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Dispute resolution update

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Case notes in ADR

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Australian cases

RAJSKI v TECTRAN CORP PTY LTD

[2003] NSWSC 476, [2003] NSWSC 477, [2003] NSWSC 478

Facts

The parties had been embroiled in 15 separate proceedings over a period of 22 years. On a number of occasions the dispute had been referred to mediation pursuant to s 110K of the *Supreme Court Act 1970* (NSW) (the Act), which empowers the Court to refer any proceedings, or part of any proceedings, for mediation 'if it considers the circumstances appropriate'. The most recent attempted mediation was extended by Court order and, when the mediation had not concluded by the conclusion of that extension period, the plaintiff obtained leave to file a notice of motion seeking the further extension of the mediation. The mediation was ordered to continue in force until the hearing of the notice of motion, which hearing raised a number of issues considered below.

Matters in issue

(1) Whether to admit into evidence documents tendered by a party as to what transpired in the mediation. Other parties objected to the admission of one particular document, a letter from the mediator to representatives of the parties. In determining the issue, the Court referred to ss 110P(4), (5) and (6) of the Act, which provides:

> (4) Evidence of anything said or of any admission made in a mediation session … is not admissible in any proceedings before any court, tribunal or body.
>
> (5) A document prepared for the purposes of, or in the course of, or as a result of, a mediation session …, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.
>
> (6) Subsections (4) and (5) do not apply with respect to any evidence or document:
>
> (a) if the persons in attendance at, or identified during, the mediation session … and, in the case of a document, all persons identified in the document, consent to the admission of the evidence or documents; or
>
> (b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under section 110Q(c) [which subsection permits a mediator to disclose information if there are reasonable grounds for believing that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property]'.

(2) Whether to admit into evidence documents tendered to the Court on behalf of the mediator as to what transpired during the mediation. Of relevance to the Court was s 110Q(b), which provides:

> A mediator… may disclose information obtained in connection with the administration or execution of this Part only in any one or more of the following circumstances:
>
> (b) in connection with the administration or execution of this Part …'

(3) Whether a person who controls entities that are parties to proceedings may, over his objection, be ordered to personally attend a mediation.

(4) Whether a further extension of the mediation should be ordered.

(5) Whether the Court has jurisdiction to restrain legal practitioners from participating in the mediation process.

Decision

(1) Admissibility of documents tendered by a party

As to the admissibility of the letter from the mediator, to which objection was taken, the Court relied on the clear words of ss 110P(4) and (5), explaining that they are 'designed to exclude the Court from going into what occurs within the mediation'. The only exceptions are the circumstances described in ss 110P(6) and ss 110Q(b). Subsections (4) and (5) afforded 'complete protection in respect of things said and done in the mediation and the documents produced for the purposes of the mediation'.

According to the Court that letter was 'unquestionably' a document that had been prepared for the purposes of, or in the course of, or as a result of the mediation session and was therefore inadmissible. The Court explained the purpose for the protection as being:

> … to avoid the very thing that is occurring in this case; that is that instead of the mediation affording a haven from litigation in which parties may negotiate frankly and informally towards settlement of their dispute, the mediation itself becomes yet another area of conflict generating another whole set of proceedings in court.

The Court rejected the submission that the protection from admission was not intended to apply where the Court is supervising the conduct of an existing mediation for the purpose of determining whether it should continue. However, it did concede that

evidence as to whether the mediation concluded successfully or unsuccessfully would be admitted, although the letter here was not of that nature; it was a document tendered in aid of proving a contested version of what was done at the mediation and why.

The Court left the remainder of the documents in the bundle to be ruled on separately (if the parties chose to take that course), but noted that even if their admissibility were not precluded by the operation of subs (4) and (5), they may well be inadmissible by virtue of s 135 of the *Evidence Act*. The ground would be that the probative value of such evidence in relation to the real issue to be determined in the application is substantively outweighed by the danger that the evidence would either be confusing within s 135(b) or else would cause or result in undue waste of time within the meaning and operation of s 135(c) (at para [26]). The Court decided to prevent the admission into evidence of a document attached to the letter referred to above on this particular ground.

