ADR Bulletin
ADR Bulletin

Volume 8 | Number 3 Article 4

11-1-2005

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From the law reports

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Editor's note: These case notes by Andrew Tuch and Gerald Raftesath were first published in the LEADR Update 1/2005 and are republished with the permission of LEADR and the authors – www.leadr.com.au.

INGOT CAPITAL INVESTMENTS PTY LTD v MACQUARIE EQUITY CAPITAL MARKETS LTD

[2004] NSWSC 1091 (McDougall J)

Facts

In the course of longstanding proceedings, the plaintiff applied for leave to further amend its summons. Evidentiary issues raised in connection with this included the time at which the plaintiff's legal advisers formed the view that amendments to the summons were necessary, the time when that intention was intimated to the defendants, and the time when a mediation was conducted. The plaintiff's solicitor said that he formed the view prior to the mediation that if the mediation was unsuccessful then some amendment to the summons would be necessary.

In his affidavit filed in respect of the application for leave to amend, the solicitor for one of the defendants referred to a number of items of correspondence relating to the mediation marked 'without prejudice', stating that none 'referred to any intention of the plaintiffs to further amend the summons if the matter did not settle at the mediation.' The solicitor stated that had he been aware at any time prior to the mediation of the view of the plaintiff's legal adviser (about amending the summons) he would have formed certain conclusions and recommendations and acted in certain different ways.

The plaintiff wished to challenge this evidence of the defendant's solicitor and, to do so, served a notice to produce documents which included those referred to in the affidavit. The defendant, in turn, asked for the paragraphs requiring production of the documents in question to be set aside.

The plaintiff submitted that the evidence should not be excluded, reasoning that s 131(1) of the (NSW) *Evidence Act 1995* did not apply. Section 131(1) provides as follows:

> Evidence is not to be adduced of:
>
> (a) a communication that is made between persons in dispute … in connection with an attempt to negotiate a settlement of the dispute, or
>
> (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

The plaintiff asserted that the provisions did not apply by reason of s 131(2)(g), which provides that s 131(1) does not apply if 'evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence.'

The defendant, however, asserted that the terms of the mediation agreement prohibited production of the documents. Pursuant to the mediation agreement the parties agreed that 'no party shall cause any subpoena or other compulsory process to issue requiring production of the without prejudice statements prepared for the purpose of the mediation or any document recording them.'

Matter in issue

Whether the paragraphs requiring production of documents relating to a mediation should be set aside.

Decision

The Court decided that the paragraphs in question should be set aside. It rejected the plaintiff's contention that s 131 of the (NSW) *Evidence Act 1995* applied and decided, instead, that the position was regulated by s 110P of the (NSW) *Supreme Court Act 1970*. Section 110P provides, in

relevant part:

(1) In this section, **mediation session** includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

…

(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 document, or

(b) In proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under s 110Q(c).

The Court concluded that the documents in question would be inadmissible by virtue of s 110P(4) or (5) and that, further, there was no legitimate forensic use to which they could be put that would justify their production. Although it was possible that the documents in question might be put to the defendant's solicitor and he could be asked whether he stood by his previous evidence, cross-examination of that kind could place the solicitor in an extremely prejudicial position and, in any case, the probative value of a negative response (if one were given) would be slight.

Accordingly, the Court decided that the paragraphs of the notice to produce calling for production of the documents in question should be set aside. The Court explained that the basis of this decision was either (1) s 110P and the Court's discretion under s 135 of the (NSW) *Evidence Act 1995* (to exclude evidence where its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party), or (2) s 135 alone.

Furthermore, the Court explained that, even aside from these statutory provisions, it would have come to the same conclusion on the basis of the mediation agreement, under which the plaintiff had contracted not to require production of the 'without prejudice' statements.

THE SILVER FOX CO PTY LTD AS TRUSTEE FOR THE BAKER FAMILY TRUST v LENARD'S PTY LTD

[2004] FCA 1570 (Mansfield J)

Facts

The applicants, The Silver Fox Co Pty Ltd and others, succeeded in establishing liability against the respondents to pay damages in proceedings in which the respondents were found to have contravened several provisions of the *Trade Practices Act* (Cth) 1974. The applicants claimed indemnity costs and relied on an affidavit of their solicitor that referred to a mediation conducted among the parties and sought to disclose the final proposals put by the applicants and by the respondents at the point when the mediation broke down.

The mediation agreement provided for confidentiality of the mediation process. In particular, cl 16 imposed a confidentiality obligation on any information or document provided during the mediation unless disclosure was required by law or by cll 17 or 21. Clause 17 permitted a party to disclose information or documents to persons 'within that party's legitimate field of intimacy'. Clause 18 provided (inter alia) that, subject to cl 21, any settlement proposal made in the course of the mediation would be 'privileged' and would not be tendered as evidence in any proceedings relating to the dispute (the dispute was defined to include the present proceedings). Clause 21 authorised disclosure to enforce any settlement made at the mediation.

