Discovery before or after mediation?[1]

By David Knoll

Among the factors that can affect the prospect of settlement at mediation is the timing of the mediation in the dispute resolution process. When counsel suggests that a dispute might be resolved cost effectively by way of mediation, parties often seek advice as to most propitious stage of the litigation process to entertain mediation. It is often apparent that whether or not discovery has been completed influences the chances of settling the dispute. This short note seeks to highlight a few of the criteria that counsel can utilise in advising clients about the appropriate timing of a mediation.

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Better information leads to a more sensible approach to settlement, sometimes

Particularly in cases which are document intensive, the prospects of settlement can be improved when the parties are able to assess each other's evidence, and come to a more fully informed understanding of each other's interests than would be the case prior to discovery.

When solicitors conduct discovery on a co-operative and professional basis, without compromising their respective clients' interests, it often happens that they and the clients better understand the other party's position, and are more able to narrow the scope of the dispute. Some of the guesswork is taken out of the dispute resolution process, and the prospects for a successful mediation tend to be quite good.

The very process of discovery can contribute to reducing the overall cost of litigation by removing the need for an expensive trial. This of course is not always the reality of the pre-trial process. When solicitors 'take every point' discovery is an expensive process, and sometimes unnecessarily so. This can work both ways. The expense can act as a barrier to settlement. Just as often, the concern to stem the tide of dollars can act as an incentive to settle.

A rational plaintiff will want the dispute resolved at a point where the probability of a generous settlement is maximised. They will want to appreciate whether the probability of achieving a generous settlement will improve by virtue of discovery of documents held by the defendant. Where the answer to that question is in the affirmative, the plaintiff will want to delay mediation until discovery happens.

A rational defendant usually will entertain mediation at the point where the defendant is confident that it can both obtain an inexpensive settlement, and cap the costs of the litigation. Counsel is sometimes called upon to help assess whether discovery will assist in that regard.

At a more objective level, discovery necessarily affects the assessment of the credibility of witnesses, including one's own. Discovery makes it harder for litigants to conceal the truth, and thus may assist settlement.

Embarrassment saved

In one recent case, discovery of a building report almost certainly ensured the payment of a claim that had been long rejected and hard fought by the insurer. The claim was in respect of defective building works. The insurers had commissioned an expert building report, and wrote a letter to the claimant rejecting the claim. The decision to reject relied upon the report. Upon receipt of that letter proceedings were commenced by the claimant.

In the course of discovery it turned out that the building report being relied upon had recommended to the insurer confidentially that the claim largely be paid. Needless to say, the insurer saved itself considerable embarrassment, and the case was settled.

The plaintiff did not expect that the insurer had lied about the content of the building report, and mediation before discovery may well not have led to settlement.

If oral evidence is critical, mediation before discovery is often to be preferred

In cases where oral evidence from witnesses is more important than production of documents, conducting mediation after discovery can be counter-productive. The cost of litigation will have risen, and parties will have become more entrenched in their positions. Settling on the basis that each party pays its own costs becomes more difficult. The costs will have become a barrier to successful mediation.

But too often, knowledge held by one-party – and uncertainty on the part of the other – result in a settlement that reflects the cost of dispute resolution at least as much as it does a sensible assessment of prospects on the merits. It can also result in a refusal to settle. A plaintiff may decide that a defendant will offer more once the defendant has incurred the pain and cost of discovery . A defendant may consider that it knows too little about the plaintiff's case to offer more than an amount that is just enough to avoid the nuisance and costs of litigation. Experienced counsel on both sides – and an effective mediator – can offer sound guidance in helping the parties make a better educated assessment of their respective cases. In the context of a mediation, it often happens that such experience and guidance helps to resolve the dispute, with considerable cost savings.

Even if the dispute does not settle at mediation, it sometimes happens that as pre-trial preparation goes into full swing, there is a renewed willingness to avoid uncertainty and settle, but not always. For example, this can occur when, after discovery, it becomes apparent that one of the parties' documents destroys the credit of one or other witness. A sensible assessment of credit issues at mediation can contribute to settlement.

