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Dispute resolution update

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ADR Bulletin

Case notes in ADR

Dispute resolution update

Prepared by **Andrew Tuch**

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ORIENTAL CARPET DEPARTMENT STORE PTY LTD v SUPACENTA PTY LTD

[2003] NSWSC 783

Facts

A dispute regarding arrears of rent arose between the lessee and lessor under a lease that was subject to the (NSW) *Retail Leases Act 1994* (the Act). The dispute involved what the Court described as 'complicated questions of equitable relief', which included issues of restitution, relief against forfeiture and economic duress. However the Court expressed no view on these matters, and focused instead on two primary issues.

Matters in issue

(1) Whether the proceedings should be transferred to the Administrative Decisions Tribunal (the Tribunal).

Under s 75 of the Act, if civil proceedings pending in a court involve a retail tenancy dispute, the court must, on the application of any party to the proceedings, transfer the proceedings to the Administrative Decisions Tribunal, but only if the court is satisfied that the dispute is such as may effectively and appropriately be dealt with by the Tribunal and that the interests of justice do not require that the matter be dealt with by the court.

(2) Whether, if the Supreme Court were to decide the matter itself as the parties initially requested, it could be satisfied that mediation was unlikely to resolve the dispute, a general precondition to it hearing the matter (pursuant to s 68 of the Act).

Although the Court was not strictly required to determine this issue if it

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transferred the proceedings to the Tribunal, it did provide instructive guidance as to when a court can be satisfied of the matters in s 68.

Section 68 provides that a retail tenancy dispute or certain other disputes under the Act:

> may not be the subject of proceedings before any court unless and until the Registrar [of retail tenancy disputes] has certified in writing that mediation … has failed to resolve the dispute or matter or the court is otherwise satisfied that mediation … is unlikely to resolve the dispute or matter.

No certificate had been granted by the Registrar for purposes of this provision.

Decision

(1) Transfer of proceedings to Administrative Decisions Tribunal

The Court decided to transfer the proceedings to the Tribunal, being satisfied that it was the appropriate body to effectively deal with the claim and that the interests of justice did not require the Court to determine the matter.

(2) Whether mediation was unlikely to resolve the dispute

The Court explained that s 68 required the Court, and not the parties or their legal advisers, to be satisfied of this matter. The views of legal advisers would be important factors for the Court to consider and it would be 'slow to ignore' them. However, it could reject their views. The Court explained (without elaborating):

> The cases under s 110K of the *Supreme Court Act 1970*, such as *Higgins v Higgins* [2002] NSWSC 455 show that there are circumstances where mediation may be worthwhile despite the statement of the parties that mediation may be unlikely to resolve the dispute or matter.

(In *Higgins v Higgins* [2002] NSWSC 455 the Supreme Court referred the matter to mediation in the face of opposition by one party, recognising that referral may be appropriate where the opposition may be founded on the fear that agreeing to mediation signals weakness or where the opportunity to approach the disputed matter in a spirit of compromise may lead to its resolution).

On the basis that the lessor viewed mediation as hopeful, the Court decided that it could not be satisfied for purposes of s 68 that mediation was unlikely to resolve the dispute.

The Court explained that s 68 required the Court, and not the parties or their legal advisers, to be satisfied of this matter. The views of legal advisers would be important factors for the Court to consider and it would be 'slow to ignore' them.

It followed that the dispute could not have been the subject of proceedings before the Court and this buttressed the Court's decision (above) to transfer the proceedings to the Tribunal. ●

MCDONALD'S AUSTRALIA LIMITED (FORMERLY MCDONALD'S PROPERTIES (AUSTRALIA) PTY LIMITED) v CHALLENGER PROPERTY NOMINEES PTY LIMITED

[2003] NSWSC 963

Facts

After entering into a lease subject to the *Retail Leases Act 1994* (NSW) (the Act), the lessee complained that the lessor had breached its obligations under the lease by not providing an appropriate goods lift or an adequate kitchen exhaust system. During the term of the lease, the premises were sold, with the result that there was disagreement as to whether the former or existing lessor was responsible to the lessee for the alleged breaches.

The lessee's history of complaints and attempts to resolve the matter is extensive and covers a three-year period. These took the form of numerous letters, telephone calls and meetings. However, the problems remained unresolved on the date of the hearing as the current lessor, former lessor and builder apparently struggled to allocate responsibility among themselves for the problems.

After the lessee commenced proceedings, the former and current lessors and builder objected that mediation had not been attempted, relying on s 68 of the Act. That section prevents a court from hearing a retail tenancy dispute unless the Registrar of Retail Tenancy Disputes has certified in writing that mediation has failed or the court is otherwise satisfied that mediation is unlikely to resolve the dispute.

Each of the parties involved, except the lessee, declared that it was willing and able to participate in a mediation. The lessee refused to mediate unless its costs for mediation were paid, a request to which the other parties refused to accede.

By a consent order under Part 31 of the Supreme Court Rules the parties agreed for the determination of a preliminary question. That question, stated below, was the only matter in issue at the hearing.

