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Legal practice issues for mediation

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Clause 2.6 of the Standard Law Institute of Victoria Mediation Agreement provides that the parties agree that they will not at any time before, during or after a mediation, call the mediator as witness in any legal or administrative proceedings concerning the dispute.[1]

Many mediation agreements also provide that if settlement is reached at the mediation, the terms of the settlement must be written down and signed by the parties before they leave the mediation. Alternatively, some mediation agreements provide that in the absence of a document signed by the parties to the mediation, there is no settlement.[2]

Recently the Federal Court Judge Justice Allsop delivered judgment in the case of *Barry and Steamline Drains & Pipelines Pty Ltd v City West Water Ltd and Brambles Australia Ltd*.[3]

The case (and reflection on it) reveals some interesting questions for all mediators to consider. But first, some background information.

Background

The mediation which became the subject of the court case was held on 8 June 2000. The mediator, Mr Jolson QC, provided an affidavit to the parties after he met with the legal representatives of the applicants and Brambles. His affidavit was based on what on what he recalled on 28 September 2001, some 15 months after the mediation.

The mediation agreement had two interesting provisions:

> *Recording of Settlements*
> 16. If the parties agree to resolve the dispute, a note of the essential terms of the settlement must be signed by or on behalf of the parties, before they leave the mediation.
>
> *Enforcement of Settlement Agreements*
> 17. A party seeking to enforce a settlement agreement made at the mediation may call evidence of entry into the agreement, including evidence from the mediator and from any other person present at the mediation.

In the face of those two provisions Mr Jolson QC was contractually bound to provide evidence going to the question of whether the parties had agreed to resolve the dispute. However, before providing the affidavit he invited the parties' legal representatives to his chambers to tell them both, in the presence of each other, what the substance of his evidence would be if he was called, hoping that might assist the parties in assessing whether or not there was a binding agreement. It did not.

Clause 17 is no longer in the standard mediator's agreement.

The question for the judge was whether the proceedings against Brambles had been settled.

Judgment

Paragraph 27 of the judgment reads as follows:

> Mr Jolson QC, the mediator, provided an affidavit to the parties after he met with the legal representatives of the applicants and Brambles.

The substantial part of the judgment does not concern the role of the mediator. The judgment contains a very detailed analysis of the evidence before the judge as to whether there was a binding agreement made on 8 June.

In respect of the mediator, the judge notes that:

> 29. Mr Jolson was not cross-examined. No witness who was at the mediation, that is KBS, KBJ, Mr Smith, Mr Merritt, Mr Partington or Mr McSweeney, specifically contradicted the proposition that Mr Jolson said the words emphasised in the passage above at [27].
> ...
> 33. After this process of clarification and emendation was complete, the mediator wrote the following on the top of the handwritten document:
> 'Essential Terms agreed between Barry's [sic], Streamline Drains & Pipelines P/L & Brambles Australia Ltd 8 June 2000'
> [underlining in original] ...

Lessons for mediators

What are some of the lessons for mediators after consideration of this case when they are asked (or required) to give evidence about what happened at a mediation?

- Consult with another lawyer who is well versed in the competing interests of 'open justice' in the courtroom, as opposed to the principles which underpin the need for confidentiality of what occurs at mediation. In this case the confidentiality of what happened at mediation was waived and extensive evidence was given by the persons who were at the mediation.
- Consider having a meeting with all of the parties or their lawyers (probably in preference to talking separately to the parties or their lawyers).
- Swear up an affidavit after that meeting. If the affidavit is comprehensive enough you may avoid being called as a witness.
- Consider carefully what to do when the clients, without their lawyers, and with the assistance of the mediator come to an agreement which they want to document and sign, before they again consult with their lawyers.[4]
- Be aware of the detail into which a judge may go to satisfy him or herself whether there was a settlement (if that is the issue). The mediator's story is only part of the evidence.
- Read the mediation agreement and make sure you are not contractually bound to provide evidence.
- Consideration of this case may cause mediators to be more careful in their representations that what happens at mediation is confidential. It ceases to be confidential if the parties waive it.

