Mediation and the Courts

Introduction

With the increasing frequency of use of mediation, it is not surprising that a body of case law has begun to accumulate about it. Here is a brief guide to some recent cases.

Enforceability of Agreements to Mediate

In *Hooper Bailie Associated Limited v Natcon Group Limited* (1992) 28 NSWLR 194, Giles J gave effect to an agreement to mediate by staying an arbitration that one party sought to resume in breach of the agreement, which was to the effect that the arbitration would not resume until the mediation was concluded. *Hooper Bailie* is significant because it did not follow the House of Lords' decision in *Walford v Miles* [1992] 2 AC 128 which refused to give legal effect to agreement to negotiate.

Hooper Bailie is significant also because it emphasises that, for a mediation agreement to be recognised as having legal effect, it must specify with sufficient certainty the conduct required of the parties. It also makes clear that, because equity is unlikely to order specific performance of an agreement to mediate (because supervision of performance would be impossible), such agreements should make concluding the mediation a condition precedent to commencing an arbitration or litigation. The Court can then enforce the agreement by staying an arbitration or litigation commenced in breach of the agreement to mediate.

Privilege Attaching to Communications during a Mediation

In *AWA Limited v Daniels* (unrep. Supreme Court of New South Wales, 18 March 1992), Rolfe J considered the limits of the "without prejudice" privilege in the context of mediation. A very large commercial cause was attempted to be resolved by mediation after twelve hearing days at the direction of the trial judge: *AWA Limited v Daniels* (unrep. Supreme Court of New Wales, 24 February 1992, Rogers CJ in Comm. Div.). The mediation was unsuccessful and the hearing resumed before the trial judge. The proceedings concerned a claim by the plaintiff against its auditors for damages for alleged failure to audit properly the plaintiff's 1986 accounts. The auditor defendants cross claimed against the plaintiff's former chairman and chief executive officer, the former non-executive directors and two banks.

Before the mediation started, the defendants had requested an amendment to the draft mediation agreement. The defendants asked for a warranty from each party that it had a position wholly independent from that of the other parties and that its ability to mediate was not fettered by any existing agreement for indemnification by another party. The plaintiff would not consent to such an amendment. The matter was resolved by the plaintiff's solicitor making an oral statement at the mediation on the basis that what he said was without prejudice and confidential. The mediation then proceeded.

When the hearing of the case resumed after the mediation had failed to resolve the underlying dispute, the defendants served notices to produce on the plaintiff and some of the cross-defendants. They sought documents relevant to the existence of a matter to which the proposed amendment to the mediation agreement related - presumably, whether the plaintiff AWA had agreed to indemnify its former officers from liability to the defendants.

The plaintiff claimed the notices to produce were an abuse of process because they called for the production of documents whose existence probably only became known to the defendants as a result of what the plaintiff's solicitor said at the mediation. The defendants argued that they were not attempting to put into evidence something said at the mediation, but rather were attempting to gather documents whose existence had been confirmed by something said at the mediation.

Rolfe J considered himself bound by *Field v Commissioner of Railways of New South Wales* (1957) 99 CLR 285 at 291-292, where Dixon CJ and Webb, Kitto and Taylor JJ said:

> "This form of privilege, however, is directed against the admission in evidence of express or implied admissions ... It is not to be concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence."

Applying this test, Rolfe J held that the notices to produce were not an abuse of process. In his Honour's view, the plaintiffs were not seeking to prove directly or indirectly what was said at the mediation. Rather, they were seeking to prove, by admissible evidence, "a fact to which reference was made at Mediation not by reference to the statement but to the factual material which sourced the statement" (at 13).

His Honour emphasised (*id.*) that nothing in his reasons was intended to cast doubt on the proposition that admissions or statements made at a mediation carried out on a confidential and "without privilege" basis could not be proved in evidence unless the parties consented.

