Kluwer Mediation Blog

Do Two Wrongs Make it Right?

Malcolm Holmes (Eleven Wentworth) · Thursday, September 29th, 2011

1. Unlike the arbitral process where courts strive to distinguish between the concepts of a private process and a confidential process, the mediation process is indisputably and inherently confidential. But what happens if one party breaches this confidentiality during the mediation? In formal terms, can the act by one party in breach be treated as a repudiatory act which can be accepted by the other thereby bringing the agreement to mediate as at an end? In informal terms, can the other party then treat the cloak of confidentiality as torn but can make it right by also breaching the obligation to treat the mediation as confidential? Do two wrongs make it right, that was the question recently considered by the Supreme Court of Western Australia, but first some background.

2. As a result of this cloak of confidentiality, the detailed story of what actually transpires in a particular mediation rarely sees the light of day and even then, usually long after the mediation has concluded and generally in circumstances where the mediation was unsuccessful. In these circumstances, the disclosure is not in breach but sought to be relied upon to achieve an advantage in legal proceedings.

3. A recent example where evidence was given describing what happened during the setting up of the mediation process is seen in the class action case of Celese Cook v United Insurance Company of America, US District Court, Northern District of California, Case No C-11-1179-MMC, Chesney J, 20 July 2011, unreported. There the cloak of confidentiality was extended to cover statements made in the course of pre-mediation telephone discussions held to set up the session with the mediator. The court refused to allow one party to rely on these statements.

4. Another such example but one where evidence was given describing what happened during the mediation process is the case of Keeneye Holdings Limited [2011] HKCFI 240 There the mediation took place during a break in the arbitration proceedings. The mediation was unsuccessful and the arbitration resumed and ultimately led to an award which for various reasons was refused enforcement by the Hong Kong Court. The court ruled that what had happened during the mediation process gave rise to “a fair minded observer to apprehend a real risk of bias”. Another common example is where the parties cannot agree whether an agreement was reached during the mediation, e.g, Smith & Anor v ABN Amro Mortgage Group Inc & Ors, US Court of Appeals for 6th circuit, No. 08-3948, unreported decision, 29 July 2011.

5. An example where evidence was given describing what had happened during the closing moments of the mediation process is seen in Jireh International Pty Limited v Western Export Services Inc (No 2) [2011] NSWCA 294 which concerned a mediation session pursuant to s.30 of the Civil Procedure Act 2005 (NSW). Section 30 relevantly provided that “Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body”. The evidence described the mediator holding a meeting of all of the

parties and then passing messages and offers backwards and forwards. The mediation appears to have taken place all day and continued into the evening. Then, "[s]ometime late in the evening the mediator came into the room where the [Party A] had been located for most of the day. At the time we were packing up our belongings getting ready to leave the mediation venue because it was late and the parties were so far apart. When the mediator came in he said to us words to the effect of: 'The parties are miles apart; there is nothing further that can be done'".

6. The evidence continued and described the mediator then leaving the room, and while everyone was packing up their belongings in order to leave the venue, the principal of Party A said "I am going to speak to [Party B] direct, leave it to me". On his return sometime later he said that he had had a one-on-one discussion with the principal of Party B. That discussion occurred at the end of the day just before the parties left the venue. The issue was whether or not the statutory cloak of confidentiality which was applicable to a mediation session extended to the one-on-one discussions at the end of the day when the mediator was not present and was not acting as a go-between. The Court considered the authorities which had examined the policy underlying the confidentiality protection and the privilege attaching under the general law to settlement discussions. Consistent with this policy the Court concluded that the conversation that took place at the end of the day was both "in a mediation session" and "within the mediation". There was no need for the mediator to be present and the mediation was held to continue "at least whilst the parties remained in the mediation venue and continued to talk about compromise" (at [49]). Thus the offer which was communicated in that one-on-one conversation at the end of day could not be used in support of an application for a special costs order. The approach taken by the court is similar in this respect to the attempt to rely upon a discussion with an arbitrator after the hearing and after the arbitrators had, it appeared, reached a general consensus of what their decision would be but before the written award had been published by the arbitrators to the parties. The Quebec Court of Appeal colourfully described the situation in Michel Rheaume & Anor v Societe d'Investissements l'Excellence Inc & Ors [2010] QCCA 2269 (CanLII) at 39 as: "Anyone who has participated in a collegial decision-making process knows that the decision is not final until it is signed and formally issued, at which point the decision-makers become functus officio. To use a sporting analogy made famous by Yogi Berra, "It ain't over til it's over".