The Court distinguished the admission of documents relating to the mediation tendered by the mediator from those tendered by a party.

(2) Admissibility of documents tendered by mediator

The Court distinguished the admission of documents relating to the mediation tendered by the mediator from those tendered by a party. It explained that the function fulfiled by the mediator under Pt 7B of the Act is part of the administration of justice itself and that s 110Q specifically provided for the mediator to disclose certain information. Paragraph (b) of that section, which permitted disclosure by a mediator 'in connection with the administration or execution of this Part', permitted a mediator to make a report to the Court pertaining to the progress of a particular mediation ordered under Part 7B and it followed that the Court was permitted to receive and act upon that disclosure if the Court considers it in the interests of justice to do so.

In the present case, where the question was whether the mediation should continue or not, the Court could see no reason why the mediator should not assist in the Court's administration of Part 7B by stating his views on that topic. Indeed, it is a document to which the Court 'ought to have regard where a matter arises which calls for the supervision of the Court in a particular mediation'. However, the Court is still to have regard to matters such as its relevance and whether it is unduly prejudicial in determining whether it is admitted in each particular case. Furthermore, where such a report is admitted, it does not necessarily follow that any evidence tendered to counter what is said in the report will necessarily be admitted, for that is a question that will hinge on s 135 of the *Evidence Act* among other considerations.

The Court further explained:

> It may be that in the course of stating his views material will be disclosed to the judge which would have the effect of disqualifying that judge from determining the case, if the mediation does not result successfully and the matter must go to trial. Those are considerations of which account can be taken when it comes to determining if, and by what means, a trial should proceed if a mediation has been unsuccessful. Those considerations do not, however, in my opinion, of themselves limit the scope of the matter which a mediator may report to the Court, if he or she thinks it proper to do so, in order to assist the Court to administer Part 7B.

(3) Order for personal attendance

The Court did order a person that controlled entities that were parties to the proceedings to attend the mediation. In exercising its judgment, the Court took into account the following factors: even though in ill health, the individual was not physically or mentally disabled from participating in the mediation process; he was open to a global settlement of the dispute that mediation may have provided; and he could make a valuable personal contribution to the mediation.

(4) Further extension of mediation

The Court concluded that a further extension of the mediation should be ordered. It was relevant that in the absence of a settlement, 15 separate proceedings would continue, consuming valuable Court and party resources. In these circumstances, and because the parties appeared open to settlement (even though one opposed the order), the Court decided to give mediation 'another chance' even though it had failed on a number of previous occasions.

As a precondition to its order, the Court required the parties to give an undertaking to the Court not to commence or continue any legal proceeding or complaint to a disciplinary body or authority arising out of the conduct of the previous mediations. This was required in order to avoid a climate of 'fear' which had prevailed at previous mediations, apparently because of the willingness of a party to threaten professional disciplinary actions against lawyers of other parties.

(5) Restraint of lawyers attending mediation

As to restraining a party's legal advisers from participating in the mediation process, the Court explained that it had power to make such an order in the exercise of its inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process: *Grimwade v Meagher* [1995] 1 VR 446; *Black v Taylor* [1993] 3 NZLR 403; *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587. The Court commented that:

> … a mediation ordered under Part 7B of the Supreme Court Act is just as much a part of the administration of justice by the Court as are proceedings in the courtroom. The jurisdiction of the Court to protect the integrity of its administration of justice therefore extends to the making of an order restraining named legal practitioners from participating in a mediation, if a sufficient case for such an extreme order is made out.

The Court concluded that no case against legal advisers was made out. Indeed, no attempt was made to do so after the Court had excluded evidence relating to the mediation on the basis that such evidence was inadmissible under ss 110P(4) and (5) (discussed above). ●

When a judge acts as a mediator, the judge sheds … the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private.

DUKE GROUP LTD (IN LIQ) v ALAMAIN INVESTMENTS LTD

[2003] SASC 272

Facts

The action before the judge (the 2003 action) involved a number of issues, including that directors of the plaintiff company, now in liquidation, had breached their fiduciary duties. Some 11 years earlier a related action occurred (the 1992 action) at which a Supreme Court judge had been appointed as mediator for certain pre-trial issues. That action had involved issues as to whether directors of the plaintiff company, then also in liquidation, had breached their fiduciary duties. That judge was to hear the 2003 action. At the time of the 2003 action the judge had no detailed recollection of the mediation and had destroyed his notes of it. There was no transcript of the mediation.

