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Barristers Sydney Australia

Edmund Barton Chambers Seminar Series 2009

Wednesday 4 March 2009

Litigation: A Mediator's Observations Concerning the Resolution of Disputes

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LITIGATION:
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THE RESOLUTION OF DISPUTES

It is important that the solicitor prepares both himself and his client for mediation. Lack of preparation will often lead to mediation failing simply because the client and the solicitor have not considered the range of options that may be open during the negotiations. Failure to prepare also leads to a lack of understanding of the process and the failure to consider what are the likely benefits to flow from the process.

It is important for legal practitioners to understand the mediation process and ADR generally. It is clear that courts are taking a far more proactive role in ADR than they did 10 years ago. The *Uniform Civil Procedure Act 2005* reinforces the role that ADR has to play in the court system. And whilst not all judges are advocates of ADR, as time goes by a greater number of judges are convinced of the merits and the benefits of the system. In the Supreme Court of NSW, judges regularly refer matters to mediation and recently the Equity Division requires that Family Provision Act matters proceed to mediation before a hearing date in allocated. Often a matter is referred by consent of the parties, but increasingly where a judge forms the view that mediation is an appropriate step to undertake, he or she will order mediation notwithstanding the parties have not consented to the process.

The matters that a solicitor ought to consider when advising the client whether or not to go to mediation and, if the client decides to embark on mediation, the steps to be taken by both the client and the solicitor in preparation for mediation are matters which will greatly assist in a successful resolution of the dispute. It is important that all parties to the mediation approach the exercise in an informed manner.

What should you expect from the Mediator?

In an article "Overview on Pre-Mediation Conferences" in the NSW Law Society Journal, December 2005 by Robert Angyal SC the author suggests that a pre-

mediation conference enables the client and the solicitor to, inter alia, carefully assess the proposed mediator as to his suitability having regard to his style, your client and the nature of the dispute. Mediators take a different approach to mediation. It is probably fair to say that there are many approaches to mediation as there are mediators, notwithstanding all apply the general principles of ADR to mediation. Some mediators are facilitative, others look for an interest-based approach to the resolution of the dispute and others again play a pro-active role and will not hesitate to express their views on the prospects of success should the matter proceed to litigation. Whilst it is dangerous for a mediator to offer a view on the prospects of success of a dispute, an experienced mediator will examine the weaknesses and strengths of the parties' respective positions rather than express a view on the prospects of success. However, often the exercise of exposing weaknesses and strengths is a subtle way of dealing with the question of the prospect of success at litigation.

It is important to make the right choice in appointing a person to act as mediator of your client's dispute. Generally practitioners have either had experience of particular mediators or have discussed mediators with colleagues and have an idea of the person who may be best suited to mediate the client's dispute.

In determining who is the appropriate person to mediate your client's dispute, one should consider the experience that the mediator may bring to the mediation. There are also other qualities which are worth bearing in mind. The list that I set out is not meant to be exhaustive. A good mediator will have, amongst other things, the following qualities: patience, ability to listen, ability to be even-handed with the parties, a positive attitude, rapport with the parties, ability to develop strategies for the mediation, ability to problem solve and a reputation of preparing for a mediation.

Pure mediation theory would suggest that anybody with mediation training can successfully mediate a dispute and that they need to have no experience in a particular area. Further, that they need to have no knowledge of the matters in dispute. In other words, the mediator is not required to do any preparation for the mediation. I have heard comments by some practitioners who have been disappointed with a mediator

because his opening line at the mediation is, “Now tell me what this is all about?” That is notwithstanding that the parties have prepared and sent a Position Paper to the mediator and have provided him with documents which are relevant to the mediation. Salt is rubbed into the wounds with the knowledge that the mediator is being paid for his services and yet he goes into the mediation with no knowledge and having done no preparation in relation to the dispute. It is my view that mediators who take that position will have a very short life in the mediation world.

It is important to provide the mediator with documents which will assist in settling the dispute. The materials should be given to the mediator not less than 7 days prior to the mediation or within the timeframe requested by him. It is then the responsibility of a mediator to read the material and consider options that may be open to the party and to bring that preparedness to the mediation. A mediator who has prepared and who knows what the matter is about creates a degree of confidence amongst those who are present at the mediation. It opens up channels for negotiation far sooner than where there has been no preparation at all.

