Court – ordered mediation: Is it undesirable?

By Robert Angyal *

Synopsis

Most New South Wales courts now have the power to refer proceedings to mediation whether or not the parties consent. Many barristers believe that this is undesirable because compulsory mediation is a contradiction in terms and is futile.

But, in practice, most mediations are voluntary only in an attenuated sense. And there is no necessary contradiction involved in requiring parties to participate in a compulsory process that might produce agreement between them. In practice, parties at 'compulsory' mediations behave in much the same way as at 'voluntary' ones. The statutory obligation to participate in court-ordered mediations 'in good faith' should assist this trend.

The two practical consequences for barristers are, firstly, that they should use their skills to attempt to ensure that proceedings are not ordered into mediation before they are suitable for mediation; and, secondly, that they should use their skills to prepare themselves and their clients for the mediation adequately, whatever the genesis of the mediation.

...many barristers believe that ordering parties to mediation against their will is futile because parties who are compelled to participate will attend grudgingly, merely go through the motions and do the bare minimum to comply with the court's order.

Background: The legal framework

All New South Wales courts now have the power to order matters to mediation with the consent of the parties: e.g. *Local Courts (Civil Claims) Act 1970*, sec 21M. The Supreme Court and the District Court now have the power to refer matters to mediation whether or not the parties consent: *Supreme Court Act 1970*, sec 110K(1); *District Court Act 1973*, sec 164A(1). If they do so, the parties have a duty to participate in the mediation 'in good faith': sec110L; sec 164B. While no statistics are available, anecdotal evidence indicates that both courts are using their power.

Various other NSW statutes provide for compulsory mediation before proceedings can be commenced, e.g., *Retail Leases Act 1994*, sec 68; *Farm Debt Mediation Act 1994*, sec 8. The Federal Court also has the power to refer matters to mediation without the parties' consent: *Federal Court of Australia Act 1976*, sec 53A(1), (1A).

Both the Supreme Court and the District Court have issued practice notes relating to their powers to order mediation: Supreme Court Practice Note 118 (8 February 2001); District Court Practice Note Number 33 (effective 1 January 2002). They are discussed in the last section of this article.

* Robert Angyal is Chair of the Bar Association's Mediation Committee. The views expressed in this article are those of the author and not necessarily those of the Mediation Committee or the Bar Association.

Is court-ordered mediation a contradiction in terms?

Many lawyers hold the belief that compulsory mediation is a contradiction in terms. They believe this because (by definition) a mediation can only produce a settlement by agreement of the parties and the parties cannot, of course, be forced to agree. Accordingly, they reason, it is pointless to order parties to engage in mediation if they are unwilling to mediate. See, e.g., Walker and Bell, 'Justice according to compulsory mediation: *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW)', *Bar News* (Spring 2000), p. 7.

Further, many barristers believe that ordering parties to mediation against their will is futile because parties who are compelled to participate will attend grudgingly, merely go through the motions and do the bare minimum to comply with the court's order.

There are two reasons that compulsory mediation is not a contradiction in terms. The first reason was eloquently set out by Giles J (as his Honour then was) in the course of deciding whether an agreement to mediate was enforceable. In *Hooper Bailie Associated Ltd v Natcon Group Pty Limited* (1992) 28 NSWLR 194 at 206 A - D, his Honour said:

> Conciliation or mediation is essentially consensual and the opponents of enforceability [of agreements to conciliate or mediate] contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not be enforced; equally, they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result.
>
> The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, particularly where a skilled conciliator or mediator is interposed between the parties. *What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come* (emphasis added).

The second reason that a court-ordered mediation is not a contradiction in terms is that most 'voluntary' mediations, in the author's observation, are voluntary only in a very attenuated sense. Most mediations seems to be motivated by factors such as:

> 1) The realisation by one and sometimes all of the parties that they cannot possibly afford the legal costs of a final hearing.
>
> 2) The realisation by one or all parties that they cannot possibly risk losing at the final hearing and incurring the obligation to pay the other parties' costs (plus, in the case of defendants, the judgment sum).
>
> 3) The realisation by one or all parties that the dispute must, if at all possible, be resolved without final determination by the court, tribunal or arbitrator involved:
>
> • lest the subject matter of the dispute evaporate (intellectual property cases); or

- lest the subject matter of the dispute be overtaken by its competitors (software disputes); or
- lest the publicity be damaging (e.g., professional negligence disputes); or
- because the cost in lost management time of a final hearing is manifestly excessive given what is at stake; or
- because the costs of taking the proceedings to the conclusion of a final hearing plus any likely appeals exceeds the value of what is in dispute.

