LEADR Forum
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Court Views on Mediation
A District Court Perspective

Judge Peter Johnstone

Introduction

The important role played by mediation in the administration of justice in this state is now well recognised, at least insofar as the disposal of civil disputes is concerned: see the article by Spigelman CJ *Mediation and the Court* (2001) 39(2) LSJ 63.

The process is defined by s 25 of the *Uniform Civil Procedure Act 2005* as follows:

> "A structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute."

The Act empowers the courts to refer any proceedings, or any part of proceedings before it, for mediation, with or without the consent of the parties: s 26(1). It is the duty of each party to participate in the mediation in good faith: s 27. The mediation is privileged with respect to defamation to the same extent as judicial proceedings: s 30. The mediator may only disclose information obtained in the mediation in limited circumstances: s 31. The mediation is otherwise confidential, and the contents of statements made in the mediation are not admissible without the consent of all parties, being statements made without prejudice and the subject of joint privilege: *Re Turf Enterprises Pty Ltd* [1975] Qd R 266 at 267; *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283 at 289-91.

In the exercise of its power, the court must seek to give effect to the overriding purpose of the Act, to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56(1) and (2). Correspondingly, the parties are under a duty to assist the court and, to that effect, participate in the processes of the court: s 56(3). Practitioners must not cause their clients to be put in breach of that duty: s 56(4).

Hence, mediation may be ordered even over the opposition of a party: *Remuneration Planning Corporation Pty Limited v Fitton* [2001] NSWSC 1208; *Harrison v Schipp* [2002] NSWCA 27.

1. District Court Strategic Plan 2007-2012

1.1 In August 2007 the District Court adopted its third Strategic Plan, for the period 2007-2012. For those who are interested the Plan appears on the District Court website. It sets out the Court's values, goals and key performance indicators. Relevant to the present discussion is Goal 2.4, relating to Court operations and processes, which reads:

"further develop and facilitate alternative dispute resolution processes"

1.2 A second relevant provision of the Strategic Plan is the time standard for civil actions, which is as follows:

· 90% disposed of within 12 months of commencement of proceedings

· 100% disposed of within 2 years of commencement of proceedings

1.3 The current demand (or under-demand) for arbitration has been driven by circumstances, including costs constraints and the diminution in common law work following reforms in various areas, such as changes to the workers compensation scheme, the motor accidents scheme, and the introduction of the *Civil Liability Act 2002.*

1.4 Mediation is currently the preferred method of alternative dispute resolution. The use of mediation, however, also has to be viewed in the light of cost. Hence it is less likely that mediation will be ordered in smaller, less complicated cases where it is quicker and cheaper to appoint an early hearing date.

2. Mediation in the District Court

2.1 The District Court has developed, and continues to develop an in-house capacity for mediation services. There are now 3 accredited Deputy Registrars who are available for mediations. The Registrar at Gosford has recently become accredited, and the Registrar of the Dust Diseases Tribunal also conducts mediations. Mediations by these court officers is free of charge, but referrals are limited to parties with a genuine financial need. I am pleased to report that this service is regularly utilised, with over 100 mediations having been conducted to date in 2008, with a success rare over 50%.

2.2 The Court does not keep statistics as to external referrals to commercial mediators.

2.3 Judge led mediation in the Court is not widespread. Some judges do regularly conduct mediations. In particular, judge led mediation is a regular feature of the Newcastle circuit.

3. Referral of proceedings for mediation

3.1 "Long" cases (matters with an estimate for hearing of 5 days or more) are almost invariably sent for mediation before trial.

3.2 As to shorter cases, there is no formal policy in the Court as to the referral of matters for mediation and it remains very much an outcome of the personal perspective of individual judges. In the General List and the Construction List, the Judicial Registrar actively encourages mediation at an interlocutory stage. In the Commercial List, mediation is also encouraged in matters involving complexity.

3.3 In my list, the Professional Negligence List (PNL), mediation is also encouraged, but it is not my practice to require mediation in every case. I have a bespoke approach. The likely range of damages involved is a relevant consideration. I will not order mediation if I consider it is just as quick and equally cheap to send a matter straight to trial, but I will do so if in my assessment the matter will benefit from mediation, either because it seems likely to settle, or because mediation will help clarify the issues. More often, if the parties are dithering, and there has been an excess of Directions Hearings, I will send a matter to mediation.

Conclusion

In my experience, even if the mediation does not lead to settlement, it will invariably narrow or clarify the real issues in dispute. Hence, opposition by one party to mediation is a factor in considering whether mediation is to be ordered, but not one to which I personally give much weight.

From a case management perspective, the real skill is judging when to refer a matter for mediation. This requires a balancing exercise, having regard to the twin advantages mediation can deliver in terms of reduced cost and a negotiated settlement rather than an imposed outcome unsatisfactory to either. The idea that a case requires full preparation before mediation can be productive needs to be challenged, as experience shows that is simply not always true. As against this, two considerations need to be weighed: first the avoidance of accumulated interlocutory costs that subsume the original dispute; and second, that early discussion circumvents the hardening of attitudes and thus the entrenchment of adversarial positions.

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