7. In each of these cases, no breach occurs because the Court decides whether the cloak of confidentiality should be removed. But what can be done when a party breaches the mediation agreement by disseminating information about what has happened in the mediation, and the dispute has not reached the stage of adversarial resolution through arbitration or litigation. What can a party do in response to a breach by the other party of the obligation of confidentiality? A rare insight into the question is provided by the decision of the Supreme Court of Western Australia in the case of C v M [2011] WASC 175. The decision related to two actions which were being case managed by the Court. The Court, as most courts are now wont to do, referred the two proceedings to mediation to be conducted before a Registrar of the Court. There was a joint mediation as both actions involved essentially the same parties. The plaintiff and the defendant, Mr C and Mr M, personally attended each mediation session and were accompanied by their teams of legal representatives, one senior counsel's clerk and one of the parties' business manager. The mediation did not result in a settlement but after the mediation an issue arose which caused both proceedings to be referred to the Supreme Court.

8. Immediately subsequent to the mediation, Mr M's solicitor who was present at the mediation, sent a report to his client and duly marked the email "Private and Confidential." He reported to his client about that day's "short mediation conference". But the problem arose when, the globalisation of society being what it is, Mr M then on-forwarded "his solicitor's email report to him to at least five other identified persons variously located in the Marshall Islands, Austria, South Africa or

(possibly) elsewhere". The report to Mr M by his solicitor revealed settlement offers, expressed views about business prospects referred to in the mediation and various aspects of the mediation such as whether or not there should be more time allowed to consider the merits of the offers and the counter-offers rather than rejecting them outright. The Court noted: "Needless to say this privileged solicitor/client communication by [the solicitor] to his client Mr M, the defendant, was heavily slanted towards the defendant's position, as one might expect". This email was never intended to be circulated or to end up, as it did, in the possession of the plaintiff. Thus a wrong had been committed by the defendant, could the plaintiff right the wrong by sending an email in breach of the obligation of confidence but letting the recipients of the original email, know what his views were? The dispute was still ongoing and the information in the form disseminated was potentially commercially damaging.

9. The Court heard evidence from both sides but case managed the dispute by isolating the affidavit materials and other records relating to this issue from the normal Court litigation files so that there could be no leakage of information from the mediation dispute to the litigation. The Judge ordered that all materials be placed in a sealed envelope and then only to be accessed on the order of the Judge or another Judge who was not the trial judge. Both parties led extensive evidence about what happened and how extensive the email circulation was. The end result was that the Court found "that the obligation of confidentiality attaching to Mr M as a participant in the mediation [had] been disregarded and violated by the on-forwarding of the email to the five identified overseas recipients". What should be done? Should Mr C be able to commit the same wrong and make a responsive communication in his own words to the recipients of Mr M's email. The Judge rejected this application saying that he was not "prepared to make an order unilaterally permitting Mr C to make an unsupervised responsive communication to the recipients of Mr M's email communications". The Court has inherent power to control and deal with abuses of its processes and to regulate its procedures "but countenancing two wrongs is not a scenario that would usually be approved one confidentiality violation, by Mr M, is more than enough". As it transpired the Judge invited a draft email to be put forward by the parties which the Judge then settled. The Judge then made a decision approving and permitting Mr C to dispatch this email to the recipients of the original email. The decision does not reveal the final costs order of the application although the Judge did say that "this matter presents to me prima facie as a scenario where for this plaintiff, to be effectively vindicated, as well as for the court to indicate its disapproval of what has transpired, for an indemnity costs sanction".

10. Thus one wrong, and a wrong done the right way, made it all right in the end.

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