Swear up an affidavit ... If [it] is comprehensive enough you may avoid being called as a witness.

My own experience

I have decided, on a few occasions during a mediation, to alert the participants that what was then going on, or what may be about to go on, may well be an exception to the generally understood confidentiality rules. For example, in one mediation one counsel gave an undertaking to another. At that point, I intervened and asked each counsel whether they regarded that undertaking as something which could be enforced regardless of the outcome of the mediation — that is, that the undertaking, although given at a confidential mediation, was not of itself confidential.

In another mediation, one party made some very significant representations to the other party and it was those representations which were likely to form the basis of a settlement. I asked each party to consider, if there was a settlement based on those representations and the representee were to form the

view that the representations were false, what the confidentiality rules would be in relation to that part of the mediation where the representations were made.

Where I have suspected that a party may, in the course of the mediation, reveal something that might constitute an admission of a crime, I have invited the parties to ask me to absent myself for the duration of those discussions. I doubt that the mediation confidentiality privilege covers admissions (made in my presence) of criminal activity.

In a mediation between A and B, there was discussion about related litigation between B and C. In this case, I asked counsel for both sides whether that discussion was something that was confidential as far as the related litigation was concerned.

I emphasise to parties the desirability of not leaving the mediation without a written agreement. Nevertheless there are cases where it may not be practical to write up the entire agreement and have it signed on the day of mediation.

Where the parties do leave the mediation with the intention of documenting an agreement 'that day' or 'the next day', I encourage the parties to adjourn the mediation *sine die* or until there is a written agreement. Furthermore, before adjourning the mediation I get the parties to confirm that, for the purposes of the mediation, before the agreement is documented, there is no agreement. I don't want to be giving evidence that there was an agreement! I don't want to be giving evidence — period.

Conclusion

Beware of the blanket statement, 'Everything said at a mediation is strictly confidential'!![5] ●

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Endnotes

1. A pro forma of the Agreement is contained in Appendix C of the Law Institute of Victoria (LIV) publication *Mediation — A Guide for Victorian Practitioners* (1995), available at the LIV Bookshop. The LIV revised their standard agreement in 1998/99. In that agreement cl 3.5 provides that the parties will not call the mediator as a witness in any proceedings concerning the dispute.

2. The current Law Council's Ethical Standards for Mediators can be found at (2002) 4(9) ADR 119. It reads as follows:

> If the mediation results in a settlement between the parties, the mediator should encourage the parties to record those terms of settlement in writing. Normally, agreement to record the terms of any settlement should be made prior to the commencement of the mediation. The mediator ought to be cautious about direct involvement in drafting the terms of agreement, as their involvement in drafting may be construed as providing legal advice.

3. [2002] FCA 1214 (3 October 2002) BC200205851. Ian Lulham has written an excellent comprehensive case note of the decision. It appears in the December 2002 edition of *The Litigation Lawyer*.

4. This is what happened in this case. It is not unusual at a mediation for the mediator to have a session, in the absence of the lawyers, with the parties. The parties come to an agreement which the lawyers then document. In this case the lawyers were not consulted in the writing up of the 'Essential Terms' (as envisaged by clause 16 of the mediation agreement).

5. Readers with a thirst to read more may like to look at the following sources.

- A comprehensive paper given by Ian Lulham at the Law Institute of Victoria Litigation Annual Conference, 12 September 2002, titled 'Mediation — pointers and pitfalls'. That article is progressively being published in *The Litigation Lawyer*. Part One appeared in the October 2002 edition.
- A very good article by Jonathan Mott and Kristie Baravelli in the April 2002 edition of *The Litigation Lawyer*.
- A very good overview in two papers given on 18 June 2001 by Geoff Masel and Henry Jolson QC at an Advanced Civil Litigation Seminar of the Law Institute of Victoria 'Current Issues in Mediation & Alternative Dispute Resolution'.