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ADR and the courts

Mandatory mediation litigation begins in NSW

David Spencer

Amendments to the *Supreme Court Act 1970* (NSW) (the Act) which give the NSW Supreme Court power to force parties to mediation, have been recently discussed in this bulletin ((2000) 3(3) ADR 43). Amendments to the Act, primarily Pt 7B of Div 4, commenced on 1 August 2000. The new s 110K of the Act states:

- (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceedings concerned.
- (2) The mediation or neutral evaluation is to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties cannot agree, by a mediator or evaluator appointed by the court, who (in either

case) may, but need not, be a person whose name is on a list compiled under this Part.

As to be expected with new legislation that affects the rights of litigants, the issue of forcing unwilling parties to mediation has already come before the court of original jurisdiction. This article will examine the first two decisions dealing with the amendments to the Act.

Waterhouse v Perkins

In the matter of *Waterhouse v Perkins*,¹ the cause of action before the Court stemmed from the publication of a book entitled *The Gambling Man*. His Honour, Justice Levine, noted that there have been many actions in the defamation list of the NSW Supreme Court relating to the publication of this book making it a text of some notoriety. ➤



➤ The notice of motion before the Court involved several interrogatory applications moving the Court to pronounce on discovery of various documents and, in the words of his Honour, the more substantive application of an order for compulsory mediation under the Act. Clearly this article is more interested in the latter as opposed to the former issue.

Before judging the application, his Honour recounted counsel's submissions on the efforts of the defendants to seek mediation with the plaintiff and the plaintiff's rejection of those efforts.

The defendants suggested to the plaintiff that the costs of litigating the matter would be large, given that the matter would occupy six weeks of hearing time and be an all issues jury trial, save for public interest and privilege.

Therefore, as an inducement to mediate, the defendants had offered to pay for the costs of the mediator and the venue. The defendants assured the plaintiff that his only cost would be legal representation on the day of the mediation. His Honour noted the plaintiff's reluctance to accept a mediator suggested by the defendants when he quoted counsel for the plaintiff in submissions, as stating:

There is also the question of a choice of mediator. The plaintiff, for reasons which may or may not be justified, would rather die than accept a mediator selected and forced on him by the defendants and it wouldn't matter if it was the Archangel Gabrielle. They are not offering his services.²

Clearly the plaintiff did not want to mediate, so his Honour was faced with the unenviable task of deciding whether mediation should be forced upon an unwilling party to the dispute.

Levine J noted the plaintiff's submission that an important ingredient of the remedy in a defamation action is the public vindication of the plaintiff. This goes some way to restore the good name of the plaintiff if it is a matter of public record that the plaintiff was defamed and was successful in seeking a remedy from the Court. His Honour raised the question of whether it was impossible for mediation to provide public vindication of a successful plaintiff in a defamation case. His Honour

had no trouble in answering that question in the affirmative, stating:

It is at least theoretically possible that the outcome of a mediation conducted in good faith by all parties could be a mechanism for the public vindication of the plaintiff. It might not necessarily be so, but to say it is impossible is quite ingenuous.³

His Honour qualified his opinion on public vindication by pointing out that defamation litigation required of the Court a determination of a person's rights, whereas mediation was not conducted to the exclusion of rights even though it primarily deals with interests and needs. His Honour wisely suggested that a person's rights might form the backdrop to a discussion of interests and needs. Therefore, if a person's rights are impliedly vindicated by virtue of the result of the mediation and at the same time interests and needs are satisfied, then the mediation has produced a result similar, philosophically, to the remedy supplied by the Court.

Also, his Honour suggested that another benefit of a mediation may be to 'take the edge off the acrimony' between the parties. In this respect his Honour reminded the plaintiff that given that he was an officer of the court (a legal practitioner), and that any order to mediate made under Pt 7B of the Act would require the plaintiff to participate in good faith. Levine J hinted that failure to participate in a court ordered mediation in good faith could result in a litigant being in contempt of court.

