Casenotes

MEDIATION PURSUANT TO THE TRADE PRACTICES (INDUSTRY CODE-FRANCHISING) REGULATIONS; CONDUCTING MEDIATION TOO EARLY; MEDIATION MEDIA WATCH

BROAD SPECTRUM TRAINING PTY LTD v BIDDING BUZZ LTD

In *Broad Spectrum Training Pty Ltd v Bidding Buzz Ltd* (2010) 244 FLR 335, the respondents, Bidding Buzz and others made application to the Federal Magistrates Court for proceedings to be adjourned so that mediation could take place. The applicants, Broad Spectrum and others opposed the application; however, at some stage of the application they agreed to mediation but remained in disagreement over who should be appointed media>mediator.

The dispute arose pursuant to a franchise agreement between the parties that provided that the applicants purchased from the respondents' knowledge, skill and experience to sell learning programs related to e-Bay-based business and associated products. Further, the applicants were granted non-exclusive rights to operate a business exclusively using the learning programs including the use of trade marks and defined territory. The dispute involved alleged misrepresentations in breach of the *Trade Practices Act 1974* (Cth) (TPA) and damages pursuant to that Act that included loss of income and lifestyle. The issue in the application before the court was whether the proceedings ought to be adjourned pending the proper implementation of the mediation procedures outlined in the *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth), in particular its Schedule containing the *Franchising Code of Conduct* (the Code).

Lucev FM commenced his judgment with a meticulous explanation of the jurisdictional issues, beginning with ss 22 and 23 of the *Federal Magistrates Act 1999* (Cth) (FM Act), r 27.02 of the *Federal Magistrates Court Rules 2001* (Cth) and ss 26-27 and 29 of the Code.

His Honour noted that the franchise agreement specified compliance with the Code and commenced the substantive elements of the judgment by addressing whether s 22 of the FM Act – that provision that requires the court to consider whether to advise parties of dispute resolution processes that could assist in the resolution of matters in dispute – had been complied with. Lucev FM found that:

> [27] Section 22 of the FM Act need not be utilised in this case. Both parties are aware of the appropriate dispute resolution processes. The respondents contend that, in accordance with cl. 21.3(a) of the *Franchise Agreement*, the process under the Franchising Code ought to be followed. The applicants express a preference for mediation by a Registrar of this Court.

Next, his Honour addressed s 23 of the FM Act that requires the court to consider whether the dispute resolution process "may" help the parties resolve the dispute. Lucev FM found (at [29]) that the word "may" "expresses a subjective possibility that the dispute resolution process might help resolve the dispute". His Honour was influenced by the fact that six of the seven parties to the proceedings were willing to enter mediation – that being a factor in determining that mediation may help the parties. Lucev FM was of the view that nothing in the substance of the proceedings would prevent mediation helping resolution. Even the fact that the second and third applicants would have to travel from Perth to Brisbane for the mediation was not seen by his Honour as an impediment to the helpful nature of mediation given that pursuant to cl 26 of the Code attendance at mediation does not have to be personal. In other words, somebody else can be present at mediation on behalf of the parties providing they have authority to settle the dispute. Further, his Honour suggested that video conferencing could also be a substitute for personal appearance that would be cost-effective yet still allow satisfactory representation.

Lucev FM took the opportunity to compare the costs of litigation with that of mediation as a further argument in support of s 23 of the FM Act:

> [33] The costs of resolving the dispute by mediation, as opposed to the matter proceeding to hearing, is a further reason why mediation may help the parties resolve the dispute. Costs for Counsel and

> solicitors for a three to five day hearing in this Court are likely to run to tens of thousands of dollars, with the losing party or parties likely to have to pay the winning party or parties' costs. In this case, some of the parties are also likely to have to incur significant travel costs depending upon where any final hearing is held. Mediation may therefore assist the resolution of this matter by offering a cheaper, compromise solution, rather than the win-lose outcome of a hearing.

