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PRACTICE MANAGEMENT

NEGOTIATIONS DURING MEDIATION

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"Practice Management – Negotiations during mediation"

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Mediation styles

1. Mediation is now a part of almost every commercial lawyer's practice. With the ever increasing cost of litigation, a client's appetite to settle proceedings has never been greater.

2. There is no universally accepted definition of mediation. It has been observed that:

> "Some definitions [of mediation] are highly normative and theoretical, stating what ought to happen (the conceptualist approach) while some are highly descriptive, stating what actually happens in practice (the descriptive approach). Other definitions fall somewhere in between."[2]

3. However, regardless of any purported definition of mediation, it is generally accepted that there are a number of different styles of mediation, each having their own particular intended outcomes.

4. When conducting mediations, there are a number of things that we as practitioners should be mindful of so as to ensure the best outcome possible for our clients. Failure to grapple with some of these matters prior to participating in a mediation may have very significant consequences for your client, as well as you as a practitioner personally.

5. Professor Laurence Boulle[3] suggests that mediation can be grouped into four different groups or styles, namely:

   (a) facilitative mediation;

   (b) settlement mediation;

   (c) therapeutic mediation; and

   (d) evaluative mediation.

6. Facilitative mediation focuses on the needs and interests of the parties. It does not focus on the legal rights or positions of the parties, and the dispute is defined in terms of "underlying interests". This type of mediation is ordinarily used in family or partnership disputes.

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[1] The contribution of Matthew Minucci, Barrister on Foley's List, is gratefully acknowledged.

[2] Hinchy, R *"Commercial mediators: do they have style?"* ADR Bulletin (1999) citing Professor Laurence Boulle, Mediation: Principles, Process Practice, Butterworths, Sydney 1996, pp 4-5.

[3] Professor Laurence Boulle, Mediation: Principles, Process Practice, Butterworths, Sydney 1996, pp-28-30.

7. Settlement mediation focuses on positions; that is, what do the parties want? This is the most common type of mediation that occurs in a commercial litigation context.

8. Therapeutic mediation is a type of mediation that concentrates on the causes of a dispute. It is interest based mediation. The ultimate aim is to improve the relationship between the parties, which would then lead to a resolution of the problem.

9. Evaluative Mediation attempts to resolve disputes in a manner consistent with legal rights. The mediator in these circumstances is a lawyer with experience in litigation, and in particular, with expertise in the subject matter of the dispute. It is ordinary in this type of mediation that the mediator takes an interventionist role in proceedings. This type of mediation can commonly be seen in court-assisted mediation, where a judge, magistrate or tribunal member actively attempts to settle a dispute, with opinions expressed about prospects of success.

10. Each of these four types of mediations have their strengths and weaknesses. The type of mediation that is used is always dependent upon the nature of the dispute and the jurisdiction in which proceedings have been commenced.

NMAS Practice Standards **and the "preliminary conference"**

11. On 1 July 2015 new NMAS Practice Standards came into effect. The Practice Standards can be accessed at www.msb.org.au/mediator-standards/standards.

12. The new Practice Standards describe mediation as a process that "promotes the self-determination of participants" and in which participants, with the support of a mediator:

    (a) Communicate with each other, exchange information and seek understanding;

    (b) Identify, clarify and explore interests, issues and underlying needs;

    (c) Consider their alternatives;

    (d) Generate and evaluate options;

    (e) Negotiate with each other; and

    (f) Reach and make their own decisions.

13. The practice standards now require an accredited mediator to ensure that a preliminary conference or intake session occurs. However it can be conducted by a person other than the mediator.

14. Barrister mediators are likely to ask you to conduct the preliminary conference or intake session with your client. I do so where the parties are legally represented. I send a letter which states that the matters contained in paragraphs 3.1(a) & (b) and 3.2(a) – (j) of the Practice Standards must be canvassed with the participants. It should take approximately 15 minutes to do so.