Levine J summarised the issues pertinent to the application before the Court in the following manner:

- the matter had been running in part for 10 years and was unlikely to be heard until the end of 2001;
- the hearing would be of at least six weeks in duration;
- the defendants were concerned about the extent of costs accruing;
- the plaintiff was clearly concerned about vindication;
- mediation can provide vindication for the plaintiff;
- the defendants have offered to pay the costs of the mediator and the venue;
- the plaintiff need only pay for his legal costs during the mediation;

- the total cost of mediating compared to litigating the matter could not be considered to be a disproportionate diversion of resources;
- parties are obliged to act in good faith, therefore, the potential outcome should be viewed positively when compared against litigation; and
- there is no rational reason for not ordering mediation in this case.

His Honour ordered that the whole of the proceedings before the Court be referred to mediation with the defendants paying the costs of the mediator and the venue as the parties may agree upon and for the plaintiff to pay his own costs in respect of his attendance at the mediation.

His Honour's judgment is important to civil litigators as we are now a little clearer on what the Court will be looking for when making orders for a compulsory mediation, especially against the will of one or more parties to the dispute.

Morrow v chinadotcom

The second matter before the NSW Supreme Court also dealt with this vexing issue. Similarly, it also related to an application under the new amendments to the Act. In this case, however, the parties had contractually agreed to participate in an alternative dispute resolution (ADR) process. While the application dealt with a stay of proceedings to participate in an ADR process on the basis of the contract between the parties, an alternate application by the first defendant was for the Court to invoke s 110K of the Act and order a mediation.

In *Morrow v chinadotcom* [2001] NSWSC 209 (28 March 2001) proceedings were on foot regarding the sale of shares in XT3 Pty Ltd by the plaintiffs, Morrow and others, to the first defendant, chinadotcom corporation. The dispute that gave rise to the alleged cause of action is irrelevant for our purposes, but suffice it to say that the contract between the parties recited the following alternative dispute resolution clause, numbered 13.16:

- (a) The parties must attempt to settle by negotiation any dispute in relation to this Agreement in accordance with this clause before resorting to external dispute ➤



'Justice Barrett opined that merely because both parties had agreed by contract to an ADR process prior to litigation was of marginal relevance to whether the Court should impose an ADR process against the will of the plaintiffs. His Honour's view was, "That question has to be determined by reference to the circumstances which exist at the time of the proceedings, not at the time the parties contracted".'

- resolution mechanisms.
- (b) A party claiming that a dispute has arisen under this agreement must immediately notify the other parties' nominees.
- (c) If the dispute is not resolved by the nominees within seven (7) business days of it being referred to them then the dispute must be immediately referred by the nominees in the case of a referral by one or more of the founders, to the purchaser's chief executive officer and in the case of a referral by the purchaser, to one of the founders.
- (d) If the dispute referred to in the case of a referral by one or more of the founders to the purchaser's chief executive officer or in the case of a referral by the purchaser, to one of the founders under s 13.16(c) hereof, is not resolved within seven (7) business days of referral, the matter must be referred by the nominees for dispute resolution to the Australian Commercial Disputes Centre or its successors.
- (e) If a dispute is not resolved within two months after referral to the Australian Commercial Disputes Centre under s 13.16(d) hereof, or such longer period as agreed between the parties, then either party may institute legal proceedings without further notice.
- (f) Notwithstanding the existence of a dispute each party must continue to perform its obligations under this agreement, including payment.

The first defendant argued in favour of the notice of motion on the basis that the parties had agreed to attempt an ADR process prior to litigation and that this showed a predisposition towards ADR. Also, that the substantive issues to be determined by the Court were not of an urgent nature. Therefore, it would not be unreasonable for the parties to embark on an ADR process prior to litigation.

