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From the law reports

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HOPESHORE PTY LTD v MELROAD EQUIPMENT PTY LTD

[2004] FCA 1445 (Branson J)

Facts

In October 2003, the applicant, a civil engineering company specialising in excavation work, brought proceedings against the respondent for relief arising out of the supply by the respondent of allegedly defective excavators to the applicant. The applicant's financial position was precarious and it was in its interests to have the dispute resolved speedily.

Following a number of delays in the litigation timetable, in August 2004 the respondent, by motion in reliance on s 56 of the *Federal Court of Australia Act 1976* (Cth) and s 1335 of the *Corporations Act 2001* (Cth), sought an order requiring the applicant to give security for the payment of costs that may be awarded against it.

In considering the motion, the Court noted that in the course of the proceedings the respondent's solicitors had taken action to defer mediation of the dispute that it (the Court) had ordered. According to the Court, the conduct of the respondent's solicitors reflected their view (which was admitted) that early mediation was not in the best interests of its client, apparently because the applicant was 'teetering on the brink of insolvency' (at paras 27, 35).

Matter in issue

Whether, in determining whether to grant or dismiss the motion for security for payment of costs, the Court could take into account the respondent's solicitors' actions to defer mediating the dispute.

Decision

The Court dismissed the motion, in part by reason of the conduct of the respondent's solicitors.

In determining whether to grant or dismiss the motion, the Court identified the factors relevant to its exercise of discretion. Some factors are 'generally recognised as appropriate for consideration', including the following: prospects of success in the proceedings; whether the order would preclude the applicant from pursuing the claim; whether the impecuniosity of the applicant arises out of breaches of conduct alleged against the respondent; the public interest; and the timing of the application, namely that it should be brought promptly: *Gartner v Ernst & Young (No 3)* [2003] FCA 1437 at [10]. However, the Court also considered whether the respondent's approach to mediation, which had been ordered by the Court, was also a factor the Court could take into account in exercising its discretion and decided that it was indeed a relevant factor.

The respondent's solicitors had acted to defer the court-ordered mediation and had thereby adopted a position that was 'inconsistent with the manner in which the court had made it plain that it wished [the] matter to be managed.' It was also 'inconsistent' with a legal practitioner's duty to assist

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the Court in management of a proceeding, which duty involved working 'with the Court to ensure that its caseload is managed efficiently and with due regard to the interests of justice' (at para 34).

Although few meaningful sanctions are available to the Court where it does not receive the co-operation required to be provided by legal practitioners, the lack of co-operation could be taken into account in the exercise of its discretion in a case, such as this, 'where the explanation for the lack of co-operation is a desire to achieve an advantage for a client' (at para 38).

Having regard to the respondent's approach to mediation and the factors identified in *Gartner v Ernst & Young (No 3)*, the Court dismissed with costs the respondent's motion for security for the payment of its costs.

The Court also criticised the respondent's solicitors for adopting the position that it was 'pointless to conduct a mediation prior to the applicant quantifying its claim against the respondent' (at para 33). This view reflected a failure to appreciate the true nature of mediation. The Court explained that (at para 31):

> Mediation is a process whereby … parties to a dispute are assisted in identifying options to resolve the dispute between them. The options available to the parties … may be wide and flexible when compared with the orders that would be open to be made by a court were their dispute litigated. The options available to the parties at mediation may include a win-win option. Options available early in the history of a dispute may not be available later.

The Court also explained that (at para 32):

> Court referrals to mediation reflect judicial appreciation of the skills of experienced mediators, [which are] different skills from those required of a litigator. A well-conducted mediation is not simply an occasion for each side to give consideration, with the assistance of a mediator, to the strength of its legal case and concomitantly to the extent to which it may be willing to compromise on its formal legal position. The respective business operations of the parties in this case lead me to conclude that, provided it could take place at a relatively early stage in the dispute resolution process, mediation could well result in the identification of options for resolution of the dispute that would not be available to the Court. ●

The Court also criticised the respondent's solicitors for adopting the position that it was 'pointless to conduct a mediation prior to the applicant quantifying its claim against the respondent' (at para 33). This view reflected a failure to appreciate the true nature of mediation.

UNCONVENTIONAL CONVENTIONS PTY LTD v ACCENT OZ PTY LTD

[2004] NSWSC 1050 (Hamilton J)

Facts

In the course of proceedings, a party applied for an order under s 110K of the *Supreme Court Act 1970* (NSW) that the matter be referred to mediation. This was despite the proceedings having previously been referred to mediation, which had failed. The plaintiff opposed the making of an order for a further mediation on the grounds that (1) mediation would impose additional expense on the parties and (2) 'it will not budge in negotiations' from the position that it had already put to the defendants and that, accordingly, further mediation would be 'pointless'.

Matter in issue

Whether the Court should order the parties to attend a second mediation, even though mediation had already been unsuccessful and the plaintiff opposed the referral.

Decision

Hamilton J ordered that the proceedings be referred to mediation

despite the lack of consent on the plaintiff's part. The judge explained that a Court should not lightly order a second compulsory mediation in a matter in which one has already taken place. However, he rejected the plaintiff's argument as to the costs of mediation, saying that he was 'unable to perceive that the costs of an afternoon mediation and preparation for it are a great consideration in proceedings the trial of which is taking weeks'. The judge also rejected the plaintiff's argument about being unwilling to change his position, saying that it had happened in other cases that apparently inflexible plaintiff's had changed their positions at mediation, including compulsory mediations.

It was also relevant to Hamilton J's reasons that the circumstances in the proceedings had changed *'very considerably'* since the first mediation. The financial position of the defendants had worsened since that time. There had also been a judgment on an application concerning interlocutory relief in the proceedings that had gone against the plaintiff. The change in circumstances were 'possibly sufficient for a compromise to be reached' in a second mediation which was not possible before, the judge said. It was also relevant to the judge's decision that the parties were engaged in voluntary without prejudice negotiations, despite the failed mediation.