The final issue dealt with by the court was whether it had discretion to adjourn the matter and if so whether the court should exercise that discretion. Lucev FM found that pursuant to s 23(2) of the FM Act, the court has the power to adjourn proceedings to mediation where it considers it desirable to do so. His Honour listed the following factors that the court might consider:

> [45] …
> (a) whether the parties consent to mediation;
> (b) the prospect of the matter being resolved through mediation;
> (c) whether mediation might narrow the issues to be determined in the proceedings, and, therefore, whether the mediation might be of benefit to the proceedings;
> (d) the length of time that mediation may take;
> (e) whether or not mediation will unduly delay the proceedings;
> (f) whether processes and timeframes for mediation have been, or can be, complied with;
> (g) the expense to the parties of the mediation;
> (h) the effect on the parties of mediation and attending mediation; and
> (i) the objects of the relevant legislation, in this case the FM Act and FMC Rules, and the TP Act, *TP Franchising Regulations* and Franchising Code.

His Honour answered the above factors in the affirmative in relation to them contributing to the argument that the court should adjourn the proceedings to mediation. Lucev FM's only discussion point on the above list of factors was as to (g): the expense being too prohibitive to make adjournment to mediation desirable. Although his Honour had dealt with the issue earlier in the judgment, he took the further opportunity to state:

> [54] Mr Rice and Ms Rowell [2nd and 3rd applicants] argue that mediation ought not occur in Brisbane, which is where it appears that the mediation would take place under the Franchising Code mediation provisions, because they are a commission sales person and a self-employed business owner respectively, and travelling time would result in a loss of income needed to maintain their livelihood, as well as other expenses from having to stay in Brisbane. Even if Mr Rice and Ms Rowell were required to travel to Brisbane for a mediation for, say two to three days, the Court does not consider that there is sufficient evidence, as opposed to assertion to conclude that there would be a significant detrimental effect on Mr Rice's or Ms Rowell's income or livelihood. In any event, for reasons otherwise set out above, it may be possible for mediation to be conducted under the Franchising Code mediation provisions without either Mr Rice or Ms Rowell, or at least only one of them, having to go to Brisbane.

Lucev FM concluded that whether or not the applicants have to attend mediation in person in Brisbane should not preclude the mediation going ahead in Brisbane pursuant to the Code. His Honour concluded his judgment on this issue by stating:

> [56] Mediation, insofar as it might resolve or narrow the dispute, and therefore dispose of or shorten the proceedings, is a course which is connected with the objects of the FM Act to encourage the use of the range of dispute resolution procedures, and the statutory purpose of ensuring that proceedings are not protracted.
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> [57] It is an object of the FM Act to "encourage the use of a range of appropriate dispute resolution processes." The use of "range" indicates that the Court is not restricted in either its choice of dispute resolution process or as to who may provide a particular dispute resolution process, such as mediation. What the Court looks to have provided is an "appropriate" dispute resolution procedure.
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> [58] In this case there is a dispute as to which of two mediation processes the parties are to be advised by the Court to use. In these circumstances the Court ought to advise the parties to use the mediation process that it considers most appropriate at this stage of the proceedings.

The court granted the application for proceedings to be adjourned pending mediation under the provisions of the Code. *Broad Spectrum's case* is significant in that it provides guidance on the jurisdictional issues pursuant to the Franchising Code under the TPA. Further, it gives some insight into the considerations given by the court before adjourning disputes pending mediation and an idea of the processes to be followed pursuant to an order of adjournment pending mediation.

RE SONRAY CAPITAL MARKETS PTY LTD (IN LIQ)

In *Re Sonray Capital Markets Pty Ltd (in liq)* [2010] FCA 1371, an application was made by the appointed liquidators of Sonray Capital Markets Pty Ltd for, among other things, to enter a mediation agreement and a mediation funding deed. Sonray held an Australian Financial Services Licence which authorised it to market and sell financial products and to provide financial advice. Because of alleged mishandling of funds, Sonray was deficient in funds of approximately $46.7 million and its creditors resolved that it should be wound up.

