Kluwer Mediation Blog

Mediation Lessons from the Cases – Part 2

Alan Limbury (Strategic Resolution) · Friday, February 22nd, 2019

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Although infrequent, court cases against mediators are illuminating, helping us avoid being dragged into court ourselves.

Here's an example

In *Tapoohi v Lewenberg & Ors (No 2)* [2003] VSC 410, the Supreme Court of Victoria, Australia, considered it arguable that a mediator owes a duty of care to the disputants.

The mediated dispute

This was litigation between two legally represented sisters over the estate of their deceased mother. Mrs Tapoohi attended by telephone. The mediator was an experienced senior counsel and mediator.
Handwritten Terms of Settlement were executed and faxed to Mrs Tapoohi, who faxed back a signed copy.
The settlement contemplated payment by Mrs Tapoohi of $A1.4 million for certain real estate and transfer by her of certain shares for $A1.00.

Following the mediation
It later became apparent that the $A1.00 figure had undesirable tax consequences for Mrs Tapoohi. Her sister refused to change the price, so Mrs Tapoohi commenced fresh court proceedings seeking to set aside the settlement, saying it was subject to an express oral term that the parties would seek taxation advice before concluding any settlement.

The claim against her solicitors

Mrs Tapoohi later added a claim against her solicitors that they had advised her to sign the Terms because they were subject to the express oral term and were not binding upon her. Alternatively, if the settlement was binding, she had suffered loss and damage due to the solicitors' breach of their retainer or negligent advice.

More than two years after bringing the initial proceedings, Mrs Tapoohi discontinued the second proceedings against her sister and thereafter pursued only her solicitors.

The solicitors' claim against counsel and the mediator

The solicitors claimed that if the Terms of Settlement were binding, the damage suffered by Mrs Tapoohi was due to breaches by her barrister and by the mediator of duties they owed to her in contract and in tort. Hence if the solicitors were liable to pay damages to her, they were entitled to contribution from the barrister and the mediator.

The mediator applied to strike out the solicitors' claim

The mediator submitted that the solicitors' claim had no arguable basis. The solicitors and the mediator provided sworn affidavits as to what happened at the mediation. The judge noted that a number of important allegations were vigorously disputed by the mediator, saying:

"For the purposes of an application such as this I must approach the matter on the basis that the facts most favourable to the claim will be established. This means that, in the event of conflict, I must prefer the affidavits filed on behalf of the solicitors".

The barrister also sought to strike out the solicitors' claim but did not pursue that application.

What happened at the mediation?

In determining whether to strike out the claim against the mediator, the judge examined in detail the solicitors' evidence as to the conduct of the mediation, summarised below.

The solicitors for both sisters verbally agreed to appoint the mediator and so informed him. The mediator then wrote to the parties confirming his nomination and proposing a preliminary conference, saying:

"I confirm that the aim of the Mediation Conference is to assist the parties in reaching a settlement of their dispute by the involvement of an impartial mediator. It is not the role or function of a mediator to impose a settlement on the parties. It is up to the parties to arrive at their own resolution of the dispute. The purpose of the mediator is to assist the parties to define the issues, eliminate obstacles to successful communication, explore settlement alternatives, and generally work with the parties to achieve a negotiated resolution."

The solicitors for Mrs Tapoohi confirmed his appointment "to act as mediator in the proceedings".

On several occasions during the mediation it was made clear to the mediator that any agreement reached would need to be subject to getting proper tax advice.

After approximately nine hours the parties reached agreement in principle. The mediator told everyone to return to the main room so that they could get something down for the parties to sign, saying forcefully:

"You have got to stay, you have got to do the terms of settlement tonight." "No, we are doing it now. We are signing up tonight as that is the way that I do it, that's how I conduct mediations." "Given the acrimony between these two sisters we must go away with something that is written. It is in the interests of all the parties to sign up tonight."

The mediator then dictated the Terms. There had been no discussion as to the price to be paid for the shares. The mediator suggested $A1.00 as nominal consideration. Her solicitor took this as recognition that the Terms were not binding because of the need to obtain tax advice. Nobody

noticed that this requirement was not included in the Terms.

The solicitors' argument

The solicitors pleaded the doubtful proposition that:

"the Parties retained the mediator for reward to act for them and advise them as a mediator at the Mediation"

and that it was implied in the mediation agreement that the mediator would:

"(a) exercise all the due care and skill of a senior barrister specialising in commercial litigation and related matters; (b) exercise all the due care and skill of a senior expert mediator; (c) reasonably protect the interests of the Parties; (d) not act in a manner patently contrary to the interests of the Parties, or any of them; (e) act impartially as between the Parties; (f) carry out his instructions from the Parties by all proper means; and further or alternatively (g) not coerce or induce the Parties into settling the Earlier Proceeding when, at the relevant time or times, there was a real and substantial risk that settlement would be contrary to the interests of the Parties, or any of them."

The judge's decision

The Judge dismissed the mediator's application to strike out or dismiss the solicitors' claim for contribution, holding that it was arguable that the mediator owed duties to the disputants in both contract and in tort, saying:

"I have reached the conclusion that it is not beyond argument that some at least of the breaches of the contractual and tortious duties might be made out. I consider that it is possible that a court could find that there was such a breach constituted by the imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they, or one of them, wanted to seek further advice upon aspects of it, or where it was apparent that the agreement was not unconditional, or where the agreement was of such complexity that it required further consideration. I emphasise that it is not for me to conclude that any of these things occurred in the present case and I do not do so. It is sufficient that I conclude, as I do, that on the evidence before me such a contention is not plainly hopeless."

The outcome

In the absence of any reported judgement, it appears Mrs Tapoohi's claim against the solicitors and their claim for contribution against the mediator did not proceed to trial. In the result, it remains to be judicially decided whether mediators do owe a duty in contract or tort to disputants, especially where, as here, no formal Mediation Agreement was entered into.

Lessons for mediators

One advantage for mediators in having a formal Mediation Agreement is that the mediator may expressly exclude liability to the parties. That might have been useful in this case.

It frequently happens in mediation that settlement is reached only after a very long day when everyone is exhausted. (My own record is 21 hours, 40 minutes! I suggested we all go to bed and come back next day. No-one accepted.)

In the case under consideration it took 9 hours to reach agreement in principle. It is not clear how much longer it took to write the Terms and have them executed. My own theory is that it usually takes three times as long for the lawyers to draft the settlement agreement than anyone expects. Meantime the mediator needs to prevent everything from falling apart. No doubt it didn't take as long for the mediator in this case to do the drafting, since he chose to do it himself. However, this case illustrates the danger for mediators in doing so.

Where the parties are legally represented, the mediator can usefully hover behind them as they write, occasionally suggesting some language or the need to address a topic, but not in a way that could be understood as telling them what to do.

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