You can probably add several more reasons to this list from your own experience!

Mediations undertaken in these circumstances are voluntary in the sense that no court has ordered them, but the parties concerned probably do not regard themselves as having had much choice about the matter.

In the author's experience, the behaviour of parties and their lawyers at court-ordered mediations is indistinguishable from behaviour at 'voluntary' mediations.

Further, mediation is usually stressful; it often is physically and emotionally exhausting for the parties; and it can be expensive. These factors also tend to indicate that it is not undertaken voluntarily.

Many of us have experienced judges who encourage the parties to attempt to resolve their disputes by mediation. Sometimes the encouragement is forceful. The author has had the experience, when seeking an extension of time for a client to file its evidentiary statements, of being told by the Bench that the extension would be granted, but only if the client agreed to mediation. Was the mediation that resulted a voluntary one?

Yet further, it is clear law that agreements to mediate are enforceable by the courts if they are properly drafted: *Hooper Bailie Associated Ltd v Nation Group Pty Limited* (1992) 28 NSWLR 194; *Elizabeth Bay Developments Pty Limited v Boral Building Group* (1995) 36 NSWLR 709. In other words, a party to such an agreement who is not willing to mediate a dispute caught by the agreement can be compelled to do so. Such a mediation could be described as 'voluntary' because the parties agreed, when entering into contractual relations with each other, to mediate their disputes. But the mediation could also be described as a court-ordered mediation because the party who now does not want to mediate has been compelled to do so by the court.

Finally, it should be remembered that the 'overriding purpose' of the *Supreme Court Rules 1970* is 'to facilitate the just, quick and cheap resolution of the real issues in…proceedings' (part 1, rule 3(1)); that parties have a duty to 'assist the court to further the overriding principle' (part 1, rule 3(3)); that 'a solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of [that] duty'; (part 1, rule 3(4)); and that the court may take into account any failure to comply with the two previous rules 'in exercising a discretion with respect to costs' (part 1, rule 3(5)).

In *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 2 All ER 850; [2002] 1 WLR 2434, the UK Court of Appeal, in dismissing an appeal, applied broadly similar rules, the *Civil Procedure Rules 1998* and, as a result, did not order the unsuccessful appellant to pay the costs of the respondent. The respondent had refused to accept a proposal by the court, when granting leave to appeal, that alternative dispute resolution be explored. The appellant had agreed with the proposal.

Delivering the judgment of the Court of Appeal, Brooke LJ said (paragraph 15):

> It is to be hoped that any publicity given this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.

NSW barristers and solicitors now have an express obligation to advise a client 'about the alternatives to fully contested adjudication of the case which are reasonably available to the client': *New South Wales Barristers' Rule* 17A and Rule 23 of the solicitors' *Revised Professional Conduct and Practice Rules 1995*. It is at least possible that a party might be found to have been in breach of the overriding purpose rule because it did not agree to mediation, and penalised in costs. The party may hold its barrister responsible for this result if the barrister did not comply with Barristers Rule 17A. Or the court may impose a costs penalty directly on the barrister under part 52A, rule 43A of the Supreme Court Rules. See 'The overriding objective of avoiding a costs order!', *Bar Brief* No. 99 (November 2002), page 6.

Are mediations agreed to under the influence of these rules voluntary?

What follows is that the distinction between 'voluntary' mediations and court-ordered mediations is evanescent. If the distinction exists, it is not a particularly useful one.

What are court-ordered mediations like?

Because the distinction is evanescent, it should not be surprising that court-ordered mediations look and feel much like 'voluntary' mediations. The author has mediated a number of proceedings ordered to mediation by the Supreme Court and the District Court. In one multi-party set of proceedings, all parties had opposed mediation. The author has also mediated many disputes under the Retail Leases Act and the Farm Debt Mediation Act, where mediation is compulsory before proceedings can be commenced.

In the author's experience, the behaviour of parties and their lawyers at court-ordered mediations is indistinguishable from behaviour at 'voluntary' mediations. This is not surprising, for a number of reasons. Firstly, once the parties are committed to paying their share of the mediator's fees and their own lawyers' fees for the mediation, and once they have committed their own time and emotional energy to participating in the mediation - and realised that the other party has done likewise - it would be strange if they did not try to take advantage of the occasion as an opportunity to settle their dispute. Thus, common sense and self-interest tend to drive the parties to participate constructively in the mediation.