Matter in issue

Whether, for the purposes of determining the applicants' claim for indemnity costs, evidence of settlement proposals by parties to a mediation was admissible in circumstances where, pursuant to a mediation agreement, parties had agreed that any settlement proposal would be 'privileged' and would not be tendered as evidence in any proceedings.

Decision

The Court decided that evidence of the settlement proposals at mediation was admissible for purposes of the applicants' claim for indemnity costs.

Section 131(1) of the (NSW) *Evidence Act 1995*, the Court explained, reflected the 'long standing principle' in *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285 that allowed courts to exclude evidence of communications made in attempting to negotiate a settlement of a dispute. An exception was given in s 131(2)(h), which provided that s 131(1) did not apply if 'the communication or document is relevant to determining liability for costs.'

The Court stated that it could 'be assumed that the terms of the offers made during the mediation are relevant to determining liability for costs, so that

prima facie s 131(2)(h) … would remove the prohibition in s 131(1) from adducing evidence of the communications [in question].' The Court then reasoned as follows.

First, precedent supported the use of s 131(2)(h) to permit the reception of settlement proposals in evidence: in *Bruinsma v Menczer* (1995) 40 NSWLR 716, Santow J had admitted evidence of an offer of compromise that was not marked 'without prejudice' and in *Marks v GIO Australia Holdings Ltd* (1996) 66 FCR 128, Einfeld J admitted 'without prejudice' correspondence between solicitors for parties that was exchanged to explore the prospects of settlement.

Second, public policy considerations did not prevent the exception in s 131(2)(h) from applying. Referring to the *Safeway* (*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 3)* (2002) ATPR ¶41–90 and *Black on White* (*Australian Competition and Consumer Commission v Black on White* [2002] FCA 1605) decisions, the Court explained that there was indeed a public policy of encouraging parties to endeavour to settle disputes without their communications being disclosed. However, that policy was directed to preventing disclosure for the purposes of influencing the outcome on 'the primary matters in issue', not the outcome of a question as to costs. The Court explained as follows:

> Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression 'without prejudice' or by a mediation agreement.

Third, expressing communications as being 'without prejudice' does not prevent the exception applying since the reference to 'relevant' in s 131(2)(h) 'is to be judged and determined by reference to legal principle'. It follows that invocation by the parties of the 'without prejudice' privilege did not answer that question of relevance. It was for the Court alone to determine whether the communication was 'relevant' for purposes of s 131(2)(h) and the parties could not pre-judge that question.

The Court concluded that s 131(2)(h) applied and that the settlement proposals were admissible. This conclusion was not changed by the operation of s 135 (which gives the Court the discretion to exclude evidence where its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party). The terms of the mediation agreement here did not demonstrate prejudice required for purposes of s 135. The Court explained that it was possible that such prejudice 'may appear from the facts recorded in the [mediation] agreement, or from other evidence' but that was not established in the present case.

Although admitting the evidence of the settlement proposals, the Court did not regard them as providing a proper basis for departing from the normal rule as to costs. The respondents' rejection of the applicants' settlement proposal 'was not imprudent or plainly unreasonable' and nor 'was their negotiating position imprudent or unreasonable.'

The respondents have appealed the Court's decision as to liability.

HYUNDAI ENGINEERING AND CONSTRUCTION CO LTD v VIGOUR LTD

[2004] HCCT 100/2003

(High Court of the Hong Kong SAR; Court of First Instance)[1]

Coram: Hon Reyes J

Facts

Pursuant to construction contracts, the parties to the contracts agreed to a dispute resolution procedure that involved resolution of any dispute by expert determination and, further in certain circumstances, by arbitration. A dispute arose and in 'a spirit of compromise' the parties entered into another agreement (the 'March Agreement'), which provided in relevant part as follows:

> *The parties will not continue arbitration and will not bring any arbitration or court action forever* and any right to sue each other will not be exercised … and *the parties will start to discuss together to resolve any differences* under or in connection with the above contracts and any arguments that may come up now and in the future for anything about the above contracts that can not be finalised will be resolved and decided by [senior manager directors]… *provided failing an ultimate agreement then both parties shall agree and submit to Third Party Mediation* procedure which shall be conducted and completed as soon as possible and in any case no party will exercise the right to sue against each other…' [emphasis added]

Representatives of the parties met unsuccessfully to negotiate to resolve the dispute. After several months, one party sought to have the dispute mediated pursuant to the March Agreement, but the other party refused to participate in any mediation. In proceedings that followed, the primary issue that arose – considered below – is whether the March Agreement was enforceable. The Court considered United Kingdom and Australian law on the issue.

Matter in issue

Whether the March Agreement, which purported to require the parties to negotiate, was valid and enforceable.

Decision

The March Agreement was valid and enforceable. The Court reasoned as follows.

