They think it's all over - it isn't now: mediated settlement agreements and mediators in the firing line

18.01.12

Simply because a settlement is achieved at mediation does not mean that it cannot be challenged. There are a number of grounds on which it may be possible to set aside a settlement reached at mediation.

A settlement agreement signed at a mediation is no different from any other commercial contract. Its drafting can be particularly challenging because it is not uncommon that it will be drafted and signed at the culmination of perhaps an all day mediation and in the small hours of the morning, when energy levels and concentration are flagging. Indeed one of the advantages of mediation is said to be that, if agreement is reached, settlement will happen "then and there" while the momentum is running.

Misrepresentation

Although the recent case of Clay v Lenkiewicz Foundation was settled prior to a trial of the substantive issues, it did explore the possibility of a mediated settlement agreement being unpicked on grounds of misrepresentation.

The claimant alleged that the agreement reached between the parties at mediation had been induced by a material misrepresentation either by the defendant or on its behalf. The trustees of the defendant instructed the mediator to make an offer to settle for a cash sum and a painting. The mediator provided the claimant with a written valuation obtained by the trustees and informed the claimant that the painting had been professionally valued at £80,000.

The claimant accepted the offer on the basis of the mediator's representation that the valuation was a market valuation. The valuation had, however, been obtained for insurance purposes and was a much larger figure than the actual market value figure intended to cover the cost of purchasing a similar painting in the event of it being lost or destroyed.

The claimant alleged that the mediator's representation was a false statement of fact. While accepting that they had provided the mediator with the valuation, the trustees denied that he had been instructed to make the representation as above or to hand over the valuation.

It is very common in a mediation for a party to disclose documents/information to the mediator. Usually a party will make it clear whether the mediator may disclose some, all or none of the documents/information to the other side and the mediator should act accordingly. Where such authority exists, if documentation/information passed over by a party (or its agent) during the mediation amounts to an untrue statement of fact or law which induces the opposing party to enter a contract thereby causing it loss, this may lead to a claim for the settlement agreement to be rescinded (unless the parties cannot be restored to their original positions).

Fact sensitive questions of agency and authority (as in Clay) can arise where a party accepts that it provided the mediator with information/documentation but denies that the mediator had been

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25/01/2012
instructed to provide that information/documentation to the other side. In those circumstances, is a party entitled to rely upon an unauthorised representation by the mediator?

Much will depend upon whether the mediator can be regarded as the agent of the parties and can reasonably be assumed to have authority to make representations which a party is entitled to rely on as having come form the other side. Interestingly in Clay, the mediator indicated that he could not be regarded as the agent of either party given his role as an independent and impartial facilitator.

Another issue: what representations made during the course of a mediation are capable of being relied upon? A certain amount of posturing is expected in a mediation and an opponent will (or should) know that such statements are not intended to be relied upon. Other representations may fall into an entirely different category.

For example, during the course of a mediation, Party A provides Party B with its income and customer forecasts over the last 12 months. Party B settles its claim on the basis of those forecasts. There is no reason why Party B should not rely on Party A’s representation. In the event that those forecasts prove to be untrue and were relied upon by Party B (causing it loss), Party B may seek to rescind the agreement reached at mediation (unless the parties cannot be restored to their original positions) on the basis of misrepresentation. This of course brings into focus the importance of "entire agreement" clauses in well drafted settlement agreements.

What contract?

In just the same way as contracts require offer, acceptance, consideration and an intention to create legal relations, agreements reached in mediation are no different. However, it is not always that simple in practice. Post mediation a party may, rather than becoming embroiled in arguments around setting aside any alleged agreement entered into, argue that no binding contract was ever reached between the parties. This may be on the basis that one or more of the constituent elements required for the formation of a contract are absent. Practically, to help avoid this issue arising, most standard mediation agreements provide that the parties will not be bound until the agreement is signed.

Illegality and mistake

A settlement agreement entered into between the parties may be declared void due to illegality (for example a contract that unlawfully fixes prices) or be unenforceable as being contrary to public policy (for example it amounts to a contract in restraint of trade). Equally, depending on its nature and effect, where the parties have made a fundamental mistake about some fact, this can result in the settlement agreement entered into being declared void.

Duress

A contract which has been entered as the result of duress may be avoided by the party who was threatened. In each case, the wrongful or illegitimate threat must have had some causal effect on the decision to enter into the contract. It is important to remember that in commercial transactions, pressure and "hard bargaining" are commonplace and perfectly proper. Indeed many agreements...
are entered into under pressure (sometimes overwhelming). In these circumstances it will be important to distinguish between legitimate and illegitimate forms of pressure.

