Tell the truth or blow your cover

by DOUG JONES

OVER the last few years, mediation has become very popular as a relatively inexpensive, speedy and business-like way of solving construction disputes.

One of the main attractions has been the fact that information can be exchanged and disclosures made - both to the other party or parties and to the mediator - in confidence, on the basis that if the dispute is not settled, whatever is said in the mediation cannot be subsequently revealed in court.

This assurance of confidentiality has generally been supported by obligations in the mediation agreement signed by each of the parties and the mediator.

But if you are thinking this arrangement can help you put one over your opponent without any risk of interference from the courts, think again.

Be warned: the protection of confidentiality may *not* be absolute, especially if it is later alleged a mediated settlement has been obtained by fraud or by harsh, "unconscionable", misleading or deceptive conduct.

And the courts may be much more willing to find there has been this sort of conduct in a mediation than they would if they were looking at an ordinary commercial negotiation.

The principles to be applied were spelled out by the NSW Court of Appeal in its September 1999 judgment in *Williams v Commonwealth Bank of Australia*. In this case the court ordered a new trial on whether a settlement agreement made after mediation should be enforced.

The proceedings had their origin in a foreign currency loan obtained by Mr Williams from the Commonwealth Bank early in 1985, for the equivalent in Swiss francs of A$640,000. Almost immediately the Australian dollar began to slide against the Swiss franc and other currencies. As a result, by the end of 1985 the Australian dollar value of the loan had effectively doubled.

The Court of Appeal found there was evidence that Mr Williams had approached the bank after the dollar commenced its dive, seeking to enter into a currency hedging agreement which would have significantly protected his position, but had been incorrectly advised that such an agreement could not be made.

In 1990 Mr Williams commenced legal proceedings against the bank. In an effort to resolve matters, the parties turned to mediation.

As is usual, each party provided a position paper and a number of proposed witness statements to the mediator and the other parties. The proposed statements filed on behalf of the bank were endorsed "without prejudice - for the purpose of mediation only" and were not signed.

The mediation led to a settlement agreement in November 1992. Mr Williams later discovered that the bank officer who had originally given him the incorrect advice about a hedging agreement was quite unhappy with the witness statement provided by the bank concerning his involvement, and that he had not signed it for this reason.

Mr Williams refused to be bound by the settlement, and the bank brought enforcement proceedings. At the subsequent trial it appears that neither party objected to the admission of the proposed statement into evidence, or to evidence being given about what had transpired at the mediation.

The trial judge ruled in favour of the bank.

Mr Williams appealed - and won.

Witness statement

He argued that by serving the proposed witness statement during the mediation, the bank had represented that the statement had been approved by the witness, was not a statement which the witness had rejected or refused to sign and was the evidence which he would be willing to give at a hearing - and that the bank had therefore, among other things, infringed section 52 of the Trade Practices Act, which prohibits misleading and deceptive conduct.

Mr Williams had not been aware during the mediation that the bank officer had refused to sign the statement. The statement had been extremely brief, omitting information that the bank officer had regarded as important. Mr Williams said he had been left with the impression that the bank officer's evidence - central to the case - would not be favourable, because the officer had been "gagged" by the bank, and this had persuaded him to settle the case more favourably to the bank.

In response, the bank argued the statement had emphasised that it was for the purposes of the mediation only, and it should have been seen as providing only a "general indication" of the matters the bank officer would deal with in any evidence he might give should the case proceed to a hearing.

The Court of Appeal commented that the bank's submission was effectively that the statement had been nothing more than "a negotiating document". It noted that courts dealing with allegations of misleading and deceptive conduct were "well aware of the need not to be over zealous" in interfering with negotiations.

Misleading or deceptive

As an example, it quoted comments that "Traditional bargaining may be hard, without being in the statutory sense misleading or deceptive. No one expects all the cards to be on the table."

But the Court of Appeal stressed that mediation is not a process of negotiation alone: it is also part of a process designed to *bring about a settlement.*

So while the principal purpose of the statements had been to inform the mediator of the nature of the parties' cases and the fundamental issues, the exercise would not have been likely to produce a settlement unless there had been "the same degree of disclosure by each of the parties to the other".

The sending of the bank's brief statements to Mr Williams had therefore constituted a representation to him that they were an *accurate* indication, albeit in broad outline, of the nature of the evidence each of the bank's witnesses was willing and able to give.

The court said that for a mediation exercise to have any meaning, each party is entitled to think that each statement contains a fair representation of the substance of the evidence to be relied on, and that each witness is in agreement with the form of the statement. And this applies even if cautionary words make it clear, as in the Williams case, that the statements are prepared solely for the purposes of the mediation.

The court said any statement disclaimed by a person to whom it is attributed should either not be sent at all or should be sent with an explanation that although the witness is not prepared to sign the statement, it is nevertheless an outline of the evidence the witness is expected to give.

The court also warned of the dangers of mediation statements that focus on the *differences* between the parties, saying they may operate unfairly to the witnesses involved and may also mislead readers uncertain about whether they are intended to be comprehensive or merely selective.

The lessons from this case are straightforward - but while they may produce fairer results, they may also accelerate the removal of "alternative" from this form of "alternative" dispute resolution.

First, all the parties to a mediation need to ensure that *all* material served at a mediation is probative and accurate.

Preparation for a mediation needs to involve processes as thorough as those required for a court hearing.

Second, greater consideration needs to be given to the terms of many mediation agreements, and in particular the ways of ensuring mediation proceedings will remain confidential.

If this cannot be achieved, many of the most important benefits of mediation may be lost.

These may be onerous tasks, but the alternatives can be worse.

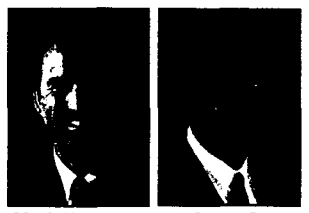
Just ask Mr Williams and the Commonwealth Bank. Some 15 years after the original loan, more than seven years after the mediated settlement and after many years of hanging out the bank's memoranda in public, they're heading back into court again, with no end in sight . . . ■

❑ *Ed.: Doug Jones AM is a construction partner in the national law firm Clayton Utz.*

PEOPLE

■ Project management and construction contractor Bardavcol has appointed **Darren Foster** as managing director. Foster has worked with Bardavcol for 11 years, most recently as operations director. The man who founded the company 25 years ago, **Michael Barnhurst**, is retiring as manager but will remain chairman of the board. Estimating manager **Tony List** has been appointed to the board.

■ **McConnell Dowell Corporation has appointed Mark Twycross to the new position of gm, business development, based at the Melbourne Group's global business development operations. Twycross has been with McConnell Dowell for 20 years as a project manager and country manager. Dowell has appointed Steve Scott as manager business development, Australasia, based at the McConnell head office in Melbourne. He was new business manager for McDonnell Dowell in New Zealand.**



Mark Twycross and Steve Scott ... business development.

■ *International Egis Innovation Awards have been won by* ***Luke Fisher*** *from Egis Consulting Australia and* ***Benoit Rossi*** *from* ***Transfield*** *for their work on the tunnel ventilation of the M5 Motorway in Sydney. The team has innovated a system to control the flow of polluted air from the portals of the expressway tunnels. This innovation has reduced investment and operating costs.*

■ Ingersoll-Rand Company has formed an electronic commerce business unit and appointed **Rone Lewis** as it president and as a vp of the company. Lewis is a business-to-business e-commerce entrepreneur. He has served as vp of business development for Surety.com, an

■ Schaefer will be responsible for service to clients throughout the state. He has worked for several years for two manufacturers in mining, industrial and gas utilities.