The liquidators identified a number of potential claims against third parties and raised the possibility of early mediation to resolve those claims at the earliest possible time with minimal cost. One of the third parties offered $500,000 to enable the liquidators to investigate the matters the subject of the proceedings and to prepare for mediation. Finkelstein J noted:

> [17] The liquidators take the view that entering into the mediation funding agreement and thereby getting their hands on $500,000 is in the best interests of Sonray's creditors (including, of course, its former clients) as access to the funds will enable them to complete their investigations and participate in the proposed mediation to explore a settlement which may maximise the return to creditors.

His Honour summed up his concerns in relation to what was being asked of the court:

> [19] In my experience it is, to say the least, highly unusual for A to fund B's investigation into A's conduct so that B is in a position where it can compromise any claim it may have against A. Saxo [third party] may be motivated to fund an investigation into itself by one of a number of different considerations. For example, it may realise that it has committed a compensable wrong and it may wish to make good the losses it has caused with a minimum of publicity and at a minimum cost. If that is its motivation it is a highly laudable one. Another possibility is that Saxo believes the liquidators will not be able to conduct a thorough investigation of potential claims with the $500,000 that has been put on the table and, as a consequence, at an early mediation Saxo will be able to achieve a more satisfactory compromise than would otherwise be the case. A third possibility, which is really an aspect of the second, is that Saxo hopes to reach a compromise before action and thus avoid the obligation of formally articulating a defence to any claim and also avoiding what would be quite onerous discovery obligations.

Finkelstein J also raised the concern that in some cases ordering mediation too early in proceedings can create problems and a power imbalance. His Honour expanded on this view when he stated:

> [20] My concerns are not merely idle. Mediation, particularly early mediation, has several well understood deficiencies. One of those deficiencies is the imbalance of information. A settlement based on asymmetric information will likely result in justice not being done.
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> [21] For that reason the liquidators will need to be very careful to avoid a settlement with Saxo (or any third party) in circumstances where they do not have sufficient information with which to make a prudent decision about the appropriateness of the compromise. They are, after all, embarking upon a process of settling claims which are held on trust for beneficiaries. In the unusual circumstances of this case, if there be any settlement achieved which, necessarily, will be subject to court approval, that approval may not be forthcoming if the settlement is not supported by a significant majority of the beneficiaries. At the approval application the liquidators may, in any event, be required to tender the advice of counsel on the merits of the proposed settlement. But, as I have said, these are matters that are best dealt with if it becomes necessary to do so.

Finkelstein J was also concerned about the terms of the mediation agreement brought before the court by the liquidators. The third parties seeking mediation had drafted into the mediation agreement a much wider that usual privilege or confidentiality clause. Although the clause was not reproduced in the judgment, his Honour stated his concern:

> [23] By its very nature the privilege is quite limited. Parties are, however, entitled by agreement to broaden its scope: *789TEN v Westpac Banking Corp* [2004] NSWSC 594. That is what Saxo seeks to do. In its current form the mediation agreement requires Sonray and its lawyers to undertake not to make any use of any information obtained during the mediation process. This could constitute a significant restraint on Sonray and its lawyers' freedom to act. It is not beyond possibility that, dependent upon what happens at the mediation, Saxo might seek to restrain Sonray from commencing litigation against it or to restrain Sonray's current lawyers from continuing to act on Sonray's behalf in

> any action. That possibility arises if it were to be impossible for Sonray or its lawyers to keep separate pre-mediation knowledge of the facts that support potential claims and knowledge obtained during the mediation.

In other words, Finkelstein J was concerned that such a clause could prevent litigation from being pursued because of the privilege clause in the agreement preventing certain evidence from being adduced thereby making impotent any potential proceedings. Further, the privilege clause could prevent Sonray's lawyers from acting given their knowledge of facts that were discussed and evidenced in mediation. Finally, although not stated in so many words, his Honour may have been concerned about the pre-trial tactic of sterilising evidence pursuant to mediation, that is, the deliberate introduction of evidence that becomes privileged under the veil of mediation and unavailable for use in subsequent court proceedings. Finkelstein J tendered some important advice and took a proactive stand on this issue when his Honour stated:

> [24] No rational person with equal bargaining power would agree to a provision which could have that effect. I think that the liquidators should not agree to it either. Thus I will approve the mediation agreements, but only on the condition that the non-use clause is removed or substantially rewritten.

