.com

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"By far the most satisfying means for resolving a dispute..
….roll on the next one."

Thank you!!

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