

SETTLEMENT STRATEGIES – EFFECTIVE USE OF ADR IN COMPLEX LITIGATION

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The underlying theme of my papers is that creative and resourceful use of ADR techniques and mechanisms can pay dividends in complex litigation, whatever division of the court it happens to be filed in.

What is essential is that the lawyers for the parties put their thinking caps on at an early stage of the dispute and see if they can collectively come up with an effective ADR strategy to suit it. The key objective of course is to resolve the dispute more quickly and more cheaply than will be the case if the parties commit themselves to having their day in court.

Please keep in mind two important facts –

- i. We now operate in a legal system where a court can order ADR processes to take place (compulsory mediation). Our clients will not always have the leisure to exercise their own choice and timing; and
- ii. Appropriate and timely advice about ADR is now part and parcel of a lawyer's duty of care to his or her client.¹

In the light of this reality it behoves us lawyers to be vigilant with respect to ADR possibilities at all stages of our advice giving to clients, and

¹ Much has been written about this duty of care by jurists and academics over the last 10 years or so and its existence cannot be denied. You can easily research this using any competent online legal research tool such as Lexis Nexis or Thomson Legal's Lawbook Online.

particularly early on, before the dispute escalates and becomes labour intensive, as this is where you have the biggest opportunity to save time and money for your client. Once clients and parties have travelled too far down the litigation track, experienced some painful interlocutory spats and run up some serious costs the prospects of success of ADR mechanisms become less and less. If a lawyer is not alert to and fails to alert a client to strategic opportunities for ADR during the A-Z of the life of the dispute, and the client, upon receipt of later advice from another source considers that he or she has suffered some loss that might otherwise have been avoided or minimised “but for” your lack of diligence and awareness, he or she could potentially sue you for damages for breach of professional duty.

Yet, whilst we all know this (or at have been told this) it remains the fact that many lawyers do not seriously consider ADR options until a considerable distance down the litigation track. This is sometimes more client driven than lawyer driven – as some clients feel so hot under the collar at the outset of a dispute that their desire to “get justice” by punishing the offender makes ADR talk sound a bit soft and sissy. This attitude displayed by a client may cause some lawyers to dampen or play down the ADR option(s). But this simply highlights the importance of today’s lawyers being really conversant with ADR strategies so that they can give difficult clients hard punching and mind opening advice that can gain purchase in their rational brains and assist clients to calm their emotions and stand back from the fray, carefully weigh up the pros and cons of litigation versus ADR and make a balanced and informed decision. Failure to do this may in some cases constitute professional negligence.

Another underlying theme of my papers is that complex litigation may not be amenable to just one type of ADR process being applied to it. It may need a tiered approach. This approach is discussed in another of my papers dealing with medical negligence disputes. You can obtain a free copy of that paper by going to www.barristerconnect.com.au and going to the Resources page. A failure to perceive this may see valuable time and money wasted – for example, by arranging mediation prematurely. When the mediation (quite possibly a court ordered mediation) fails everyone goes away thinking it was a waste of time and resources and they re-commit to getting on with the fight in court. In addition, judges who see mediations fail may become less inclined to lend their support to ADR in the future.

A related theme is – pick the right ADR strategy for the case.² Sometimes Mediation will be or appear to be a poor choice because the parties are too antagonistic towards each other and/or the expert opinions are just too polarised and far apart and/or the law, the issues and the facts just seem to be too complex. The judge who is presiding over an application to order compulsory mediation to take place may be totally unaware of this and so unless the lawyers understand it and explain it to the judge the whole exercise could end up being a waste of time and resources. On the other hand, a case that appears at first blush to be problematic and too difficult for ADR may, upon more careful and discerning investigation and evaluation by persons sufficiently trained and experienced in the use and application of Mediation and/or Arbitration be found to be suitable for either Mediation, Neutral Evaluation or Determination, Arbitration or a combination of two or more ADR modes.