Sonray's case is an interesting decision in that it provides commentary on conducting mediation too early and evidences a proactive approach to protecting parties entering mediation. His Honour is certainly on point when stating that conducting mediation too early without enough information about the likely claims and the overall financial position of the company in liquidation is worth remembering not only in similar factual scenarios but in other substantive fact patterns. Perhaps the question should be asked, "Is one party over-eager to enter mediation at an early stage of the dispute and if so, why?" The other issue is a matter raised by this author previously, that of being alert to the quarantining of evidence in the mediation process. While the general law guarantees the availability of best evidence in court, extra cost and the chance that vital evidence can be lost through procedural hurdles makes his Honour's warning a salient one indeed.

MEDIATION MEDIA WATCH

It seems that the Australian Football League is very fond of private mediation or they have too many misbehaving players that need to keep their indiscretions out of public court rooms.

St Kilda – nude photos

Journalist Megan Levy reported in the early edition of *The Age* on 21 January 2011 that the 17-year old girl, who cannot be named for legal reasons, who published naked photos of the captain and another player from the St Kilda Football Club would attend mediation that very day.

In what has been a sad tale for all concerned, the article reported that the teenager had been, "physically threatened by members of the public". Levy wrote that the girl "said she had also been harassed by the public with one man even trying to punch her". The article stated that "The girl will today hold a mediation session in Melbourne's CBD with St Kilda vice-president Ross Levin and executive director Michael Nettlefold at which she will demand an apology from the club".

The Age reported that in December 2010, Federal Court of Australia Justice Shane Marshall ordered the teenager and St Kilda to attend a mediation session before January 28. Levy quoted the teenager as stating:

> They've said "If you apologise to Nick [Reiwoldt – the captain of the St Kilda football team] publicly, then we'll apologise to you privately", but if it's private it's as though they've done nothing wrong. I want them to be public about it, that's what we're sort of trying to mediate.

In the late edition of *The Age* that same day journalist Daile Pepper reported on the outcome of mediation. The by-line on the article read, "St Kilda reach settlement with nude-photo girl", with Pepper reporting: "The St Kilda Football Club has reached a settlement with the woman who caused a national storm after releasing nude photos of senior players. The club announced via its website that 'it will provide the young woman with accommodation for a few months, in order for her to gain stability back into her life'."

Brisbane Lions – Brendan Fevola

The *Courier-Mail's* Jasmin Lill reported on 24 February 2011 that: "Charges against Brendan Fevola are expected to be dropped after he wrote a letter of apology to the [police] officers and agreed to meet with them for mediation. Fevola was not required to appear in the Brisbane Magistrates Court yesterday where his lawyer Jim Coburn said a case conference with police had resolved all issues relating to public nuisance and obstruct police charges."

The *Courier-Mail* reported that Fevola's lawyer said "mediation would be undertaken before the case returned to court on March 23. The police have agreed to mediation and what will end up happening is when we come back to court, all charges will be dismissed".

Lill further reported that:

> As part of the mediation process, Fevola will sit down with the two police officers involved in his New Year's Day arrest and talk through their differences. Brendan has already sent an unconditional written apology to the police, so they'll speak about what happened and about Brendan's steps toward rehabilitation, because I think that's been a motivating factor so far as the attitude of the police is concerned.

Fevola's lawyer was reported as saying: "I haven't had any experience yet whereby once it goes to mediation, it's not successful." Lill reported the view of Fevola's lawyer being that "as in past cases that have been sent to mediation … it was likely Fevola would make a donation to a charity such as a children's fund or the flood appeal". Lill also reported that Fevola's lawyer denied that his client was receiving preferential treatment.

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