

Kluwer Mediation Blog

Delving into what happens in mediation

Alan Limbury (Strategic Resolution) · Monday, August 21st, 2023



[Picture credit: creative commons]

Unless we ourselves are involved, whether as mediators, advisors, parties or support persons, we do not often find out what happened in a mediation because communications between the participants are predominantly confidential and “without prejudice”, so evidence of who said what to whom is inadmissible in court proceedings. One of the few exceptions in New South Wales, as elsewhere in Australia, is where a court is asked to make an order to enforce a mediated settlement agreement, in which case evidence may be given, including from the mediator, as to whether agreement was reached and as to its substance. See [Civil Procedure Act 2005 – Section 29\(2\)](#).

In the recent case of [Fiona & John Sinclair Pty Ltd v Burns Bay Services Pty Ltd \[2023\] NSWSC 789](#) (7 July 2023), the judge was asked to decide whether or not a complex dispute involving two sets of court proceedings between several companies and individuals was resolved by a document entitled “Deed of Release & Indemnity, Settlement of Proceedings”, drafted by the mediator at the end of a mediation in April 2022 that lasted all day.

None of the parties chose to have their lawyers attend the mediation and declined several invitations by the mediator to contact their lawyers before signing the deed. The court had to decide whether the deed was valid, void or unenforceable. Evidence of what happened before, during and after the mediation was given by the parties and by the mediator, including the mediator’s file of documents.

Before the mediation

The two sets of proceedings commenced in June and July 2021.

The mediator was contacted in late 2021 and told the parties might be interested in a mediation. The mediator had several communications and held pre-mediation conferences with the parties, explained the mediation process and provided a sample mediation agreement. None of the parties wanted their lawyers to be present at the mediation.

At the mediation

The mediation took place face-to-face. The mediator held joint sessions with all the parties and private sessions with individuals on each side. The mediator's notes recorded that, at the outset of the first joint session, the mediator confirmed with all participants that they still wished to proceed even though their legal representatives were not present. All the participants strongly felt and expressed that they were in the "right head space to proceed and wanted to do so without lawyers... they had received advice from lawyers and just wanted to do it without their interference."

The Agreement to Mediate was signed and the parties made opening statements. The mediator wrote the key issues on a whiteboard. The mediator's notes refer to "inter-active triadic discussion between parties during this phase". There followed private sessions with both sides, the substance of which is set out in the judgement, and a further joint session at which some matters were agreed. The mediator then typed the deed and told the parties that they could take it to their lawyers if they wished but the parties said words to the effect of "[n]o, we want to finalise and settle the deed now". The mediator's notes recorded that, when asked whether they would consider a clause that "it is in full and final settlement of the dispute", all parties vehemently agreed that they wanted this. The mediator went through the repercussions of the deed for the parties and went through the deed with each of them.

The deed was executed by the individuals on behalf of the companies but they did not execute it separately as individuals. The mediator agreed in her evidence that she did not say to the participants that they understood that they were entering into the deed personally and on behalf of the companies.

After the mediation

Shortly after the mediation, the lawyers for one side wrote to the lawyers for the other side:

"In circumstances where the Deed appears to be missing some important elements, we are in the process of preparing a more comprehensive version which will of course reflect the terms of settlement reached."

The lawyers for the other side responded:

"We are unhappy with the circumstances in which the mediation occurred, in which we were not involved. We do not at this time concede that the deed that resulted is effective to terminate the proceedings."

The judgement

The judge decided:

"Overall, and in circumstances where the Deed was not drafted by the parties' lawyers, the

material terms in the Deed are, in my view, sufficiently described to support the conclusion that the parties intended the Deed to be immediately binding when it was signed and that the parties made a sufficiently complete agreement for it to be binding.”

Further, the judge found that those who signed the deed in their capacity as directors of the companies were also bound as individuals, since that is what they agreed to, without the benefit of legal advice about the formal requirements for executing a deed and the need for them to sign separately and identifiably in each of their individual capacities.

One takeaway

The judgement sets out some of the evidence of what occurred in the private sessions, including the amount of money that one party wanted to receive in settlement. As it happened, the agreed settlement was for a lower sum. Had it been for a higher sum, the paying party would have learned from the court case that it could have settled for less. And if the judge had ruled the deed invalid, one wonders what the outcome of any further mediation or negotiation might have been.


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