Kluwer Mediation Blog

Mediation Lessons from the Cases – Part 1

Alan Limbury (Strategic Resolution) · Saturday, December 22nd, 2018

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Court cases not only determine issues between litigating parties, they provide guidance for others facing similar situations. For mediators and for disputants alike, they can help us identify and avoid difficulties we might not have previously contemplated.

Here's one example

In *Robert Samuel McCosh v David A R Williams* [2003] NZCA 192, the New Zealand Court of Appeal considered the conduct of a mediator, after the conclusion of the mediation, in attempting to help the parties resolve a fresh dispute over the terms of settlement signed on the mediation day.

The mediated dispute

The mediation concerned a "bitterly contested" dispute between a father and three daughters over their entitlements to a dairy farming property. The Settlement Agreement required the father to transfer 21,530 shares to the daughters.

The subsequent dispute

Shortly after the mediation, a dispute broke out between the daughters and their father as to whether the number of shares the daughters should receive should be 59,430, taking into account a bonus issue a year earlier.

It appears the daughters were unaware of the bonus issue at the time of the mediation and the father did not draw attention to it.

An unusual twist – the mediator becomes an adjudicator

The daughters invoked a clause of the Settlement Agreement, which provided:

"In the event of any dispute between the parties in relation to the interpretation or implementation of this Agreement, that dispute shall be submitted to [the mediator] for summary determination and his decision will be final…"

Despite objections by the father that the mediator had no jurisdiction to do so, the mediator issued a "Summary Determination", declaring that the reference to 21,530 shares in the Settlement Agreement "as amplified and interpreted by this separate binding determination" should be interpreted as meaning 56,954 shares.

The dispute reignites

The father did not transfer any additional shares and, relying on the mediator's Summary Determination, the daughters sued their father for the balance of 35,424 shares. Those proceedings were settled.

Another unusual twist – the mediator becomes defendant

The father then sued the mediator, alleging the mediator lacked jurisdiction to make the Summary Determination, negligence and misleading conduct in doing so. The father claimed legal costs and expenses in relation to the litigation with his daughters, travelling expenses, interest on the value of the shares while they were "frozen" and $25,000 for "trauma, worry, stress and the upset suffered of ongoing litigation with [the] daughters for a three-year period", including aggravated damages.

The verdict

The Court of Appeal found that, under the Settlement Agreement, the mediator could make a summary determination only as to interpretation of the meaning of the words of that agreement or as to implementation of the mechanics of putting it into effect.

The mediator had exceeded his jurisdiction because changing the number of shares from 21,530 to 56,954 was a rectification of the agreement.

However, the mediator had not been negligent in undertaking the task of giving a summary determination and had not been misleading. Further, because the daughters would probably have sued their father for the additional shares even if the mediator had declined to adjudicate, the mediator was not liable to pay anything to the father, who was ordered to contribute towards the mediator's costs.

So the mediator escaped liability but no doubt suffered the stress and strain of the proceedings, all because he tried to help the parties resolve their dispute in the way he thought they had intended when they signed the Settlement Agreement.

The mediator sought to rely on his exclusion of liability clause

At first instance, the High Court Judge did not need to determine the jurisdiction issue because he accepted the mediator's argument that an exclusion clause in the Mediation Agreement, signed before the mediation began, protected the mediator from liability. It read:

"The parties jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to this mediation."

By contrast, the Court of Appeal commented that the exclusion clause applied only in relation to acts and omissions of the mediator when acting as a mediator. The actions complained of were, instead, taken by the mediator after the mediation had concluded by the execution of the Settlement Agreement and were purportedly done in pursuance of the Settlement Agreement. Clear and unambiguous language would be required for an exclusion clause to be effective beyond the scope of the mediation process.

The lesson for mediators – broaden your exclusion of liability clauses!

As a consequence of this case, mediators have sensibly amended their usual form of mediation agreement to include a broader exclusion of liability, along the following lines:

"The disputants jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to the mediation **or to any arbitration or expert determination by the Mediator or to any subsequent act or failure to act pursuant to any settlement of the dispute."**

Conclusion

Mediators may safely adjudicate within the mediation or afterwards if the parties agree.
However, their safety comes from excluding, in the mediation agreement (by clear and unambiguous language) all potential liability for whatever might be done, consciously or inadvertently, before, during or after the mediation and whether having anything to do with the mediation or not.

Substantial professional indemnity insurance cover in the widest terms is also a good idea.

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