Matters in issue

The 2003 action involved the same plaintiff (the company in liquidation, by its liquidator) as the 1992 action but none of the same defendants. The plaintiff objected to the judge hearing the matter on the following grounds:

- the plaintiff makes the same allegations as in the 1992 action and alleges that the defendants were party to the breaches; and
- the judge's participation in the mediation may have resulted in him receiving information which would cause him to have a view on the merits of certain aspects of the 2003 action.

There was no allegation against the judge of actual bias.

Decision

The judge disqualified himself from hearing the trial. The fact that some defendants in the 2003 action intended to re-litigate issues (namely whether directors of the plaintiff, who were defendants in the 1992 action, acted in breach of their fiduciary duties) raised in the 1992 action was the ground that the judge considered disqualified him. He explained that a reasonable bystander might apprehend that, in the course of the mediation, he might have received information which would cause him to have a view about the merits of certain issues raised in the 2003 action which might affect his discretion in dealing with that action.

He explained that:

> … I believe that what is at stake is the integrity of the Court engaging in two forms of dispute resolution and the public interest in upholding the integrity of the Court and public confidence in the Court. It is necessary to uphold public confidence in the integrity of the mediation process. It is equally important to uphold the public confidence in the integrity of the process of adjudication by the Court. It is important that nothing should occur which would suggest any breach of the obligation of confidence attaching to a mediation. Those who engage in mediation should be entirely confident that in no respect will anything said in confidence be revealed. Secondly, the public should have confidence in its judges knowing that, when they adjudicate issues, they are not influenced by anything which might have occurred in a mediation.

With respect to the role of serving judges acting as mediators, he commented:

> When a judge acts as a mediator, the judge sheds … the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other. It is for that reason that the judge will not in any respect adjudicate in that action except with the consent of the parties. ●

International cases

United States

The following cases of interest have occurred in the United States.

On 30 May, 2003 California's Second District Court of Appeals

(DCA) held in *John Eisendrath v Superior Court* (2003 DJDAR 5849), a case of first impression, that there can be no implied waiver of mediation privilege. Mediation communications could only be disclosed with the express consent of all participants (as distinguished from parties), including the disputants, other non-parties in attendance and the mediator.

On August 29, 2003, California's First DCA held in *David Furia v Hugh N Helm III* (2003 DJDAR 9901) that a cause of action exists where a mediator to a dispute who is also an attorney to one of the disputing parties fails to disclose actual or potential conflicts of interest. In those circumstances, the mediator owes the same duty of disclosure as an attorney representing clients and should disclose its interests in a common writing to both parties and not have an undisclosed side agreement with one of the parties. ●

United Kingdom

The following cases of interest have occurred in the United Kingdom.

On 14 May 2003, in *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (Ch), the Court refused to award costs to the Ministry of Defence (MoD), even though it successfully defended its right to terminate a lease. The MoD had earlier rejected the claimant's suggestion of resolving the dispute by ADR on grounds (including that there was a point of law involved that required an adjudicated answer and that emotions did not play a part in the conflict) which the Court ruled did not make the matter unsuitable for mediation.

On 1 July 2003, in *Corenso (UK) Limited v The Burnden Group plc* [2003] EWHC 1805 (QB), in a decision that has been criticised as possibly being inconsistent with decisions since *Dunnett v Railtrack* [2002] 2 All ER 850 (CA), that failure to engage in mediation may have adverse consequences, but not necessarily so. Provided the parties show a genuine and constructive willingness to resolve the issues between them, the Court explained that a party will not automatically be penalised because that party has not gone along with a particular form of ADR proposed by the other side.

More recently, in September 2003, in *Valentine v Allen, Nash & Nash* [2003] EWCA Civ 1274, the Court of Appeal declined to relieve an unsuccessful appellant from costs liability to the respondents on the appeal on the ground that he had offered mediation before trial in the court below. ●

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