15. The requirements of paragraphs 3.1 (a) & (b) and 3.2(a) – (j) of the Practice Standards include:

    - providing a description of mediation and the steps involved including joint and separate sessions and shuttle negotiations;
    - explaining the content of the mediation agreement including confidentiality;
    - identifying who will participate and the extent of their authority to make decisions;
    - assisting the parties to prepare for the mediation including discussing any advice or information which may need to be sought and/or exchanged prior.

16. However in some cases it may still be appropriate for the mediator to personally conduct the preliminary conference, which can also take place via telephone or, increasingly, by Skype.

17. Although the Practice Standards require a preliminary conference for the purpose of ensuring the participants understand the process, they are also an effective way for the mediator to begin to gather information about the parties to the dispute, the reasons for the dispute and their interests and needs. This in turn assists the mediator to manage the mediation and commence thinking about how the parties could resolve the dispute. After all, that is what the mediator is there for.

Good faith and the *Franchising Code of Conduct*

18. On 1 January 2015 the new Franchising Code of Conduct took effect and for the first time contains an express obligation on the parties to a franchise dispute to act in good faith. The obligation applies during dispute resolution process[4] and is as follows:

    "Division 3—Obligation to act in good faith

    6 Obligation to act in good faith

    Obligation to act in good faith

    (1) Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:

    (a) the agreement; and

    (b) this code.

    This is the obligation to act in good faith.

[4] Explanatory statement p 18.

Civil penalty: 300 penalty units.

(2) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:

(a) any dealing or dispute relating to the proposed agreement; and

(b) the negotiation of the proposed agreement; and

(c) this code.

Matters to which a court may have regard

(3) Without limiting the matters to which a court may have regard for the purpose of determining whether a party to a franchise agreement has contravened subclause (1), the court may have regard to:

(a) whether the party acted honestly and not arbitrarily; and

(b) whether the party cooperated to achieve the purposes of the agreement.

Franchise agreement cannot limit or exclude the obligation

(4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.

(5) A franchise agreement may not limit or exclude the obligation to act in good faith by applying, adopting or incorporating, with or without modification, the words of another document, as in force at a particular time or as in force from time to time, in the agreement.

Other actions may be taken consistently with the obligation

(6) To avoid doubt, the obligation to act in good faith does not prevent a party to a franchise agreement, or a person who proposes to become such a party, from acting in his, her or its legitimate commercial interests.

(7) If a franchise agreement does not:

(a) give the franchisee an option to renew the agreement; or

(b) allow the franchisee to extend the agreement;

this does not mean that the franchisor has not acted in good faith in negotiating or giving effect to the agreement.

Preparing for mediation

19. Obviously before a mediation commences, you will be required to take instructions from your client. It will also be important to prepare them for what is to come. Clients may not realise that they will have to give ground in order to

settle the matter. Clients may not realise that a successful mediation might mean that they achieve less than they had hoped for. Clients may not realise that the mediator may talk about the prospects of success of their legal claim.

20. If you know who the mediator is, then prepare your clients for what is to come. Are they interventionist? Will they confront your client with perspectives that they may not want to hear? How will your client cope with this? Is your client going to get angry when certain things are put by the other side? Will your client's temperament be counterproductive to any settlement negotiations? These are all matters that will need to be considered prior to attending and participating in a mediation.

21. It is worth noting that clause 7.7 of the Practice Standards states:

    "A mediator must encourage and support **negotiations that focus on the participants' respective interests, issues and underlying needs** and must encourage participants to assess any proposed agreements accordingly and with reference to their long-term viability.

22. With the mediator's task in clause 7.7 in mind, there are a number of basic things that practitioners should consider when preparing for and participating in any mediation on behalf of their clients. These include *inter alia*:

    a. what is the outcome your client is seeking?;

    b. are all the parties who need to be there, present at mediation?;

    c. does your client have the mental capacity to settle?;

    d. if you have the opportunity to do so, have you chosen a suitable mediator for the dispute?;

    e. if you are representing a company, is the person at the mediation the appropriate company representative?;

    f. if you are representing a company, does the person at the mediation have appropriate authority to settle?;

    g. if you are representing a company, does any agreement need to be approved by the Board?;

    h. if you have agreed a settlement outcome, can it be described as full and final settlement; are the terms of the agreement certain?