Secondly, as mentioned earlier, the parties have a statutory

obligation in court-ordered mediations to participate in 'good faith'. Courts have had no difficulty in determining whether good faith was present at mediations: see, e.g., *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 257 per Gleeson CJ (mediation under the Farm Debt Mediation Act); *Western Australia v Taylor* (1996) 134 FLR 211 at 224 - 225 (mediation under the *Native Title Act 1993* (Cth)).

In the latter case, Member Sumner of the National Native Title Tribunal listed no fewer than eighteen criteria for deciding whether a government had negotiated about native title in good faith. In *Aiton Australia Pty Limited v Transfield Pty Limited* (1999) 153 FLR 236; (2000) 16 BCL 70; [1999] NSWSC 996 at paragraph 156, Einstein J set out in dicta 'the essential or core content of an obligation to negotiate or mediate in good faith'.

Further, neither the confidentiality of a mediation, nor the fact that the 'without prejudice' privilege generally applies, excludes the Trade Practices Act 1994 or the fair trading Acts. Statements made in the course of a mediation can be false or misleading conduct: *Quad Consulting Pty Limited v David R Bleakley & Associates Pty Limited* (1990 - 1991) 98 ALR 659.

The fact that the court has ordered the proceedings to mediation does not excuse barristers from being adequately skilled for the mediation or from preparing adequately for it.

Practical consequences:

What are the practical consequences for barristers of court-ordered mediations being much like voluntary mediations?

The first consequence is that barristers need to use their skills to attempt to ensure that mediations are not ordered at inappropriate times. A court may be minded to order proceedings to mediation too early for the mediation process to be effective.

As noted already, the Supreme Court issued Practice Note 118, entitled 'Mediation', on 8 February 2001. It is not yet clear how the court will used the procedures outlined in the practice note. What sorts of proceedings will the court order to mediation over the parties' objections? What sorts of cases will be referred to a registrar for an 'information session' where the appropriateness of mediation will be discussed? If the parties do not agree on whether mediation is appropriate, what criteria will the registrar use to recommend to the court that mediation is appropriate - or inappropriate?

Supreme Court Practice Note 120, entitled 'Differential Case Management' (3 July 2001), provides by paragraphs 13(1) and (3) that, at any status conference, the court may consider whether the proceedings are appropriate for alternative dispute resolution. If the proceedings appear to the court to be appropriate for resolution by mediation, the court will refer them to mediation.

The District Court's revised Practice Note Number 33 took effect on 1 January 2002. The revised practice note has a heavy emphasis on alternative dispute resolution. Paragraph 5.8.1 provides for a status conference seven months after the filing of the statement of claim. At the status conference, the parties must be ready to take an arbitration date, or have their case referred to mediation, or take a hearing date.

Under paragraph 5.8.4, if a date is given at the status conference for mediation, a further date - for the hearing of the matter or for fixing a hearing date - will also be given. Paragraph 10 states:

'It is proposed to finalise as many matters as possible through alternative dispute resolution systems. Most matters will be referred to arbitration or court managed mediation. ... Cases may be sent to arbitration or mediation at any time.'

Again, it is not yet clear how these powers will be used. What is clear is that there is scope for barristers to attempt to influence whether and when matters are referred to mediation. For example, it may be too early for a matter to be mediated effectively - the issues in dispute may not be clear because the pleadings are not yet closed. Or it may be desirable to have discovery before mediation; see, e.g., Knoll, 'Discovery before or after mediation?' *Bar News* (Summer 2002/2003).

Thus, barristers can use their knowledge of the issues underlying the proceedings and their understanding of mediation to arrive at an educated view whether mediation is appropriate for the proceedings and, if so, when it is likely to be appropriate. It seems likely that a judge inclined to order proceedings to mediation would hold his or her hand if presented with a reasoned submission that mediation would be premature.

The second practical consequence of court-ordered mediation being much like voluntary mediation is that barristers need to have the same skills for preparation for and advocacy at the mediation as if the mediation were voluntary, and employ those skill with just as much vigour. The fact that the court has ordered the proceedings to mediation does not excuse barristers from being adequately skilled for the mediation or from preparing adequately for it.

Thus, barristers should help their clients understand the process. In particular, they need to prepare them for the pressure to settle that mediation will exert on them. With their clients' assistance, barristers should try to unearth the issues that lie behind the formal pleadings in the proceedings. They should canvas options for resolution of the dispute, and it is always useful to analyse the client's best alternative to a negotiated agreement. And they should determine what role they will play at the mediation. See Wade, 'Representing clients at mediation and negotiation' (Dispute Resolution Centre, School of Law, Bond University 2000); and Angyal, 'Practical tips on representing clients at mediation' (NSW Bar Association CPD seminar, 5 March 2003).