Accordingly, Hamilton J ordered pursuant to s 110K of the *Supreme Court Act 1970* (NSW) that the proceedings be referred to mediation. ●

HALSEY V MILTON KEYNES GENERAL NHS TRUST; STEEL v JOY

[2004] EWCA Civ 576
(England and Wales Court of Appeal (Civil Division)) [1]

Facts

The two appeals raised the common question of general importance: when should the court impose a costs sanction against a successful litigant on the grounds that he or she has refused to take part in an ADR? In both cases, which the Court of Appeal decided together, it was submitted that the trial judge was wrong to award costs to a successful party that had refused a number of invitations to mediate.

Matter in issue

Whether, in each case, the trial court should have imposed a costs sanction against the successful litigant that had refused invitations by the other party to mediate the dispute.

Decision

In a decision delivered by Lord Justice Dyson, the Court of Appeal provided the following general guidance on the question of when costs consequences should be awarded against a successful party to litigation that refused to mediate the dispute:

1. A court's role is to encourage, not compel, the use of ADR. Courts should strongly support the use of ADR in general, and mediation in particular. Cases in which courts had adopted this approach included *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803, *Dunnett v Railtrack plc* [2002] 1 WLR 2434 and *Hurst v Leeming* [2003] 1 Lloyds Rep 379.

However, for courts to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable constriction on their rights of access to the court. Furthermore, even if (contrary to this view), the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, it is 'difficult to conceive of circumstances in which it would be appropriate to exercise [that discretion].'

2. The general rule as to costs awards is that they follow the event. An exception exists under the rules that allow a court to deprive a successful party of some or all of his costs on the grounds that the party has refused to agree to ADR. However, the burden would be on the unsuccessful party to show why there should be departure from the general rule. The 'fundamental rule is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR' (at para 13). Factors to be considered by the court in deciding whether a refusal to agree to ADR was unreasonable include (but are not limited to) the following:

(1) the nature of the dispute
(2) the merits of the case
(3) the extent to which other settlement methods have been attempted
(4) whether the costs of ADR would be disproportionately high
(5) whether any delay in setting up and attending ADR would have been prejudicial
(6) whether the ADR had a reasonable prospect of success (the burden is placed on the unsuccessful party to show that there was a reasonable prospect of success that mediation would have been successful) and
(7) whether the court had encouraged the parties to use ADR (the stronger the encouragement, the easier it will be for the unsuccessful party to show that the successful party's refusal was unreasonable).

In many cases no single factor will be decisive, the Court said, and these factors should not be regarded as an exhaustive checklist.

The Court analysed each of the appeals according to the relevant factors set out above. In neither matter was the Court satisfied that the successful party had acted unreasonably in refusing to mediate. The trial court had not encouraged the use of ADR in either matter. Furthermore, in the first matter, the successful party had reasonably believed it would succeed and the unsuccessful party '[came] nowhere near proving that there was a reasonable prospect that the mediation would have been successful' (at par 52) and the subject-matter of the dispute was not by its nature unsuitable for ADR. In the second matter, the nature of the dispute (involving a question of law which the successful party – or more realistically his insurers – wanted to have resolved by the courts) 'was one which was towards the 'intrinsically unsuitable' end of the spectrum [of disputes suitable for ADR]' (at para 78). Accordingly, both appeals were dismissed. ●

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Endnote

1. A brief summary of this case was provided in the LEADR Update for the period 1 February to 1 June 2004 under the heading 'International News – United Kingdom'. In view of the importance of the decision, a more detailed summary is provided in the current issue.

international diary and happenings

- The Association of Family and Conciliation Courts are holding their 42nd Annual Conference entitled 'Solving the Family Court Puzzle: Integrating Research, Policy and Practice' on 18-21 May 2005 at the Sheraton, Seattle. The conference will feature a full-day course on advanced mediation skills in addition to numerous workshops on mediation, collaborative divorce, interviewing children, research, domestic violence and more. Visit <www.afccnet.org> to register or for more information.

- Pepperdine University School of Law and the Straus Institute for Dispute Resolution present Pepperdine's 18th Annual Professional Skills Program in Dispute Resolution on 16-18 June 2005 in Malibu, California. There are 12 workshops offered including Advanced Mediation: Skills and Techniques, Specialised Mediation: Handling Challenging Employment, Medical Malpractice and Personal Injury, and Cultural and Gender Issues in Dispute Resolution. Visit <www.law.pepperdine.edu/straus/conferences> or email lori.rushford@pepperdine.edu to register or for more information.

- CEDR is holding its 10th International Summer School on 21-27 August 2005 at Lake Maggiore, near Milan, Italy. The course will provide mediator skills training leading to assessment for CEDR Mediator Accreditation. Places are limited. Visit <www.cedr.co.uk/index.php?location=/training/programmes/summerschool.htm> or email training@cedr.co.uk to register or for more information.

- The **World Mediation Forum V Conference**, jointly hosted by the **Institut Universitaire Kurt Bösch** and **World Mediation Forum**, is being held on 9-11 September 2005 at the Congress Centre 'Le Regent', Crans Montana, Switzerland. The Conference, entitled 'Mediation: A New Culture of Change', will bring together mediators, academics, lawyers, psychologists and all who support mediation to resolve conflicts, including former Eastern Europe, Asia-Pacific countries, Africa and South America. The English language program is available in PDF Format at <www.mediate.com/world/flyer+ grand+anglais20041125c.pdf>. For additional information and online registration, see mediation.qualilearning.org and <www.mediate.com/world>.

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