23. The consequences for clients where practitioners fail to grapple with these matters are best demonstrated by way of case example.

Settlement Agreement at Mediation

24. In the recent case of *Rilgar Nominees Pty Ltd v BHA Holdings Pty Ltd* [2014] VSC 632 a mediation agreement contained a clause which provided that no settlement of the dispute will take place unless and until a settlement agreement has been signed. The mediation concerned a proceeding alleging oppression of a minority shareholder of BHA Holdings Pty Ltd (BHA) by reason of a proposed issue of shares in a company to existing shareholders. BHA was a party to the oppression proceeding but took no part in it, nor in the mediation. A director of BHA representing the minority shareholder company, and two other director/shareholders attended the mediation.

25. They reached agreement on certain terms which were written on a whiteboard. They stated that they agreed to the terms on the whiteboard and shook hands, took photographs of the whiteboard and agreed that formal documentation would be necessary.

26. A draft proposed agreement was subsequently prepared but rejected by BHA. The minority shareholder brought an application arguing that an agreement had been made at the mediation which settled the matters in dispute in the oppression proceeding. However Sifris J found that there was no such agreement reached at the mediation.

27. The case illustrates three important issues for mediators, parties and their representatives:

    a. *Who must attend mediation and be a party to a settlement agreement?*

       The draft proposed agreement contained obligations on BHA including borrowing money, paying interest on the loan by way of increased directors fees, issuing of shares and granting an option of converting the loan into shares. However the Board of BHA was not represented at the mediation, and had not authorised the directors that attended to represent it. BHA was not a party to the agreement reached at the mediation.

       The Shareholders Deed relating to BHA provided that the Board must decide all matters relating to the affairs of the company that it does not specifically delegate to senior management of the company. By reason of this, Sifris J found that the principle of unanimous assent of shareholders as articulated in *Duomatic*[5] was of no application. The Board of BHA needed to consider the matter, and all directors were entitled to notice of a directors meeting and participate in discussions. The voting shareholders were not entitled to act unanimously, unilaterally and without regard to the board.

    b. *"No settlement agreement unless signed" clause in Mediation Agreement*

       A handshake, verbal agreement will not settle the dispute where the Mediation Agreement signed by the parties contains a clause which states

[5] [1969] 2 Ch 365.

that there is no settlement of the dispute unless and until a settlement agreement has been signed.

Sifris J acknowledged that it is possible that parties could agree to waive such requirement or vary the Mediation Agreement orally or by conduct, or be estopped from relying on such requirement. However, such inference was not proved by "clear and unequivocal conduct", so full effect was given to the Mediation Agreement clause requiring a settlement agreement to be signed. Shaking hands and taking a photograph of the whiteboard was equivocal as it was also consistent with having reached an in principle agreement only.

c. A Settlement Agreement must not be incomplete or void for uncertainty

The draft proposed agreement contained additional terms that, Sifris J found, had not been agreed to at the mediation, including definitions of terms used in the document, and a proposed share buy back transaction by BHA which the parties had not turned their minds to at the mediation, and which were matters of substance not form which required consideration and assent. This demonstrated that there had not been a complete and certain agreement reached at the mediation.

28. Where a corporate entity is relevant to a dispute, regard should be had to whether it is a necessary party to a settlement agreement and if so, whether it is represented by a person with authority at the mediation.

29. Mediators, parties and their legal representatives should ensure that a Mediation Agreement contains a clause requiring any settlement agreement to be signed, as a safeguard against a dispute as to whether a settlement was reached. Such clause should be highlighted by the Mediator and observed by the parties at the mediation.

30. A settlement agreement drafted at mediation needs to include all necessary substantive provisions, including definitions and machinery provisions, for the agreement to be clear and complete and enforceable as a legally binding contract.

31 October 2015