Casenotes

JURISDICTION OF TRIBUNAL TO HEAR DISPUTES ABOUT MEDIATED AGREEMENTS AND WHETHER A COMPULSORY CONFERENCE IS A FORM OF ADR?

HUGHES V YATES

In *Hughes v Yates* [2008] QCCTB 121, the applicant Hughes, a builder, contracted with the respondents, Mr and Mrs Yates, on 8 October 2007 to carry out certain works on the respondents' home for the sum of $130,000. Disputes arose between the parties which led the respondents to terminate the contract on 19 December 2007. Prior to termination, the respondents had paid an amount of $25,000 to the applicant for work completed. The applicant commenced proceedings seeking a further payment of $21,551 for work completed and in satisfaction of subcontractors' unpaid invoices.

The parties attended mediation on 31 March 2008 and reached agreement the substance of which was an agreement for the respondents to pay the applicant the sum of $5,000 within seven days of the date of the mediated agreement. Further, that the applicant accept the sum "in full and final settlement of the dispute and any claims or counter claims herein as set out in the application" before the Tribunal. The sum of money was duly paid by the respondents.

On 2 May 2008, the applicant filed a second application with the Tribunal claiming $13,700 for moneys owing and $7,200 for damages and/or interest against the respondents. The applicant claimed that the sum of $6,500 was for an unpaid portion of the initial deposit and the balance was for an unpaid plumbers invoice and for unjust termination of the contract.

In answer to the applicant's application before the Tribunal, the respondents submitted (at [10]):

> that the parties agreed to the terms contained in the mediation agreement; an accord and satisfaction was achieved; any rights or causes of action that may have been available to the applicant pursuant to the building contract are no longer available; the mediation agreement is now the defining document between the parties and any issue concerning the mediation agreement must be raised in the ordinary courts and not this Tribunal. The dispute is not a "building dispute" but rather a dispute about the mediation agreement and the Tribunal does not have jurisdiction to hear and determine issues concerning the mediation agreement.

Member Sheaffe commenced his judgment by stating the legal principles surrounding the application. These included that if agreement is reached at mediation and embodied in an agreement, that the agreement replaces the cause of action set out in the first application before the Tribunal.[1] Further, that if there is an agreement, the only remedies available arise under the mediated agreement itself because any rights or causes of action that existed in the first application are now replaced by that agreement.[2] Member Sheaffe opined (at [22]):

> This Tribunal has jurisdiction to hear building disputes, but it does not have jurisdiction to hear and determine any claim with respect to mediation contracts; these are matters for the civil courts. The Tribunal has considered and adopted these principles in a number of cases including: *Sun Cool Pools and Spa's Pty Ltd v Freedom Pools and Spas* [2005] QCCTB4 and *Diamond Homes Pty Ltd v Simeonova and others* [2005] CCT B366-04.

The Tribunal posed two questions: first, whether the mediated agreement constituted and accord and satisfaction; and, secondly, are the matters raised in the second application covered by the mediated agreement?

In relation to the first issue, Member Sheaffe found that the words used in the mediated agreement, "in full and final settlement of the dispute and any claims and counter-claims herein as set out in application BD080-08" and the words, "agreed to accept the sum of full and final settlement of the dispute and any claims or counterclaims herein as set out in Application No BD080-08" meant that

[1] *Sun Cool Pools and Spa's Pty Ltd v Freedom Pools and Spas* [2005] QCCTB4.

[2] *McDermott v Black* (1940) 63 CLR 161.

once the terms of the mediated agreement had been performed, then there was full and final satisfaction of all claims in the dispute between the parties. Therefore, the Tribunal was satisfied that there had been a valid accord and satisfaction between the parties.

On the second issue, Member Sheaffe noted that the amount sought by the applicant in the second application for the unpaid plumbers invoice had already been addressed in the first application and the mediated agreement. In relation to the unpaid initial deposit, the Tribunal noted that the first application had referred to an amount owing of $21,551 and that this amount was construed by the Tribunal to mean the total amount owing and not just part of the total amount. Further, the first application relied on evidence of the notice terminating the contract and therefore, any claim for unjust termination was also dealt with in the first application and the mediated agreement.

Member Sheaffe gave judgment by stating (at [33]-[34]):

> I am satisfied that on a proper construction of the mediation agreement all the issues raised in the second application were raised in the first application and dealt with in the mediation agreement.
>
> For the reasons set out I am satisfied that the Tribunal does not have jurisdiction to hear and determine this matter.

Although concise and straight forward, *Hughes* case is an important decision because it applies the common law principle of court judgments disposing of the cause of action and preventing either party from commencing proceedings a second time on matters already litigated and/or disposed of by the court. In our case, a mediated agreement clearly disposes of matters the subject of proceedings where the parties agree that all matters between them have been satisfied through an accord, in this case, evidenced in a written settlement agreement. For this reason, parties and their lawyers need to ensure that before agreement is reached, all matters or only those matters agreed upon have been disposed of by virtue of the accord or agreement.

GUSS V ALDY CORP PTY LTD

In *Guss v Aldy Corp Pty Ltd* [2008] VCAT 912, the applicant, Joanne Guss, claimed compensation from the respondent for loss allegedly caused by misleading and deceptive conduct in contravention of s 9 of the *Fair Trading Act 1999* (Vic) in relation to the marketing of a unit in the Docklands area. In a good indication of the chequered background of the case, the Victorian Civil and Administrative Tribunal stated (at [3]): "The history of the applicant's prosecution of the case is deplorable." The case was littered with non-appearances by the applicant and a lack of attention to the requirements necessary to prosecute such a case. In short, the matter was dismissed with costs at a compulsory conference which the applicant failed to attend.

