Looking to settle during mediation? Can you determine if the offeror can pay up?

This paper was prepared and settled jointly by the members of ADRAC

1. In *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No 3)* [2023] FCA 988 (*Watson*), Lee J considered what his Honour described as a "novel issue" concerning the right of a plaintiff/applicant in representative proceedings brought under Pt IVA of the Federal Court of Australia Act 1976 (Cth) (FCA Act) to discovery of documents not relevant to any issue in dispute but sought during a mediation ordered by Thawley J in February 2023 so as to allow those advising the applicant to form a view as to whether a proposed settlement of the litigation was in the interests of group members as a whole.

2. His Honour was considering an interlocutory application which was "said to engage, for the first time, a question posed but left unanswered in several earlier representative proceedings brought under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act)".[1] As his Honour explained in his ex tempore judgment:

> [2] The applicant, Watson & Co Superannuation Pty Ltd (Watson), seeks the production of documents going to the financial wherewithal of the second respondent, E&P Financial Group Limited (E&P). The documents, however, are sought in the context of a mediation (which has been suspended) and are therefore subject to the privilege attaching to without prejudice communications. The novel issue arises because notwithstanding the settlement privilege attaching to the documents, Watson contends that in the light of the Court's supervisory and protective role, it is necessary and appropriate for the Court to intervene and order production so as to allow those advising Watson to form a view as to whether a proposed settlement of this litigation is in the interests of group members as a whole.

3. The issue arose in circumstances where there appeared to be a bona fide dispute as to the adequacy of information provided in the context of the mediation.[2] The mediation was suspended pending the resolution of the impasse concerning the provision of financial information by E&P.[3]

4. Watson contended that if the financial information it sought was withheld by E&P, it would be unable to form a rational view about whether a settlement of the litigation (which provides for a large discount because of recoverability concerns) was in the interests of group members as a whole.[4] His Honour described the high watermark of Watson's submissions as being "that if the Court, as part of its supervisory and protective role, is required to satisfy itself as to recoverability issues in settlements of this type, it is not clear why that

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[1] Watson at [1] – Part IVA is concerned with Representative Proceedings.
[2] Ibid (at [11]).
[3] Ibid (at [18]).
[4] Ibid (at [18]).

examination should only occur in the context of an extant settlement approval application (with all the attendant process costs)."[5]

5. Watson sought to rely upon non-confidential and confidential affidavit evidence. Its senior counsel conceded that aspects of the "confidential" affidavit sworn by the solicitor for Watson were protected from disclosure by dint of s 131(1) of *the Evidence Act 1995* (Cth) (Evidence Act) which excludes evidence of settlement negotiations. It was also common ground that "absent some bespoke order directed to the admissibility of such material, … the adduction of such evidence would amount a disclosure of communications made during the course of a mediation referred to under s 53A of the FCA Act, contrary to the prohibition in s 53B" which renders inadmissible evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A.[6]

6. Lee J rejected the confidential material on the basis that its adduction was excluded under s 131(1) of the Evidence Act and s 53B of the FCA Act. His Honour would also have excluded the material in the exercise of his discretion under s 135(a) of the Evidence Act (that is, on the ground that it was unfairly prejudicial to a party) even if the barriers to admissibility under s 131(1) of the Evidence Act and s 53B of the FCA Act were somehow surmountable, which in his view they were not.[7] In his Honour's view, , there was no real need for him to receive the evidence because the application could be dealt with on the basis that there was a bona fide dispute between Watson and E&P as to the material provided by E&P in the mediation.[8]

7. His Honour rejected Watson's application.

8. In his Honour's view, in the absence of any evidence to the contrary, the Court was entitled to proceed on the basis that any representations made as to the financial position of any respondent in a mediation referred to under s 53A of the FCA Act would be made accurately, and that there were a variety of means by which an applicant in the course of settlement discussions could satisfy itself as to the truth or otherwise of such representations.[9]

9. Lee J noted that:

> "For many years, it has been commonplace when issues of recoverability have arisen in *inter partes* litigation, for warranties to be sought and then given as to the true financial position of a respondent, and for the truth of those warranties to be verified on oath. If it subsequently emerged that a respondent had pulled the wool over an applicant's eyes in the course of settlement discussions, then the settlement agreement would ordinarily contain an

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5 Ibid (at [22]).
6 Ibid (at [12] – [13]).
7 Ibid (at [15] – [16]).
8 Ibid (at [17]).
9 Ibid (at [19]).