² The “right strategy for the case” may change during the lifetime of the case. The choices for dispute resolution, other than court determination, embrace face to face settlement conferences, neutral evaluation and/or neutral expert witness determination, mediation and arbitration.

Our duty of care requires us to gain sufficient knowledge and understanding of ADR processes and their application that we are capable of and competent to form judgements about such things and give appropriate and timely advice to our clients. Anecdotal evidence and commentary by both Legal and ADR professionals strongly suggests that lack of such competency and ability is widespread in the legal profession. If such competency is lacking in a lawyer or in his or her firm the proper discharge of the duty of care may require the lawyer to seek external assistance and advice from either a solicitor or barrister who possesses the competency and ability. Enquiries made to such places as LEADR, IAMA or to the soon to be launched Mediation Arbitration Chambers Sydney (www.medarb.com.au) will readily connect you to an appropriately qualified practitioner.

Key things for the lawyer to consider will be –

- i. Are the factual disputes relating to liability and damages amenable to mediation, neutral expert evaluation or determination or arbitration or a combination of two or more?
- ii. Are the legal disputes (ie. how the law should be applied to the factual disputes) amenable to some form of ADR?
- iii. Are any differences in expert opinion relied upon in the litigation amenable to an ADR process?

If it can be seen, for instance, that only the factual disputes are amenable to mediation but that the legal disputes and differences between the experts are not then you need to consider alternative strategies. These could include –

- a. Arbitration;
- b. Neutral Evaluation;
- c. Neutral Expert Determination.

It may be that some of the technical issues in the case (eg. legal, scientific, medical or engineering) will need to first be resolved by an independent person (agreed between the parties) before the parties can further their settlement negotiations with or without a facilitated mediation.

If the parties legal advisers can collaboratively work up a list of technical issues that are central to resolving the dispute and then –

- agree on choice of a suitable referee;
- the powers of the referee;
- and whether or not the referees findings will be binding on both parties

then the door is open to them to expeditiously draw up an ADR protocol and have those technical issues disposed of as quickly as possible. The parties can then consider their respective positions in the light of those binding determinations. There is usually more than one way to “skin the cat”. In some cases the parties may quickly settle the balance of the disputes via private negotiations; in other instances the parties may elect to submit the outstanding factual disputes to mediation in the light of the binding determinations that have been made on the technical issues; and others may choose to take the balance of the dispute to court. Whatever eventuates, the early ADR mechanism agreed to will ensure that the

balance of the case can be disposed of far more quickly and cheaply than otherwise would have been the case.

I would like to give a relatively recent example of how the above philosophy was put into effect in a very complex common law dispute. The dispute was between a group of 8 or so plaintiffs against the owners of a coal mine. It was alleged that negligent and unlawful underground mining was the cause of surface subsidence that caused damage to the plaintiffs' properties. Certain remedial works had already been carried out by a statutory authority, the Mine Subsidence Compensation Board, over a number of years. But the remedial works had been inadequate and damage continued to occur. The plaintiffs complained of poor treatment by representatives of the Colliery, by representatives of the Compensation Board and by the representatives of the contractors sent in to carry out the remedial works. They suffered serious dislocation and upheaval in their lives.

The matter was further complicated by a major disparity in the expert evidence served by both sides. One of the key issues was whether the continuing damage to buildings was chiefly due to ongoing subsidence activity or due to poor building practices during the remedial works carried out on behalf of the Mine Subsidence Board.

The matter was further complicated by the fact that the defendant sued by the plaintiffs for damages, the colliery, argued as part of its defence that the plaintiff's sole remedy was against the Mine Subsidence Board, or that at the very least the actions of the Board, via its contractors, created a *novus actus interveniens*.

So you can see that this was a very complex piece of litigation and it was going to cost a very pretty penny to run its course within the court system. Lawyers representing the parties estimated that the final hearing would run for 4-5 weeks.