Pursuant to the notices to produce, deeds of indemnity were then produced. The defendants tendered them. The plaintiff and the former directors objected, claiming that the deeds were protected by obligations of confidentiality. In ruling on the tender, the trial judge, Rogers CJ in Comm. Div., commented on the reasons for judgment of Rolfe J already discussed: *AWA Limited v Daniels* (1992) 7 ACSR 463.

Rogers J pointed out that the question for decision in *Field's case*, by which Rolfe J had considered himself bound, was whether an admission made by the plaintiff in a personal injury case to the defendant's doctor was admissible against him. Rogers J pointed out (at 467) that the issue was narrower than that posed in the passage quoted by Rolfe J and quoted earlier in this article:

> "In other words the judgment [in *Field's case*] concerned the admissibility of an admission and not of objective evidence to which earlier reference had been made. If the defendants were to attempt to prove what [the solicitor for the plaintiff] had said at the Mediation then, in my view, that would have been inadmissible. Strictly speaking, that is all that *Field* stands for. The earlier

statement, in the joint judgment, as to proof by extrinsic evidence is strictly obiter. In my respectful view the judgment of the High Court is not determinative of the present question although, without a doubt, a judge at first instance is hardly likely to take a view different from a statement, even if obiter, in a joint judgment in the High Court."

Rogers J continued:

"Rolfe J was prepared to take the view ... that objective evidence will not be excluded merely because the defendants learnt of the relevant facts in the course of the mediation. With very great respect I would prefer to consider that question further if, and when, it arises on some future occasion. If the fact be that the other side has absolutely no inkling of some matter, which, if known about is capable of being established by objective evidence, but which would not ordinarily come to the knowledge of the other side in the normal progress of litigation and its existence is revealed only by a statement made in the course of, and for the purposes, of the mediation, I would hesitate long before concluding that the objective evidence so revealed is admissible. It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them. As well were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process." (at 467-468, emphasis added)

"It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them."

Rogers J also pointed out that, since the deeds were in the possession or control of parties to the proceedings, they should have been discovered if relevant; thus the whole question ventilated before Rolfe and Rogers JJ would not have arisen. His Honour observed that it followed that the really difficult situation would arise

> "where the evidence, if documentary, is not in the control, or possession, of the party seeking to protect its contents, or, if not documentary, the material will remain unknown to the other party but for the disclosure at the mediation". (at 468)

This difficult question remains for determination. Rogers J went on to admit the deeds subject to relevance.

The effect of *AWA* thus is that there is a nice judgment to be made before disclosing to the other party things which might enable it to prosecute its case more effectively if the mediation fails and litigation ensues or continues. On the one hand, disclosing the matter may assist in settling the dispute. On the other hand, if the dispute is not settled, the other party may be able to prove the subject matter of the admission by admissible evidence. But this nice judgment is, of course, one that participants in "without prejudice" negotiations have always had to make. The increasing frequency of mediation only serves to highlight the point.

In *Re D (Minors)* [1993] 2 WLR 721, the English Court of Appeal, led by the Master of the Rolls, Sir Thomas Bingham, considered whether a statement of a mediator was admissible if tendered by one of the parties to custody proceedings. The parties, husband and wife, had had three joint meetings totalling about five hours with a clinical psychologist for the purposes of conciliation (a word the Court used to include mediation). When conciliation could not be achieved, the wife sought to tender a statement of the psychologist based on the joint meetings. The Court of Appeal said:

"A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party (whether official or unofficial, professional or lay) receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties' agreement: ... [citing authorities].