Matter in issue

Was the Supreme Court satisfied pursuant to s 68(1) of the Act that mediation under Part 8 of the Act is unlikely to resolve the dispute?

Decision

The Court answered 'yes'.

In doing so, it referred to *Oriental Carpet Department Store Pty Ltd v Supacenta Pty Ltd* [2003] NSWSC 783 for the principle that it was for the Court and not the parties (nor any one of them) to satisfy itself that a reference to mediation is unlikely to resolve the

dispute. In making this decision, a Court is entitled to take account of the precise nature of the dispute and the issues involved. The Court further explained that:

> Experience shows that, notwithstanding in certain circumstances the most stringent opposition to being involved in a compulsory mediation, it is sometimes seen to be successful …

On the facts before it, the Court was satisfied that mediation was unlikely to resolve the dispute because of the long history of attempts at resolution by the lessee and extensive record of communications between the parties on the matter. It was also significant that the lessee was effectively required to commence court proceedings in order to bring the dispute to a head and that there were special difficulties involved in discerning precisely the terms of the lease.

Finally, the Court rejected an argument that the former lessor might be in a different position to the current lessor. Although the former lessor's communications with the lessee had not been as extensive, both were implicated in the dispute and the former lessor had never given any indication to the lessee that there would be any utility in mediation. ●

McCOSH v WILLIAMS
[2003] NZCA 192

Facts

A bitterly contested dispute between a farmer and his three daughters concerning the entitlements of the parties to certain dairy farming property was settled at mediation. The settlement agreement provided for the father to transfer approximately 21,000 shares of a certain company to his daughters. It also included the following clause:

> 13. In the event of any dispute between the parties in relation to the interpretation or implementation of this Agreement, that dispute shall be submitted to [the mediator] for summary determination and his decision will be final and not submit [sic] to judicial review of any kind.

Several days later a dispute arose as to the number of shares to be transferred, the daughters claiming that they ought to receive another approximately 60,000 shares to reflect certain bonus issues by the company. The father opposed this and insisted that the terms of the settlement agreement were correct.

The daughters asked the mediator to 'arbitrate' the dispute and the mediator, relying on clause 13 (set out above), agreed.

The parties provided to the mediator written submissions about whether he had jurisdiction to hear the matter and about the substance of the matter. The mediator decided that he had jurisdiction pursuant to cl 13 and issued a 'summary determination' that the number of shares specified in the settlement agreement should have been greater (close to the daughters' claim).

When the father refused to comply, the daughters commenced proceedings based on the summary determination. These proceedings settled, with the father retaining the disputed shares. The father then commenced the present proceedings against the mediator alleging negligence and breach of the *Fair Trading Act 1986* (NZ).

The mediator relied on the following exclusion clause that appeared in the mediation agreement (signed prior to the mediation):

> The parties jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to this mediation.

The High Court dismissed the proceedings and the father appealed to the Court of Appeal.

Matters in issue

(1) Whether, in making a 'summary determination' of a dispute concerning the Settlement Agreement, the mediator had exceeded his 'jurisdiction';
(2) Whether the mediator had acted negligently;
(3) Whether the mediator had breached the *Fair Trading Act*; and
(4) Whether the exclusion clause operated to relieve the mediator of liability.

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Decision

(1) Jurisdiction of mediator for 'summary determination'

The Court concluded that the mediator had exceeded his jurisdiction under cl 13. That provision conferred on him power to give a summary determination 'in relation to the interpretation or implementation' of the Settlement Agreement. According to the Court, this allowed the mediator to determine a matter only if it was about the meaning of the words of the document or the obligation of the parties concerning the mechanics of putting it into effect. However, the dispute – whether the number of shares specified in the settlement agreement was wrong – could not be characterised in this way. Instead, the dispute involved an exercise of rectification of contract and did not attract the operation of clause 13.

(2) Negligence claim against mediator

Although the mediator was wrong to assume jurisdiction, this did not amount to negligence, the Court decided. His mistake did not amount to a departure from the standard of care to be expected of a reasonably careful mediator, even a Senior Counsel well versed in alternative dispute resolution – as the mediator here was.

To explain this conclusion, the Court stated simply that even it (the Court) did not find the question of jurisdiction straightforward and this was due in part to a lack of 'perfect consistency' in choice of words in the agreement.

Even if negligence were found, the Court further explained, difficult issues would arise as to whether the mediator owed the father a duty of care to protect him from the particular losses said to have arisen from the mediator's error and whether any proven breach of duty had actually been causative of the claimed losses. The Court expressed no view on either of these questions. However it did note that there is 'at the very least, a respectable argument on the facts' that if the mediator had declined to act under cl 13 that the daughters would still have pursued the disputed shares by way of litigation.

The Court dismissed the appeal.

(3) Breach of Fair Trading Act

The Court rejected any basis for mediator liability under the Fair Trading Act as 'hopeless'. If a mediator some time after being appointed wrongly exceeded his jurisdiction (that is, exceeded the terms of his appointment), as occurred here, it did not follow (as the father argued) that at the time of accepting the appointment the mediator had made a deceptive and misleading statement. Furthermore, there was no allegation here that the mediator had, at the time of appointment, concealed an intention to exceed its terms.