**Satellite litigation against mediators**

Although this will be a rarity, there are circumstances in which it may be possible for a party to bring proceedings against a mediator in contract, tort or on some other ground. Any action to establish mediator liability will face considerable difficulties.

The standard mediation agreement signed by the mediator and the parties prior to entering into the mediation will invariably contain a mediator immunity clause which will attempt to exclude the mediator's liability. Such a clause will, however, be subject to general legal principles such that it cannot exclude liability for fraud and may also, depending on the circumstances of the case, be subject to statutory controls on exclusion clauses.

**Breach of contract**

As the mediation agreement will usually also be signed by the mediator, this opens up the possibility of a claim against the mediator for breach of contract. In addition to the mediator being in breach of the express terms of any mediation agreement (whether it is to perform his/her duties with competence, impartially, diligence etc) there will also be an implied term that the mediator will provide his/her services with reasonable skill and care.

A key question is what amounts "to reasonable skill and care"? Mediations are moving feasts and no two mediations are the same. It is a flexible process which often requires a mediator to adapt to changing and highly pressured circumstances. This will make determining the level of skill and care required by a mediator a difficult task.

The main obstacle to a claim against a mediator for breach of contract lies in being able to demonstrate that the mediator's performance caused damage and how those damages should be calculated. This will involve assessing the outcome of the mediation had the breach not occurred. It is important to remember that there are occasions where, despite the best efforts of even a well respected mediator, mediation will not necessarily lead to a settlement of the dispute.

**Misrepresentation**

Representations made by the mediator during the course of the mediation may found a claim against the mediator under the Misrepresentation Act 1967. There are, however, likely to be a number of difficulties in demonstrating what representations were made and relied upon (as discussed above).

**Negligence**

A successful action in negligence against a mediator would require a party to establish that the mediator:

- owed a duty of care to the claimant
- breached the duty owed to the claimant
- in breach of his/her duty caused the claimant to suffer recoverable loss
Although the circumstances in which a duty of care is owed may vary, the starting point for liability to be imposed usually requires there to be sufficient proximity between the parties and that it is fair, just and reasonable in all the circumstances to impose a duty of care. Where advice is given, this may give rise to sufficient proximity between the mediator and the parties. This is why no sensible mediator will ever give advice to any party during the course of a mediation.

Furthermore, similar to a claim for breach of contract, determining the standard of care expected of a mediator gives rise to real difficulty. Much will depend upon the factual background to the dispute and the circumstances giving rise to the mediation. Add in the flexibility and relative informality of mediations and determinations about whether a mediator fell below an acceptable standard become extremely difficult.

Even if a party were able to get over these hurdles, showing actual damage will be difficult. A party would need to demonstrate that, but for the mediator's negligence, it would not have settled on those terms. It would be difficult to know what the parties would have done had the mediator not acted in the way alleged. Given that many parties are legally represented at mediations, this is likely to be a difficult hurdle to overcome.

**Claims for breach of fiduciary duty**

In light of the relationship of trust between the parties and the mediator, there is a possibility that a party may bring a claim for breach of fiduciary duty against the mediator. Fiduciary duties which may be owed by a mediator to the parties (and therefore may be breached) may include a duty not to be biased, to be trustworthy and to be diligent. For example, a mediator may be in breach of those duties if s/he, in breach of any instructions received, withheld important information from a party to the mediation.

**Comment**

A party can take steps to mitigate the risk of settlement agreements being set aside or unravelled on the basis of misrepresentation. This can take the form of a clause that all material terms are contained in the agreement and that no reliance has been placed on any representations not contained in the agreement. In the light of *Clay* it is also important for parties to analyse carefully and investigate any information received in the mediation. This may involve making independent checks of important information or requesting additional evidence so that it can be substantiated.

Although there have been claims against mediators in other common law jurisdictions, they mostly relate to the drafting of the settlement agreement following the mediation. For this reason most UK mediators will not be prepared to play a direct part in the drafting of a settlement agreement although they may be called upon to resolve an impasse in drafting which may require some input. If a mediator can see that some particular wording is ineffective or does not achieve what the parties intend it to and/or will simply lead to other disputes, in my view the mediator should say so. This whole issue becomes more difficult if the parties are not legally represented and more difficult still if one party is represented but the other is not.

Given that there is at least the (still remote) possibility of a claim being made against a mediator, it is commonplace for a mediator to carry professional indemnity insurance. We may see a developing practice of parties to the mediation seeking confirmation and evidence of such cover and the level of it and indeed perhaps asking for increased cover in higher value mediations. Some mediation providers require mediators to have at least £1 million of indemnity insurance cover and to maintain this insurance throughout their appointment to their panel.

See our previous alert on mediation privilege.
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