Mediation is often successful because of the uncertainties of trial

Oral evidence is often the evidence that is considered the most uncertain. In a case in which oral evidence is

important, mediation is an environment were parties can face each other and confidentially assess the potential strengths and weaknesses of each party's likely oral evidence. When a serious assessment takes place, in the author's experience matters tend to settle, and tend to settle on a sensible commercial basis.

Even unsuccessful mediation can help reduce costs

In one recent matter concerning damages for lost opportunity, mediation was conducted before discovery. While the parties did not agree on dollars, they narrowed their differences as to the appropriate valuation method for what was a rather special business. Although the matter did not settle, the parties did agree to limit the scope of the issues between them, and thus they both saved considerable pre-trial and trial costs.

The barrister's obligation

The issues raised above are only sampling of the myriad of timing issues that arise. In complying with Rule 17A of the *New South Wales Barristers' Rules*, it is arguable that the duty to inform the client or the instructing solicitor about the alternatives to fully contested adjudication should include advice about the timing of such alternative dispute resolution relative to the rest of the pre-trial process. This can only enhance the client's 'understanding of those alternatives' and assist 'the client to make decisions about the client's best interests in relation to the litigation.'

Every case has its own special characteristics, and so there cannot be any rule as to when to mediate, before or after discovery. However, in setting a strategy for dispute resolution, counsel can give constructive guidance. Fulfilling that function is of course part of counsel's duty to the court.

1 David D. Knoll, 9 Selborne Chambers, is a member of the Bar Association's Mediation Committee

Recent amendments to the Legal Profession Act*

The notification provisions

This note is to provide an update as to developments since the article published in the Winter 2002 edition of *Bar News*.

Cameron v Bar Association of NSW

The decision of Simpson J in *Cameron v Bar Association of NSW* [2002] NSWSC 191 (20 March 2002) is the subject of as yet unfinalised appeal proceedings.

Robert Cameron filed a summons for leave to appeal against the decision of Justice Simpson. He also filed a notice of motion seeking an order that the appeal be expedited, that the appeal be heard with the application for leave to appeal and seeking an order for the issuing of a practising certificate pending the hearing of the summons for leave to appeal and determination of any appeal.

On 9 May 2002, the Court of Appeal (Justice Meagher and Justice Heydon) made orders that:

> 1 Leave is granted for the claimant to appeal the orders made by her Honour Justice Simpson on 20 March 2002 (22 March 2002);
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> 2 Appeal to be expedited upon the undertaking that the claimant will not do anything to stand in the way of the hearing of the appeal being expedited;
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> 3 Opponent is to issue a practising certificate to the claimant, pending the hearing of the appeal, or further order;
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> 4 Costs of the summons to be costs in the appeal;
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> 5 Liberty for both sides to apply on seven days notice.

On 11 September 2002 the Court of Appeal made the following orders and notations by consent:

> 1 Appeal allowed.
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> 2 Orders 2 and 3 made on 25 March 2002 by Simpson J be set aside.
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> 3 (a) No order as to the costs of the appeal.
>
> (b) All previous costs orders including the order in favour of the respondent made on 12 December 2001 in proceedings No. 13646 of 2001 be vacated.
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> 4 It is noted that:
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> The Appellant will take no point in the sec 38B appeal or in this court or in any other court or tribunal to the effect that the practising certificate issued to the Appellant pursuant to the order of this court on *9 May 2002*, nor the practising certificate issued to the Appellant on 1 July 2002 were other than in lieu of a stay of the Bar Council's resolution of 1 November 2001 to cancel the Appellant's practising certificate and agrees that the Appellant's entitlement to a practising certificate will be determined on the merits in his sec 38B appeal and not by reference to any point as to the status of the certificate.
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> 5 The respondent, subject to 4, agrees to the continuance of the present practising certificate until the determination of the sec 38B appeal or until further order.

* An article prepared by the Bar Association's Professional Conduct Department and members of the association. The Editor takes resposibility for its accuracy.