The applicant sought to have the decision to dismiss reviewed. Under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act), a person may have an order made by the Tribunal re-opened under certain conditions one of which is if the order to dismiss was made at a hearing.

One of the issues for the Tribunal in determining whether the order should be reviewed was whether the compulsory conference was a hearing. This caused the Tribunal to determine the nature of the much-used compulsory conference in the Tribunal.

Senior Member Vassie commenced this section of his judgment by posing the question, "Was there a hearing?" and then quoted s 83 of the VCAT Act which states:

> (1) The Tribunal or the principal registrar may require the parties to a proceeding to attend one or more compulsory conferences before a member of the Tribunal or the principal registrar before the proceeding is heard by the Tribunal.
>
> (2) The functions of a compulsory conference are-
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> (a) to identify and clarify the nature of the issues in dispute in the proceeding;
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> (b) to promote a settlement of the proceeding;
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> (c) to identify the questions of fact and law to be decided by the Tribunal;
>
> (d) to allow directions to be given concerning the conduct of the proceeding.

Senior Member Vassie opined (at [16]) that a compulsory conference is:

> a form of alternative dispute resolution which the Act empowers the Tribunal to enliven. The major function which a presiding Member performs at a compulsory conference is the function identified in section 83(2)(b): "to promote a settlement of the proceeding". While performing this function the presiding Member acts a facilitator only, and does not perform any judicial function. In that respect a compulsory conference is akin to a mediation, another form of alternative dispute resolution which under section 88 of the Act the Tribunal is empowered to enliven.

Interestingly, Senior Member noted that at the conclusion of mediation, should settlement be reached, that the granting of orders is classed as a judicial function notwithstanding the fact that the Member was acting in the role of mediator just prior to the making of the order. In this sense, the mediator is changing hats back into an adjudicator and resuming the role of judicial officer for the function of administrative necessity. The Senior Member stated (at [17]):

> If the compulsory conference results in a settlement, the presiding Member may make any orders necessary to give effect to the settlement: section 93(1). That can be done at the compulsory conference itself. Likewise, if a mediation is conducted by a Tribunal Member and the proceeding settles at a mediation, the mediator may make any orders necessary to give effect to the settlement: section 93(2). When making such an order, whether in the context of a compulsory conference or in the context of a mediation, the member performs a judicial function.

However, Senior Member Vassie acknowledged that the making of an order in a compulsory conference is a point of difference between such conferences and mediation. Extrapolating this concept further, it is possible to state that making an order post-mediation is also a point of difference between the role of a mediator and the role of a judicial mediator or judicial officer.

After a lengthy and well-reasoned argument that invoked a number of key cases, Senior Member Vassie determined that the order to dismiss made at the compulsory conference was classified as a hearing within the ambit of s 120 of the VCAT Act.

Guss v Aldy is significant because it once again raises the issue of the use of dispute resolution in the court system and the use of judicial officers in non-curial processes that seek to resolve issues between parties without resort to the courts. Here, a compulsory conference was characterised by a Senior Member of an important and influential Tribunal as being both a dispute resolution process and a hearing. Once again, the line is being blurred between the functions of a judicial officer and mediator. Does this characterisation also mean that a Member or Senior Member conducting a compulsory conference can swap hats during a compulsory conference and convert a dispute resolution process into an adjudicatory process? I think it does!

COURT-ANNEXED MEDIATION SUCCESS

Recently the *Sydney Morning Herald* online reported the success of the New South Wales Supreme Court's court-annexed mediation program.[3] The report quoted figures that show that Supreme Court registrars had conducted as many mediations in the first half of 2008 than they had conducted all of the previous year. The New South Wales Attorney-General, John Hatzistergos, was quoted as saying:

> It is very encouraging that so far this year 59 per cent of the mediation sessions have concluded with the litigants resolving their dispute.

The article reported that 70% of 266 mediations conducted in the first six months of 2008 were family disputes about deceased estates, the remainder being property settlements, including separated de facto disputes. Mr Hatzistergos stated:

> Mediation ensures cases can be resolved early and to the satisfaction of both parties, saving time and costs.

Senior Deputy Registrar, Nicholas Flaskas, is quoted as stating:

> By the time legal proceedings have commenced within a family, the relationships may have already deteriorated to some extent but a family's willingness to try mediation can reflect its desire to resolve

[3] Smith A, "Couples, Families Choosing Mediation in Battle of Wills", *Sydney Morning Herald* (14 August 2008), http://www.smh.com.au/news/national/couples-families-choosing-mediation-in-battle-of-wills/2008/08/13/1218307006722.html viewed 20 October 2008.

> the dispute in the least acrimonious way.

Further, Mr Flaskas stated that mediation empowered people because they could find a solution to their problems on their own terms:

> By contrast, in a traditional court hearing where someone else determines the outcome, there is a greater chance that neither [side] will be happy with the result.
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> Ten registrars at the Supreme Court do mediations and as many as four are held daily, with half a day allocated to each.
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> Chalk up another mediation success story.

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