The plaintiffs argued against the application on the basis that the dispute was not a dispute as defined by cl 13.16 of the agreement. Therefore, if cl 13.16 was not the source of obligation to participate in an ADR process there was no agreement between the parties to participate in an ADR process prior to commencing litigation. Also, before a court

could refer a matter to mediation under s 110K of the Act, the court would have to identify:

... something to single the particular controversy out from the ordinary course and to justify the parties being subjected to the burden of the additional time and money that a mediation involves.⁴

Dismissing the first of the arguments by both the first defendant and the plaintiffs, his Honour Justice Barrett opined that merely because both parties had agreed by contract to an ADR process prior to litigation was of marginal relevance to whether the Court should impose an ADR process against the will of the plaintiffs. His Honour's view was, 'That question has to be determined by reference to the circumstances which exist at the time of the proceedings, not at the time the parties contracted'.⁵

After briefly reciting the salient facts, his Honour began his judgment by setting out three conditions that must be satisfied for the Court to order a stay of proceedings. They were:

First, in order to avoid being void as an unlawful attempt to oust the jurisdiction of the Court, the provision must operate as a precondition to the parties' freedom to litigate rather than a purported denial of that freedom: compare *Scott v Avery* (1855) 5 HLC 811.

Second, it is axiomatic that the disputes which are the subject of the proceedings sought to be stayed must be within the scope of the contractual provision.

Third, the agreed contractual process must possess such a degree of definition and certainty as to enable it to be meaningfully undertaken and enforced.⁶

Dealing with the first of the three conditions, his Honour had no difficulty assessing cl 13.16 as a condition drafted in a *Scott v Avery* form. As to the second condition, Barrett J judged that the dispute that had given rise to the notice of motion before the Court was a dispute within the contemplation of cl 13.16 of the contract. His Honour quoted from the NSW Court of Appeal decision in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, where Gleeson CJ (as he then was) warned that arbitration ➤



➤ clauses should be read widely as opposed to being read too narrowly. The reason for this, his Honour explained, is that it would not be within the contemplation of the parties that different disputes that arise under a contract should be resolved before different tribunals or that the appropriate tribunal should be determined by minute differences in the character of the dispute. In other words, the intention of the parties, when contracting, was for a wide variety of disputes to fall within the ADR clause.

As to the third condition to be satisfied before the Court would order a stay of proceedings, Barrett J had some difficulty finding the requisite certainty required of ADR clauses in contracts. Before turning his mind to judge the facts of the case, his Honour canvassed the relevant case law and made references to the issues of contractual uncertainty raised in cases such as *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; and *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

His Honour found that cl 13.16(d) of the contract did not have the requisite certainty required by the law of contract. In particular, his Honour detailed the role of the Australian Commercial Disputes Centre (ACDC) and concluded that ACDC's role was purely as facilitator and not resolver of disputes. In this respect, the requirement under cl 13.16(d) of the contract — that if the dispute had not been resolved by the parties within seven days of it having been notified and referred by one party to the other, then the dispute was to be referred to ACDC — lacked the necessary certainty because it failed to adequately define the role of ACDC.

His Honour made reference to *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 the ratio descendi of which provided that a contract will still be complete, and therefore valid, even if parties leave an important element of their contract to be decided by a third party.⁷ In relation to *Booker Industries* and the facts before the Court, his Honour stated:

... this line of authority is not relevant to the matters now under consideration. Clause 13.16 does not refer to dispute resolution 'by'

ACDC or cast ACDC in the role of the decision-maker who is, by the parties' agreement, to fill a gap they have consciously left. Rather, the clause speaks of a dispute being referred 'for dispute resolution to' ACDC without seeking to define its role.⁸

As to dismissing the notice of motion for the stay of proceedings, his Honour concluded:

In the light of the evidence, it is not possible to ascribe to cl 13.16(d) the kind of certainty as to procedure and process which the authorities make an essential ingredient of positive exercise of the jurisdiction to order a stay upon an application of the kind now before the Court. The outcome, therefore, must be that the application for a stay of proceedings is dismissed.⁹

The remaining issue for the Court was the second element of the application, namely for the Court to make an order under s 110K of the Act to force the parties to mediate the dispute.

Before deciding the issue, his Honour canvassed the authorities on the issue of ordering an unwilling party to mediation under legislation giving a court the discretion to do so. There were no NSW decisions to assist his Honour. However, counsel drew his Honour's attention to two South Australian decisions that established that in appropriate cases a court should order an unwilling party to mediation, and, that in deciding when it is appropriate for a court to so order a party, such a decision should be based on the merits of the case.¹⁰ However, ultimately Barrett J was unmoved by these decisions.