First, the March Agreement was not invalid by reason of offending public policy. At common law an agreement 'to deprive the courts of a jurisdiction which they would otherwise have' was contrary to public policy. However the March Agreement did not purport to do this: under it the parties agreed to forebear from suing the other in arbitration or court proceedings while negotiations and mediations were afoot. In other words, the parties had 'not purported to bar the Court from adjudicating on their differences, but [had] only postponed the time when the Court's jurisdiction may be invoked by either side pending

negotiations and mediation.'

Second, the agreement to negotiate was enforceable. The Court referred to a number of authorities on the issue. It said that cases, such as *Queensland Electricity Generating Board* had equated agreements to negotiate (of which the March Agreement was regarded as an example) with agreements to agree, which will in many cases be void for uncertainty because they do not identify any specific procedure or time frame for the proposed negotiation or mediation.

However, the Court referred to *Coal Cliff Collieries* in which a majority of the NSW Court of Appeal considered that agreements to negotiate may be enforceable. The case involved an agreement stipulating that the parties would 'proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement.' Kirby J (with whom Waddell AJA agreed) explained as follows:

> … I do not share the opinion of the English [Court] that no promise to negotiate in good faith would ever be enforced by a court. I reject the notion that such a contract is unknown to the law, whatever its term. I agree… that, provided there was consideration for the promise, in some circumstances a promise to negotiate in good faith will be enforceable, depending upon its precise terms. Likewise I agree…. that, so long as the promise is clear and part of an undoubted agreement between the parties, the courts will not adopt a general principle that relief for the breach of such promise must be withheld.
>
> Nevertheless, alike with… the substantial body of United States authority which has been cited in this case, I believe that the proper approach to be taken in each case depends upon the construction of the particular contract… In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest example of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties …

The majority in *Coal Cliff Collieries* decided, however, that the agreement in question was 'too illusory or too vague and uncertain to be enforceable.'

The Hong Kong court interpreted the NSW decision as suggesting that a 'nuanced approach is required' to determining whether an agreement to negotiate is enforceable. This would involve taking into account the terms of the specific agreement (construed in light of its factual matrix), the type of relief sought by the party wishing to enforce it and the subsequent behaviour of the parties following agreement (such as any abortive negotiations).

> … the parties had an obligation of cooperation and good faith and, specifically, 'to ensure that mediation took place in the event that good faith negotiations broke down'. At a minimum, that would involve the parties appointing a mediator or mediators …

The court also referred to a number of English decisions: *Walford v Miles* in which the House of Lords described a 'bare agreement to negotiate' as having 'no legal content'; *Halifax Financial Services*, in which that view of the House of Lords was respected; and *Cable & Wireless*, in which Colman J suggests that a duty to negotiate in good faith is always unenforceable for uncertainty.

After critiquing the authorities, the Hong Kong Court concluded that 'there is probably no hard and fast rule that agreements to negotiate or mediate in good faith are per se unenforceable' and explained that:

> The Court must instead look at each stipulation and ask whether it is possible to frame objective criteria against which a party's reasonable compliance or non-compliance with a particular obligation can be assessed. Or, to put it in another way, is the Court able to frame objective criteria whereby it can decide whether or not there has been a breach of a particular agreement? If it is not possible, then the contract cannot be enforced. Otherwise, the agreement should be sustained and as much as possible the parties required to adhere to the bargain.

Under the March Agreement the parties had an obligation of cooperation and good faith and, specifically, 'to ensure that mediation took place in the event that good faith negotiations broke down'. At a minimum, that would involve the parties appointing a mediator or mediators 'who would then guide the parties towards a procedure which was appropriate to their needs and which might best resolve their differences within a reasonable time frame.' It was therefore objectively possible for the court to assess whether or not a party had acted in accordance with the March Agreement by taking these minimum steps.

In the circumstances, one party was found to have repudiated the March Agreement, which repudiation the other party had accepted, thus terminating the contract. Accordingly, the parties' rights fell back to be determined under the dispute resolution mechanism agreed under the original construction contracts. ❖

Endnote

1. The Court of First Instance is the lower division of the High Court of the Hong Kong Special Administrative Region; the upper division of the High Court is the Court of Appeal. The only higher Court in the SAR is the Final Court of Appeal. Hong Kong courts follow the common law tradition established by British colonial rule. Pursuant to Article 84 of the Basic Law of Hong Kong, Hong Kong courts refer to decisions of courts in other jurisdictions. The case considered in the text above is useful for its analysis of decisions from the United Kingdom and Australia.

diary and happenings

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PUBLISHER: Oliver Freeman PUBLISHING EDITOR: Linda Barach PRODUCTION: Kylie Gillon SUBSCRIPTIONS: $495.00 per year including GST, handling and postage within Australia FREQUENCY: 10 issues per annum including storage binder SYDNEY OFFICE: 8 Ridge Street North Sydney NSW 2060 Australia TELEPHONE: (02) 9929 2488 FACSIMILE: (02) 9929 2499 adr@richmondventures.com.au

ISSN 1440-4540 Print Cite as (2005) 8(3) ADR

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