It is not, in our view, fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with the 'without prejudice' privilege, seem clear. But both Lord Hailsham of St Marylebone and Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage. We respectfully agree, and we can see no reason why rules which have developed in relation to 'without prejudice' privilege should necessarily apply to the other ... [We] do not accept that evidence can be given of statements made by one party at a meeting admittedly held for purposes of conciliation because, in the judgment of the other party of the conciliator, that party has shown no genuine willingness to compromise. Wherever an attempt to conciliate has failed, both parties are likely to attribute the failure to the intransigence of the other. To admit such an exception would reduce the privilege to a misleading shadow." (at 726)

The Court of Appeal in *Re D* described in some detail the great growth in England of the use of conciliation in family disputes and the practice of according confidentiality to what is said at a conciliation. The Court held:

> "These practices and expressions of opinion cannot of course be regarded as authoritative statements of the law. But in this field as in others it is undesirable that the law should drift very far away from the best professional practice. ... In our judgment, the law is that evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to

cause serious harm to the wellbeing of a child." (at 728)

Applying that test, the Court of Appeal upheld the refusal of the trial judge to admit the conciliator's statement.

Although the privilege identified by the Court of Appeal is described as one based on the public interest in the stability of marriage, the public interest in encouraging the resolution of disputes without litigation would seem to support a similar privilege attaching to mediation of disputes generally.

Privilege With Respect to Third Parties for Communications During a Mediation

There is apparently no direct authority on whether communications during a successful mediation are privileged if a person not a party to the mediation seeks discovery of them or subpoenas them in other proceedings. In *Rush & Tomkins Ltd v Greater London Council & Anor* [1989] 1 AC 1280, the House of Lords considered the situation where a builder had sued the owner of land for which it was constructing 639 houses, and one of the builder's subcontractors. The builder and the owner settled and the builder discontinued against the owner. The subcontractor sought discovery of the "without prejudice" correspondence by which the settlement was accomplished. The Court of Appeal [1989] 1 AC 1285, held that once the builder and the owner had settled, the privilege ceased.

The House of Lords reversed. It held unanimously that the privilege continued and had effect against the subcontractor. Lord Griffiths, in a speech with which the other members of the House agreed, said:

> "It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the 'without prejudice' rule. I would therefore hold that as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party." ([1989] 1 AC at 1301, emphasis added)

It is worth noting that the general rule set out in the second-last sentence of the passage just quoted is wider than strictly was necessary to decide the issue before the House. The last sentence of the passage was sufficient to decide that.

Read widely, the general rule would seem to prevent admission of communications made during a mediation in subsequent litigation between entirely different parties, if the mediation and the litigation concerned subjects that were connected. The narrower rule set out in the last sentence of the passage quoted would of course apply the privilege only as between parties in the same litigation in which a settlement had been reached.

Perhaps a hint as to the direction the courts may take is contained in the English Court of Appeal's decision in *Dolling-Baker v Merret & Anor* [1990] 1 WLR 1205. There, an underwriter had brought an action against another underwriter claiming money due under a reinsurance policy. The first defendant claimed that he could avoid the policy for non-disclosure. In the event that that defence succeeded, the plaintiff also claimed against the placing brokers. The first defendant had written similar reinsurance policies where the same placing brokers were involved. Those similar policies had been the subject of an arbitration in which the arbitrator had declared the reinsurance to be invalid.

The plaintiff sought discovery of virtually all documents produced for the purpose of the arbitration. The trial judge found that the issues in the arbitration were very similar to those in the proceedings and for that reason found the arbitration documents to be relevant and discoverable. Parker LJ, with whom Ralph Gibson and Fox LJJ agreed, allowed the appeal:

> "We were invited ... to consider whether this was a case where there ought to be production. It is not contended on behalf of the first defendant [the reinsurer] that the fact that the documents were prepared for or used in an arbitration, or consist of transcripts or notes of evidence given, or the award, confers immunity. It could not, in my judgment, successfully be so contended. Nor is it contended that the documents constitute confidential documents in the sense that 'confidentiality' and 'confidential' documents have been used in the court. What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.
>
> It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case. It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production

of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking." ([1990] 1 WLR at 1213-1214, emphasis in original)

If for "arbitration" one substitutes "mediation" in the passage just quoted, and bears in mind that parties to a mediation invariably promise to keep confidential their communications during the mediation, the holding in *Dolling-Baker* probably provides a guide to the minimum level of protection that the courts will accord - as against third parties - to communications during a mediation.