His Honour stated that when one party to a dispute wants to litigate as opposed to participate in an ADR process, the Court needs to think very carefully about compelling what could turn out to be an exercise in futility that will only increase the delay and expense of a final decision by a court. However, his Honour did acknowledge that:

There will no doubt be some cases where such a course will be justified: where, for example, the Court perceives that emotional or other non-rational forces (including unreasonable intransigence) are at work and a proper sense of proportion may be introduced into the picture by the efforts of a

third party skilled in conciliation.¹¹

Barrett J summed up by stating that, given that two commercial parties engaged in a commercial agreement (presumably at arm's length) with the requisite advice regarding ADR processes that would inform them of the benefits or otherwise of those processes, and:

If, with the benefit of that knowledge and the advice of their solicitors, they do not all see sufficient value in resort to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay at least lip service to it.¹²

His Honour judged that mediation forced upon one of the parties, rather than with the agreement of all the parties, would be unlikely to achieve anything useful. Therefore, his Honour dismissed the alternative application of the first defendant with costs and left the door open for the parties to seek mediation by private agreement.¹³

One of the interesting elements of his Honour's judgment is the quote from the judgment relating to the conditions under which the Court would consider it appropriate to order mediation under s 110K of the Act when one or more parties are not willing to participate voluntarily. While his Honour gives us an idea of the conditions for triggering an order under s 110K, his Honour gives no examples of factual situations where the court will invoke s 110K of the Act.

Barrett J's references to 'emotional or other non-rational forces' and 'unreasonable intransigence' leaves one wondering what kind of factual situations his Honour had in mind before a court will invoke s 110K of the Act.

Perhaps 'emotional forces' are those forces where emotion is driving the dispute as opposed to substantive or forensic reasons for insisting upon a litigated resolution. Perhaps retribution being exercised by one party over another would be a trigger mechanism to invoke s 110K of the Act. As for 'non-rational forces' and 'unreasonable intransigence', perhaps the desire to prolong litigation so that one party will exhaust their financial resources is a case where s 110K of the Act will be invoked.

Both the above reported ➤



➤ cases challenge the courts to discover under what conditions it is appropriate to order mediation under s 110K of the Act. While the decision must surely be easy when all parties to the dispute are in agreement on participating in mediation, the decision for the court becomes problematic when one or more parties are unwilling to participate in such a process. Watch this space for further litigation on s 110K of the Act. ●

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Endnotes

1. [2001] NSWSC 13 (25 January 2001).
2. At para 90.
3. At para 91.
4. At para 42.
5. At para 43.
6. At paras 7-9.
7. In that case, a term of the lease stated that if the parties could not agree on a rent then an arbitrator would be appointed to fix the rent. Wilson exercised an option to extend the lease and Booker ordered Wilson to vacate the premises. Wilson sought an order for specific performance of the lease and the option. The High Court of Australia found that there was a valid contract between the parties with a condition precedent to performance that the

rent would be fixed. As to the incompleteness of the contract in relation to the fixing of the rent, the Court held that if the contract had merely stated that the rent had to be agreed between the parties, then that would make the contract void for incompleteness. However, given that the contract specified a mechanism for determining the rent, the contract was sufficiently complete for enforcement.

8. [2001] NSWSC 209 (28 March 2001) at para 35.

9. At para 36.

10. At para 39, citing *Hopcroft v Olsen* [1998] SASC 7009 (21 December 1998), and *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* [2000] SASC 159 (7 June 2000).

11. Above note 8, at para 44.

12. At para 45.

13. The applicant sought leave to appeal the decision. The NSW Court of Appeal (Mason P, Handley and Heydon JJA) refused leave to appeal stating (at [2001] NSWCA 82 (5 April 2001) at para 4):

We are not persuaded that the learned judge erred in the exercise of his discretion under s 110K. Contrary to the claimant's submissions, the judge's reasons do not imply that the Court should never refer proceedings for mediation or neutral evaluation if one of the parties withholds consent. Rather, he made a finding that was well open on the material before him to the effect that the forced referral of this particular dispute to mediation or neutral evaluation was unlikely to be productive.

'Both the above reported cases challenge the courts to discover under what conditions it is appropriate to order mediation under s 110K of the Act.'

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