Matters that a Mediator considers essential to the Mediation

Once again, without limiting the scope of the comments I am about to make, the following matters are keys from the mediator’s point of view to ensuring that a mediation will be successful. It is important to note that whilst in every mediation the parties and the mediator strive to settle the dispute, failure to settle the matter at mediation does not necessarily mean that the mediation has failed. In fact in many cases where a matter has not settled at mediation subsequently, because of the work done in preparing for mediation and the negotiations that have taken place during mediation, the parties are able to reach a settlement of their dispute.

The following matters should be considered during a legal practitioner’s preparation for mediation:

1. <u>During the mediation do not get stuck on legal issues</u>.

Whilst it is fundamental to the outcome of a dispute to have knowledge of the legal parameters governing the dispute it can be counter-productive if the lawyers get bogged down on black letter law and technicalities. This can alienate the clients and de-rail the mediation. Practitioners who insist on using legal issues as the primary consideration in a mediation miss the point of the process. Whilst any matter should be settled within the parameters of an outcome in a court of law it is a well recognised fact that there are commercial and other considerations which may take settlement negotiations outside those parameters. In all cases, however, where a matters settles outside the parameters within which the court has the capacity to determine the matter you will find that settlement is not so far wide of those parameters that it would be dangerous to advise the client to settle on that basis. Therefore, in any mediation there is a combination of matters that need to be taken into account in trying to reach a resolution and the legal issues are only one component in those considerations. Other matters that will be taken into account are things such as the dynamics of the relationship between the parties, the commerciality of the litigation, the personalities involved in the litigation, whether or not there is an ongoing relationship between the parties, the listis not exhaustive.

2. Do not look at the facts just from the lawyers' perspective.

As with the legal issues, lawyers should not look at the facts just from their perspective. In other words, it is helpful to take into account the interpretation of the facts that the clients have in relation to the matters surrounding the dispute. Clients do not think in terms of a burden of proof but just their perceptions. Whilst that sometimes can be dangerous, that is not the basis for discarding their perceptions completely. After all, part of the mediation philosophy is that it is the clients who should be the driving force in the mediation and it is the clients who are the decision makers. The mediator is merely a facilitator and the lawyers are there to give advice and to assist with options.

3. If experts have been used, give consideration for their attendance.

This is particularly apt in commercial matters and building and construction cases. If expert reports have been prepared by both sides prior to mediation, there is invariably a difference of opinion by the experts. It can be of great assistance to have the experts either confer before the mediation and try to reach an agreement in those areas where they differ or alternatively have them at the other end of the telephone or preferably have them available at the mediation.

A skilled mediator will endeavour to have the experts confide with each other in the absence of the parties and try to come to a resolution of the difference of opinions expressed in their report. Often when they are away from both the lawyer and the client, their inhibitions disappear and they are able to speak frankly as one professional to another and sort out a number of their disagreements. At some stage during the mediation they will be able to report back to the parties a combined opinion which will greatly assist the parties in the resolution of the dispute. In cases where they cannot agree on all matters it is not uncommon to find that many points of disagreement will have been resolved thus reducing the number of matters in dispute in their reports.

It is often an educative process to have the experts sit in the opening session of the mediation and to hear what the lawyers and the parties say about the dispute. At that point the mediator should not encourage the experts to contribute to the discussions but merely sit there and listen to what is said.

4. Not only prepare for the mediation but prior to mediation review your material.

Often preparation for the mediation is a timely point in the litigation to consider the state of the pleadings, whether or not the affidavit evidence supports your client's position, what further matters need to be considered ie does the pleading need amendments, are all relevant parties joined, if the matter fails to settle at mediation will expert evidence be required and is discovery required.

5. Ensure that your client's representative has an appropriate level of authority.

In many matters, particularly in commercial matters involving corporations or partnerships, the persons who attend the mediation attend in the capacity as either partners or officers of the corporation. Therefore, there is no person who has a personal interest in the outcome of the dispute. Thus it is important that you get clear instructions from the client concerning the extent of the authority to settle that the delegated officer or partner has for the mediation. In an ideal world, the officer will have an almost unlimited delegation to settle the proceedings. However, in the real world that invariably is not the case and there is usually somebody more senior at head office who has the final say on settlement if it goes beyond the delegation of the officer in attendance at the mediation.