The plaintiffs were running their litigation on limited grants of legal aid. They had to keep applying for extensions of the grant as each new milestone was achieved. So it was “stop and start” litigation and very frustrating for all concerned. I was representing the plaintiffs. A major city law firm was acting for the defendant.

The case was being “judge managed” in the District Court. The judge was fast running out of patience. The judge was at that time frequently sitting at Newcastle and the legal representatives often attended directions hearings there. To add to our problems Legal Aid had cold feet and seemed unlikely to cop the cost of full blow litigation and a final hearing. This was in spite of the fact that our experts strongly supported the plaintiffs’ case.

The parties had made an early attempt at voluntary mediation. The defendant paid for us all to attend at some country retreat for two days as we attempted to mediate just two of the claims. It failed for the very reasons I have outlined in this paper. At that time we had served some partial expert evidence on the defendant. The defendant served the plaintiffs with some partial reply expert evidence just days before the mediation. They pooh poohed our expert evidence and we did the same to theirs. So we got absolutely no where.

We reported back to the judge and a timetable was implemented that required both sides to obtain and serve their full expert evidence by certain deadlines. This was a very expensive exercise. But it was necessary for this to happen before the parties could return to any meaningful negotiations.

Once the expert evidence was all served it became apparent that the key technical issue between the parties was causation, rather than negligence. Both sides agreed that an early determination of the key causation issue (was the further property damage due to ongoing subsidence) could open the door to a final settlement.

By this time the court had made an order that further mediation take place. However, at a further directions hearing we persuaded the judge that that further mediation at this stage would be unproductive. What was needed was a neutral expert to be agreed upon by the parties to receive all the technical evidence on the causation issue and make a final binding determination. The plaintiffs' conceded that if that determination went against them they would drop their claims and concede defeat. The defendant indicated that if the determination went against it, it reserved its right to argue other defences it had pleaded but that it was highly probable that offers already made would be improved on.

The main expertise needed in the neutral expert was that of mining subsidence engineering and rock mechanics. But the parties acknowledged that the neutral may find his task difficult due to lack of expertise in surveying and civil engineering. So the protocol left it open to the neutral to advise the parties that he needed assistance from other experts in matters that he considered were beyond his own expertise. This

was an important aspect of his powers, to identify gaps in his own expertise and call for help, and it gave comfort to the plaintiffs that he would not try and make a final determination of this key threshold issue feeling partially incompetent to do so. Negotiating this into the ADR protocol was essential to gaining the support of the plaintiffs to submit this core issue to binding determination by a neutral expert.

The key themes and factors that came into play in the mine subsidence case can easily be replicated in other jurisdictions such as the Equity Division – for instance in a complex Family Provision Act claim or a property dispute between a de facto couple. Valuation evidence could be a key issue in dispute. As part of an overall ADR protocol the parties might reach agreement to refer all valuation disputes to an agreed referee or a number of referees. The cost would be shared equally. This could be done expeditiously and the parties could refrain from taking any further steps in the litigation until the determination or determinations were received and considered. If private negotiations then failed to reach a total settlement the parties could then agree to court sponsored mediation.

In conclusion, given the current state of play with ADR as part of the administration of justice and dispute resolution mechanisms lawyers need to be very proactive in how they manage litigation. We have a duty to find solutions that can save the client time and expense. We need to put our creative thinking caps on as soon as we receive our first instructions. Timing may be of the essence and an opportunity lost may have serious repercussions for your client. We need to preserve as much of the pie for our client as possible and not see it unnecessarily squandered via expensive litigation.

Complex litigation poses special challenges. I hope this paper and the power point presentation and my dialogue with Mediator and Arbitrator Derek Minus at the conference workshop may be of some assistance to you in formulating and constructing suitable ADR strategies in cases you may encounter in the coming years. I am happy to have been invited by Derek to be an inaugural member of Mediation & Arbitration Chambers which it is hoped will be officially launched in October 2007 (www.medarb.com.au) and please do not hesitate to seek assistance from that place should you ever need it.

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Chambers

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