(4) Effect of exclusion clause

Since negligence was not established, the mediator did not need to rely on the exclusion clause. The Court of Appeal noted, however, that the clause only protected the mediator in relation to his acts and omissions when acting as a mediator. The acts in question, which occurred after the mediation had concluded, would not have been covered. ●

SEEL & NAREV v AMALGAMATED DAIRIES LIMITED

[2003] NZCA 195

Facts

A party to proceedings (separately reported at [2003] 1 NZLR 829) prevailed on all issues in dispute, including on the counterclaims. The winning party had refused the other party's offer to mediate the dispute. Costs in the matter were awarded on a lower basis than that sought by the winning party (separately reported at (2003) 16 PRNZ 829), although in its reasons the Court declined to reduce the costs it regarded as otherwise payable because of the failure of that party to submit to mediation. The winning party (the appellants) appealed against the costs decision on other grounds (since they had not received all the costs they had sought). The other party (the respondents) sought to bring a cross-appeal, although due to an oversight on the part of its solicitors it did this after the allowable period for cross-appeal under the *Court of Appeal (Civil) Rules 1997* (NZ), rule 8(2).

In determining whether to grant leave to cross-appeal out of time, the Court of Appeal addressed the issue — relevant for our purposes — of the prospects for success of the respondent's cross-appeal. The cross-appeal related to the Court's decision not to reduce costs on account of the appellants refusal to mediate.

The respondents argued that on appeal they would submit that if the matter had proceeded to mediation it may well have settled and the costs incurred by the parties would have been substantially less than those that were incurred and, further, that valuable court time would have been saved.

Matter in issue

Whether the trial Court erred in refusing to reduce costs on account of a party's refusal to mediate. (This issue was key to the respondent's prospects of success in their cross-appeal, which in turn was decisive in the Court's decision whether to grant leave.)

Decision

The Court interpreted the respondent's argument to be, in effect, that if the appellants had been prepared to mediate there might have been a compromise involving acceptance by the appellants of a lesser sum than was awarded by the judge. Avoidance of trial by means of the mediation process would thus have come at a financial disadvantage for the appellants.

The Court described this argument as 'bereft of any merit' because in the present case the appellants decision not to mediate had been 'vindicated'. Of the argument, the Court of Appeal explained:

> The argument might have some semblance of respectability if the trustees, after rejecting mediation, had recovered significantly less at trial than they had claimed, although even in that event the decision of this Court in *Beadle v M & L A Moore Ltd* [1998] 3 NZLR 271 might still have stood in the way. ●

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diary and happenings

- Peter Condliffe, barrister and specialist mediator and facilitator, is running a **Restorative Justice and Conferencing workshop** for La Trobe University, City Campus, Melbourne later this year (Phone 03 9479 2284). He can be contacted on *pcmediate@bigpond.com*.
- The Bond University Dispute Resolution, in conjunction with AIFLAM, will be holding an **Advanced Mediation Course** at Noosa from 23-26 September. Contact *drc@bond.edu.au* .
- The NADRAC paper on accreditation, **'Who Says You're a Mediator? Towards a National System for Accrediting Mediators'** has been published with an invitation for interested parties to respond on the issues raised. Contact *nadrac@ag.gov.au* or the website <www.nadrac.gov.au>.
- The new Australian Centre for Peace and Conflict Studies, a research centre ocated within the Faculty of Social and Behavioural Sciences at the University of Queensland, has appointed **Professor Kevin Clements as its foundation director**. For further details on the Centre visit <www.polsis.uq.edu.au/acpacs/>.
- The **Institute of Arbitrators and Mediators, Australia has appointed Gordon Tippett** as CEO to replace Peter Condliffe. IAMA's national conference New Directions in ADR is in Sydney from 21–23 May 2004. See <www.iam.org.au/>.
- The **UN Forum on On-line Dispute Resolution** is to be held at the University of Melbourne from 5–6 July 2004. See <www.psych.unimelb.edu.au/icrc>.
- The **7th Annual Mediators' Conference** will be held in Darwin from 30 June to 2 July 2004. Contact *info@thebestevents.com.au* for more details.
- The Chairman of the ACCC has recently **launched the resolution@span** service for the telecommunications industry. The service has been case managed by Shirli Kirschner for some time and was officially launched at the Service Industry Providers Association Conference in Sydney.
- The second edition of ***The Mediator's Handbook*** (2004) by Ruth Charlton and Micheline Dewdney has been published by Thomsons LBC.
- ***Evaluating Mediation — NSW Settlement Scheme 2002*** prepared by Professor Tania Sourdin and Tania Matruglio and launched by Sir Anthony Mason at The Law Society of NSW on April 29, 2004 is now available from <www.lawsocnsw.asn.au>. A review of this work will be published in the next issue of *The ADR Bulletin*.

Correction

In the previous issue of The ADR Bulletin*, Bernadette Rogers, author of 'Power in Mediation' (6(9) ADR 169), was referenced as a member of the Administrative Appeals Tribunal. She is in fact a conciliation registrar of the AAT.*

The editor apologises for the error.

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