If a stage is reached in the mediation where it is necessary to have that person make a decision, it is essential that prior to the mediation you emphasise to that person that if they cannot be in attendance then they should be by the phone throughout the course of the day so that should a call be placed to them, a decision can be made about whether or not to accept an offer or to put an offer which would be above the delegation of the officer who is in attendance at the mediation. One of the greatest areas of frustration for the parties at a mediation is to negotiate all day and then find that at the crucial time of the mediation the other side's officer does not have the requisite level of delegation to consummate a settlement there and then. This can have an adverse outcome on the mediation. It may well mean that in the absence of settlement on that day, the parties will change their position over the next few days whilst the requisite authority is sought. The result is that everybody has wasted time and money by attending the mediation.

6. Advise the client on the range of outcomes should the matter go to trial.

It cannot be emphasised enough that in preparing for the mediation and at the conference with the client you consider a range of outcomes at the mediation plus you have signposts and goals that you and the client want to achieve.

Also review the evidence and give clear advice to the client about the range of outcomes that may result if the matter goes to trial. Thus the client should get a clear picture of the advantages of mediating the dispute.

7. Know what your costs to date are and have an estimate of future costs.

This often becomes a crucial part of the negotiations. Mediations can fail because the parties have not done an assessment of what their costs to date have been and what they are likely to be in the future. Parties are sometimes loathe to negotiate on an inclusive basis when they have no idea what the other side's costs area. Whilst the natural answer to that is to say, have the costs assessed, it does not give finality to the dispute at the mediation and it can cause the mediation to abort. In preparing for mediation, knowing what the costs and disbursements to date are and what future costs and disbursements are likely to be often focuses the client's mind on the necessity to settle the matter at mediation. There are many matters where the costs even at mediation have the potential to be far greater than the potential judgment given by the court. It is of course in a situation like that that there will be no more than a Pyrrhic victory for one side.

8. Have the client consider whether or not there is likely to be a continuing or future relationship with the other side.

I have already covered this, but I think it is important as a separate heading, particularly in commercial mediations. It is interesting in the building and construction industry that parties often contract and sub-contract on many occasions and that whilst today they may be in dispute, in 12 or 18 months time there will be a tender for another project. Thus consider whether or not there is either an ongoing relationship or the potential for future relationship.

9. Advise the client of the benefits of a confidential settlement.

Once again, in a commercial matter there are attractions to mediation which cannot be found in a public hearing. The mediation is subject to

confidentiality, not only the discussions that take place during the course of the mediation but also the outcome. Even though proceedings have been commenced and the parties need to formally conclude those proceedings, there is no reason why the terms the parties have agreed on need to form part of a consent order which is made by the court and thus the commercial confidentiality of a settlement between the parties remains out of the public domain. However, if the matter goes to hearing there comes with it exposure to the public domain of not only the evidence given by the parties and perhaps questions of credit of people within the corporations but also the company's commercial dealings are exposed and open for competitors to see. In most cases, it is in the interests of the disputing parties to avoid such a situation.

10. Pre-Mediation Conference.

In my view, it is not necessary in all matters to have a pre-mediation conference. In commercial matters more often than not a pre-mediation conference will assist the parties and assist the mediator. However, one needs to look carefully at what is available in determining whether or not it is necessary for there to be a pre-trial conference. Some of the matters that need to be considered in determining whether or not a pre-mediation conference should be undertaken are:- Firstly, whether or not the parties can agree without the intervention of the mediator to a timetable. Secondly, whether they are prepared to draft position papers. Thirdly, where litigation has commenced, whether the pleadings, affidavits and any experts' reports will of themselves assist the mediator in understanding the issues, Fourthly, where experts have been used whether or not it would be beneficial to hold a pre-mediation conference to determine what use the experts' reports will be put to during the mediation.

Finally, the comments made by me in this paper apply equally to commercial and non-commercial disputes. The steps outlined are steps which will at least put the parties on the road to a successful outcome at mediation, regardless of whether or not the dispute is of a commercial nature. The main ingredient for a successful mediation is preparation by all parties concerned. Preparation covers not only the material to be

used but also a clear understanding of what the process is about and what goals each side seeks to achieve in the mediation.

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