SETTLING AT MEDIATION: BE CAREFUL WITH THE TERMS

Mark Addison

Al Azhari, Ihab v 27 Scott Street P/L & Ors [2017] VSC 600

Mediation has become a popular method to resolve disputes, and with good reason.

Depending on the circumstances, mediation can offer numerous advantages over traditional litigation. Many of these were explored in my previous article published in the Australian Banking & Finance Law Bulletin, which focused on '10 reasons why financiers should consider ADR'. Although some advantages canvassed in that article are specific to financiers, others are widely applicable – these include the flexibility, confidentiality and cost-effectiveness of mediation, as well as the increased perception of 'fairness' when compared with a court's ruling in which the parties have no ability to be involved in decision-making.

Despite its advantages, mediation – much like litigation – can be a tiring, stressful and even emotional process for the parties involved. As tempting as it might be to race through perceived 'formalities' at the end of a long day, it is critical not to rush through the process of documenting any settlement terms that have been agreed. A 2017 case highlights the level of precision that clients and their advisers need to apply once a settlement has been reached, and before everyone leaves the mediation rooms.

Background

Ihab Al Azhari and 27 Scott Street Pty Ltd attended a mediation to attempt to resolve a dispute over the financing and purchase of various properties. The parties settled at the mediation on written terms – or at least some of them thought they did.

The dispute returned to the Victorian Supreme Court[1] after the parties could not agree whether the terms that they had all had signed were actually binding upon all parties.

The handwritten settlement terms reached at the mediation included:

1. These terms of settlement are in summary form of terms to be more fully engrossed.

2. The parties agree to settle this proceeding on the following terms:

    a. the first defendant will transfer unencumbered the following properties in the development known as The Lonsdale situated at 27 Scott Street, Dandenong ('the land')

        i. Retail 1(a) at value of $440,500

        ii. Retail 1(b) at value of $597,500

iii. Retail 3 at value of $447,500 ('the properties').

The properties will be transfered (sic) in fee simple after discharge of the construction funding facility.

The defendants submitted that the essential terms of the settlement were contained in the document and were sufficiently clear. Conversely, the plaintiff submitted that there was no intention on its part to be immediately bound by the terms, and that the agreement failed to include various essential terms applicable to a transfer of land. The plaintiff asserted that the missing elements included the following:

- There were no arrangements regarding any deposit to be paid and held.
- There was no reference to any plan that identified the properties to be sold (as the properties were only a part of a development).
- There was no explanation of what the 'construction funding facility' was.
- If the settlement terms were binding, they amounted to a sale of land, and the settlement agreement failed to comply with the relevant Victorian Sale of Land Act.

The Court's finding

On the subject of whether the settlement terms were immediately binding, Justice Almond had to consider whether the terms fell within the one of the limbs of the well-known decision of *Masters v Cameron*[2], namely:

First, the parties may have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

Second, the parties may have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of them conditional upon the execution of the formal document.

Third, the parties may intend not to make a concluded bargain at all unless and until they execute a formal contract.

A fourth 'limb' has been subsequently identified in Sinclair, Scott & Co v Naughton[3], namely "....one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms".

After considering surrounding circumstances to interpret the parties' intention on entering the settlement terms, including what passed between those parties at the mediation, his Honour concluded that he was "not satisfied that the parties had 'reached finality' or 'were content to be bound immediately and exclusively by the terms agreed at mediation'. There are simply too many matters of importance on which the parties had not reached a consensus for it to be otherwise". [4]

These 'matters of importance' included:

> the lack of more specific reference to the identity of the properties, either by title reference and/or a plan
>
> the absence of even pro forma-type terms for the sale of property, either at the mediation or at any time prior
>
> the reliance upon a rather vague 'marketing brochure' for the properties rather than proper plans.

Almond J concluded that the lack of provision for these matters in the settlement terms "tends to suggest that the mediation terms were high level terms which were general in nature and not intended to be a concluded bargain".[5] His Honour also relied upon the absence of a date for the settlement to complete, and the undefined 'construction funding facility' to reinforce his view. The settlement terms were held not to be enforceable under the third limb of Masters v Cameron, and the parties were not bound without a further contact being executed.

Lessons

To some, this finding might seem artificial. In most mediations, the parties and their lawyers know exactly what is in issue, and what is included in any settlement agreement. Perhaps their settlement is simpler; perhaps the settlement agreement is drafted more clearly; or both.

However where the parties intend to create an immediately binding agreement, the terms need to unequivocally say so, and be crafted in such a way that there is no ambiguity as to their effect or the obligations they impose. This is particularly so in relation to real estate transactions that are strictly governed by legislation, or where there are cross-references to other existing documents.

Parties need to know that, once a deal is reached in principle, it may still take significant time to properly document it. Taking shortcuts at the end of an exhausting, but otherwise successful, mediation can unfortunately result in there being no settlement at all.

End Note

1. Al Azhari v 27 Scott Street Pty Ltd & Ors [2017] VSC 600 (5 October 2017)

2. [1954] HCA 72

3. [1929] 43 CLR 310 at 317

4. Note 1 at [32].

5. Note 1 at [41].

NB: Read about the author, Mark Addison, at the end of Case in Brief, Double