Mediation and Costs

Most mediation agreements provide that if the mediation is not successful, the parties will agree to treat the costs of the mediation as costs in the cause. Questions may arise about the treatment of the costs of mediation, however, where a court has ordered the parties into mediation and, as a result, no mediation agreement dealing with costs exists.

In *AWA Limited v Daniels & Ors* (unrep. Supreme Court of New South Wales, 19 April 1993) the matter came before Rogers CJ in Comm. Div. on a motion for adoption of a referee's report on the costs to be awarded to the successful cross defendants.

At pages 3-6 his Honour discussed whether the costs of counsel, particularly senior counsel, for participating in a mediation should be allowed. In heavily qualified dicta at pages 4-5 Rogers J doubted whether the fees of senior counsel should be allowed. In the event, however, his Honour ordered the adoption of the referee's report, which allowed the costs of all counsel for appearing at the mediation sessions.

His Honour's reasoning seems to be based on the premise that the role of counsel where a matter is being mediated is merely to advise their clients of the strengths and weaknesses of the competing cases - something that in his Honour's view can be done before the beginning of the mediation sessions. As a result, in his Honour's view, there may have been no need for counsel to attend the mediation sessions themselves.

With respect, this reasoning ignores the contribution that counsel trained in mediation can make at the mediation sessions to resolution of the disputes between the parties.

In *Capolingua v Phylum Pty Ltd (as trustee for the Gennoe Family Trust* (1991) 5 WAR 137, Ipp J considered whether a successful defendant should be deprived of an order for costs because of, among other things, its conduct at a mediation required by Order 31A of the rules of the Supreme Court of Western Australia. Essential elements of the defence had not been made clear until the fourth day of the hearing, when amendments to the defence were sought and granted. Given the amended defence, the matter could have been heard far more quickly.

Ipp J held that the position had been exacerbated by the conduct of the defendants and their solicitors during the mediation conference before the Principal Registrar of the Court. Available to his Honour was a report of the mediation prepared by the Registrar; neither party objected to his having regard to it and both commented on it in submissions on costs.

At the mediation the defendants' solicitor first objected to the plaintiff's counsel taking notes. Then, after an adjournment of the mediation, the defendants said they were not willing to continue. The plaintiff's counsel asked the defendants' counsel whether there was any point in just the counsel remaining with a view to endeavouring to narrow the issues. But defendants' counsel indicated that her instructions were to say simply "yes" or "no" to the various issues raised.

His Honour was of the view that if the defendants had not refused to participate in a process of identifying and resolving unnecessary issues,

> "there is every prospect that the confusion and obscurity in their pleadings would have been noticed and remedied. This in turn would probably have led to a substantial shortening of the trial." (at 140)

He held that justice required that there be no order as to costs.❑

Robert Angyal

Overthetop

Coram Gallop J (ACT Supreme Court)

Sheriff's Officer to Litigant in person seated at the bar table: "What's in that flask you are sipping from?"

Litigant: "Just some spirits."

(The matter is dutifully reported to the Associate.)

Litigant: "Your Honour I'm fairly nervous. Is it OK if I sip from this flask (holding it up)?"

His Honour: I've never had anyone ask if they could consume alcohol in Court - it is alcohol, is it?"

Litigant: "Yes."

His Honour: "I wouldn't want to impede your presentation of your case if it will overcome your nerves. Do whatever you like."

Litigant: "Well, I won't sip it then. Is it OK if I eat a banana then?"

His Honour: "Look, just sit down will you, and don't talk nonsense. This is a serious business here and there are others wanting to get their cases on. I won't let you make a farce of the proceedings."

Litigant: "Can I get an adjournment to get some legal advice?"

His Honour: "Well, that's the most sensible thing you've said so far." ❑

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