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Editorial

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The ADR Bulletin

editorial

For a number of years now there have been rules and directives which not only require certain persons to undertake specified forms of ADR, but to take them seriously as well.

Many Australian courts and tribunals, some legislation, and various agencies and industry bodies require parties to use mediation or case appraisal before, or instead of, other forms of dispute resolution such as a court hearing.

The requirement to participate in ADR is often reinforced by the prospect of sanctions for those who do not participate `satisfactorily' in the ADR procedure. The sanctions could involve a costs order against defaulting parties, preclusion of the judicial enforcement of their rights, denial of legal aid, or loss of priority in the queue for adjudicatory services.

As to what constitutes `unsatisfactory' behaviour to warrant these sanctions, there are a number of as yet unrefined standards of good faith, reasonableness and other measures of appropriateness.

At the same time that there is increasing regulation of behaviour in ADR processes, so too is there increased scrutiny of the use of traditional litigious dispute resolution.

Historically the adversarial system of litigation afforded litigants the choice of whether to litigate, and, within limits, of how to conduct their litigation. Recently the courts themselves have begun to impose standards on litigating parties and to issue warnings over the misuse of the litigation process.

Press reports from Perth and Sydney illustrate the new attitude. In Perth a Master of the Supreme Court was reported to have warned two prominent women to stop using the courts as a playground for the rich where they could `wage war' on each other. He suggested that in this kind of litigation, involving 13 separate actions between the two of them, the solicitors should stop sabre rattling and instead of acting as spear carriers they should act as counsellors. He criticised one subsidiary action brought by a clairvoyant, with the assistance of the same solicitors who were acting in the main claim, as no more than a tactical strategy in the context of the broader litigation.

In Sydney a Federal Court judge, in a protracted hearing between three large corporations, was reported to have summoned to court the three chief executives to warn them to stop wasting the court's time. The case had involved 17 interim judgments, 22 hearing days and legal costs of $19 million, with a six-month trial still to go. The judge criticised the parties for the tension and conflict surrounding the matter, and for not approaching the litigation in a spirit of co-operation, and he urged them to consider mediation to narrow the issues in dispute.

In both these cases reference was made to the problem of adverse public perceptions over the misuse by some litigants of publicly-funded and scarce court resources.

In the Brisbane Federal Court some of these issues were dealt with in a reserved judgment in the case of *White Industries Pty Ltd v Flower and Hart,* July 1998.

In this case a development company had instituted proceedings against their building contractors, White Industries, alleging contraventions of the *Trade Practices Act* and fraud. After 150 hearing days the application was dismissed and the developer was ordered to pay costs. A cross-claim by White Industries, to recover about $ 5 million due under the building contract, was successful. However by this stage the development company had gone into liquidation and White Industries took no proceedings to recover the costs awarded. It subsequently brought the present proceedings for a costs order against the developer's solicitors.

Justice Goldberg found that the purpose of the original proceedings against White Industries was to give the development company a bargaining stance and to secure a favourable bargaining position in relation to the builder's cross-claim to recover their monies due under the building contract. He found that there was no factual basis for the allegation of fraud, and no prospect of vindicating any legal rights. Moreover the proceedings were conducted in a way designed to delay and defer an inevitable outcome. This amounted to an abuse of process and serious misconduct in promoting the administration of justice. The court ordered the solicitors themselves to pay White Industries' costs of the original action on an indemnity basis.

The last word has not been said on this matter as the solicitors concerned have taken the decision on appeal. It received considerable media publicity because of the involvement of Justice Ian Callinan as barrister for the developer. However in the context of the present discussion the case is notable for the following principles on which Justice Goldberg's decision is based:

- The courts will not condone the issuing of proceedings merely as a tactic in positional negotiations, unless there is an arguable case.
- The courts will not condone obstructionist and delaying tactics which inhibit the court from achieving an expeditious or timely resolution of the dispute.
- Lawyers cannot invoke the defence of acting on clients' instructions where the client is asking no more than whether there is anything that can be done and the impetus for instituting proceedings comes for the lawyers.
- Professional advisers can be held personally liable when they do not adhere to the required standards when conducting litigation on behalf of their clients.

In the media discussion on this matter some practitioners justified the conduct of the advisers, suggesting that barristers do daily what had occurred in this case. However the judgment of Justice Goldberg shows the extent to which the contours of modern litigation are being shaped and defined by contemporary standards of dispute resolution. Participants and their advisers in both ADR and litigation are being required to adhere to new principles of reasonableness, proportionality and fairness and to comply with judicial policy and community perceptions about the appropriate use of publicly-funded dispute resolution systems. ❖

Laurence Boulle, General Editor.

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