Kluwer Mediation Blog

Court ordered mediation – some Australian developments

Alan Limbury (Strategic Resolution) · Sunday, October 22nd, 2023

In a previous blog in 2018 , I commented on how Australian courts have approached their statutory power to order parties into mediation with or without their consent.

In the recent case of Aversa v Transport for New South Wales (No 2) the judge had to decide whether to order mediation in a case involving claims of fraud by a couple whose land had been "vertically subdivided" into surface and subterranean plots by the Registrar General at the request of the government's department of transport ("TfNSW"), which had then compulsorily acquired the subterranean plots in furtherance of a tunnelling project for a tollway, "WestConnex" .

The issues

It was common ground that the landowners are not entitled to compensation attributable to the compulsory acquisition of their subterranean land because their surface land is unaffected by the tunnelling. Instead, they sought compensation because, as they claimed, TfNSW's power to effect the subdivision depended on the land being dedicated under the applicable legislation as a "public road". The plan lodged by TfNSW with the Registrar General seeking approval for the subdivision stated that the subterranean land was required for a "freeway", a type of public road. However, a tollway is not a public road. TfNSW accepted that its statement was wrong and was a mistake. The landowners said the statement was knowingly false and fraudulent. They claimed *inter alia* compensation and damages resulting from fraud and from trespass on what they claim is still their land.

The order sought

The landowners sought a court order that the proceedings be referred to mediation. TfNSW strongly opposed such an order because it wished to be cleared of the allegation that it had

fraudulently misled the Registrar General.

The legislation

The relevant legislation conferring power upon the court to order mediation with or without consent requires the parties to participate in the mediation in good faith. The judge noted that the overriding purpose of the legislation is to facilitate the "just, quick and cheap resolution" of the real issues in the proceedings [note the important comma].

When should mediation be ordered?

In considering whether to make the order despite TfNSW's strong opposition, the judge said:

"Authority does not provide particularly clear guidelines as to when it will be appropriate for the Court to refer proceedings to mediation notwithstanding the absence of consent by a party. It appears that the Court has a discretion that must be exercised judicially that will depend upon the specific circumstances of each case, and an exercise of judgment by the Court as to the likelihood that the overriding purpose will be served by the referral such that the risk of the additional costs imposed by the parties of being forced to participate in the mediation are justified. This is a judgment that must be based on experience, as the Court will rarely have objective evidence that is sufficient to enable it to make a truly educated forecast as to the prospects of success of the mediation. Furthermore, experience has now demonstrated that the process of mediation is worthwhile on an overall basis although its prospects of success in a particular case are usually unpredictable."

The parties' submissions

The judge noted that the plaintiffs sought the order because they are ordinary landowners with a young family who find themselves to be plaintiffs in proceedings that have been on foot for many years and have involved a number of interlocutory hearings. They wish to invoke the process of mediation in order to avail themselves of the possibility of achieving a satisfactory compromise with TfNSW.

TfNSW resisted the order primarily on the ground that the plaintiffs had alleged fraud against the State of New South Wales, through widespread fraud by TfNSW in the process of constructing the WestConnex project, saying this is not a private dispute amenable to being settled behind the closed doors of a confidential mediation process. TfNSW is entitled to vindicate itself and defend the claim against it in an open forum of justice. Any compromise will necessarily imply that the claims had some merit, or at a minimum that TfNSW desired to keep them out of court and beyond the gaze of the public that funds TfNSW. Further, on the advice that it had received, the plaintiffs' case has no prospects of success so TfNSW has no liability at all to the plaintiffs.

Senior counsel for the plaintiffs highlighted the plaintiffs' position that the responsible course of action is to permit the parties to sit around a table and see whether the claim can be resolved, having regard to the risk to the plaintiffs of losing their family home and their children's patrimony.

The decision

The judge reviewed the development over several years of the judicial approach to compelling

parties to take part in a mediation without consent and decided:

"Although the Court's decision whether or not to order that a mediation take place over the opposition of one of the parties should not depend upon the Court's assessment of the level of uncertainty in the outcome of the proceedings and each party's prospects of success, it would in many cases be unrealistic for the Court to ignore the benefit of its experience in making an assessment of whether a mediator may be able to facilitate a resolution of the dispute. In this case, however, I have no sense at all of the likely outcome of the proceedings, or whether there is any chink in TfNSW's self-perceived armour that might be brought to bear at a mediation. It seems to be implicit in TfNSW's adamantine opposition to a mediation taking place that it assumes that the only outcome that could be palatable to the plaintiffs would be a substantial payment of compensation by TfNSW. The Court should not assume that that is the plaintiffs' position. It is a matter of long experience that parties to litigation can lose their enthusiasm and resolve and seek a way out that limits ongoing risks rather than produces substantial victory. The Court does not know what the position of the plaintiffs will be at a mediation and it makes no assumptions in that regard.

Although there is no general rule, I think that the Court should be favourably disposed towards facilitating the possibility of a mediated solution in proceedings between ordinary citizens and the State. That is what I will do in this case."

The decision was made on August 3, 2023 and it may be too soon to know whether settlement was reached.

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