

More judicial guidance for lawyers engaged in ADR

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Dispute resolution continues to evolve. Not only are processes evolving but importantly so are the roles and responsibilities of lawyers.

The Attorney General is considering placing a legislative obligation on legal practitioners to provide information to their clients about ADR (*ADR Blueprint Discussion Paper "Framework for the delivery of alternative dispute resolution (ADR) in NSW"*). If so lawyers will need to be sure about the advice that they give to clients about ADR processes.

Fortunately, courts continue to provide guidance in cases such as those that follow.

Advice about ADR

– Be clear on what you think AND say

In *Levicom International Holdings BV & Anor v Linklaters (A Firm)* [2009] EWHC 812 (Comm) Levicom contended that relying on the (law firm) defendant's advice, they did not settle the dispute initially but instead brought arbitration proceedings at considerable cost and ultimately settled on unsatisfactory terms. It was held that Linklaters was negligent in some respects not in reaching their view but rather how it was expressed to the client. By not making their view clear on issues such as the reasonable prospects of success and the risk involved, the client had reasonably misunderstood Linklaters' advice.

The message is clear. Lawyers must exercise reasonable care, skill and competence not just in their advice but also in how that advice is conveyed to the client. To discharge their duties, lawyers must exercise proper care and skill to ensure advice is clear (at [279]).

In this case Linklaters' negligence did not cause any loss therefore only nominal damages of £5 were awarded. While Levicom had to pay costs, the claim for damages was £37 million so the risk to Linklaters was considerable.

Agreements for ADR

– Be clear on your bargain

Dance with Mr D Limited v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332, a case name worthy of its own headline act, confirms the trend of Courts to enforce contractual arrangements requiring ADR. Notably, even though the defendant "stood by" and did nothing when the plaintiff foreshadowed and subsequently commenced legal proceedings, the Court decided that it had not waived or abandoned nor was it estopped from exercising the right to expert determination of the dispute as provided for in the contract.

The Court made clear that agreed ADR mechanisms should not be construed narrowly and that in considering whether to exercise its wide discretionary power to stay legal proceedings the starting point is that parties should be held to their bargain. It is for the party opposing the stay to show good reason for the action to proceed and the onus is a heavy one.

Deal or no deal –

Be clear on whether there is an agreement

In *Worldwide Timber Trades Pty Ltd v Brouwer (No 2)* [2009] FCA 447 the Court held that there was no settlement agreement reached in mediation as the alleged agreement was conditional on the execution of a deed and the respondents did not agree to a term in the proposed deed that a consent judgment be entered.

This illustrates that the third category of *Masters v Cameron* (1954) 91 CLR 353 is alive and well. The Court declined to enforce an “uncertain agreement” even though the consent judgment was the only essential term of the deed in dispute, the Court considered the deed superfluous and unnecessary and the respondents’ counsel conceded on several occasions in open court the existence of an agreement.

Confidential information

– Be clear on confidentiality and collateral purpose

In *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Limited* [2009] NSWSC 356 lawyers were restrained not only from disclosing confidential information obtained in a mediation process involving the same defendant in virtually identical proceedings to the present case but also from involvement in any aspect of the future litigation.

There was a real and sensible possibility of conscious or unconscious misuse of confidential information which they may have received or been privy to such as the process of offer and acceptance, the settlement sum and negotiation moves and strategies. This has implications for lawyers and clients, especially those that perceive benefits in retaining the same lawyers against the same defendant in different proceedings.

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