> express provision allowing the applicant to rescind the agreement and return to the *status quo ante*."[10]

10. A similar approach commended itself to his Honour in mediations in more complex class actions. In his Honour's view, it was up to an applicant and their lawyers to satisfy themselves as to the adequacy of information provided by a respondent. This could be done in a variety of ways such as:

   a. by requiring a respondent to provide some verification of financial information in which circumstances a settlement deed could provide protections if the material was ultimately found to be false or misleading.

   b. Alternatively, if verification was not provided by a respondent and this was drawn to the attention of a Judge in the course of a settlement approval application under s 33V of the FCA, this would be regarded as somewhat of a red flag in assessing whether the Court could be satisfied that the proposed settlement (premised on a discount on the basis of recoverability concerns) was fair and reasonable and in the interests of group members.[11]

11. Lee J also hypothesised that there may be a range of measures a Court could take in such an application to explore the soundness of the proposed settlement. His Honour was not persuaded by Watson's submissions, albeit he described it as having "some superficial attraction", that such an examination could occur at an interlocutory stage as well as in the context of an extant settlement approval application (with all the attendant process costs).[12]

12. Although his Honour accepted that he had often "railed against unnecessary costs being expended on s 33V applications",[13] he did not doubt that an approval application in respect of a "proposed settlement … agreed on the basis of a substantial discount due to recoverability issues could be prepared and put before the Court economically".[14] He took comfort in reaching this conclusion in his view that "If the Court is dissatisfied with the information that has been provided by the parties, such that it is vexed as to whether the settlement can be approved, then, as noted above, the Court has an armoury of powers by which further information can be obtained."[15]

13. Lee J referred to his judgment in *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1537 (Bywater 2) as an example of where he had approached a s 33V settlement approval application in this way. In that case, his Honour

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[10] Ibid (at [20]).
[11] Ibid (at [21]).
[12] Ibid (at [22] – [23]).
[13] Ibid (at [23]); s 33V(1) of the FCA provides that "A representative proceeding may not be settled or discontinued without the approval of the Court."
[14] Ibid.
[15] Beach J took a similar approach in Evans (at [101] – [103])

adjourned such an application to allow an investigation to take place to obtain further information about the financial position of the respondent, including whether there existed grounds for taking steps to ascertain if various transactions could be characterised as an attempt to defeat a possible judgment and be potentially voidable or uncommercial transactions.[16]

14. His Honour opined that "if it turned out in a theoretical case that a respondent had misrepresented its financial position or had failed to provide sufficient information in order to allow an applicant to form a rational view as to a proposed settlement, such that issues as to good faith in the mediation process are called into question, consequences may arise following an unsuccessful s 33V application."[17]

15. His Honour dismissed the interlocutory application on the basis that "[u]pon any settlement approval application, it will be a matter for the Judge hearing the application to form a view as to what, if any, further enquiries should be made as to the financial position of E&P on the evidence adduced on the settlement application. In the event a settlement is struck and there are real issues going to recoverability, that will be an issue informing the Court's determination of whether the settlement is fair and reasonable and in the interests of group members." His Honour proposed that he would make an order referring the whole of the proceedings to mediation to be recommenced forthwith and to be concluded only when the mediator referred to in the order is satisfied that the mediation has no realistic prospect of success.[18]

Other matters

Assymetry

16. In the course of his reasons, Lee J referred to *Evans v Davantage Group Pty Ltd (No 2*[19]) and *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 6)*[20] which dealt with applications for access to documents, typically insurance documents, which concerned the question of whether or not a respondent was likely to be in a position to meet any judgment.

17. In each case, Beach J and Wigney J while recognising that s 23 of the FCA afforded jurisdiction to make the order sought, "indicated that the Court would be reluctant to exercise its discretion to compel the production of documents for the purpose of mediation where it would 'confer an asymmetric commercial advantage in favour of one party at the expense of another', or 'give rise to asymmetric bargaining positions'".[21]

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16 Bywater 2 (at [2]); see also *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1537.
17 Watson (at [25]).
18 Ibid at ([27] – [28]).
19 [2020] FCA 473 (Beach J) (Evans).
20 [2023] FCA 188 (Wigney J) (Owners).
21 Ibid ([at [6]); see Evans (at [54] and [73]); *Owners* (at [17], [19], [22]).

18. Lee J observed:

> "…. it is somewhat unclear to me as to why this 'asymmetry' could usually result from an order for production. Asymmetry means a lack of equality or equivalence between parts or aspects of something or of knowledge. Here, the whole purpose of the order is provide a symmetry of knowledge as to the financial position of E&P between both parties required to attempt to negotiate a resolution which, if approved, must have a particular character: that is, it is fair, reasonable and in the interests of specific strangers to the negotiations, being the group members."[22]

19. Keogh J considered this observation in *Agnello v Heritage Care Pty Ltd; Fotiadis v St Basil's Homes for the Aged in Victoria (No 2)* [2023] VSC 653 (Agnello) in which the plaintiffs applied for discovery of insurance policies going to the capacity of the defendants to pay the amount of any settlement or judgment obtained in the proceedings. His Honour was considering appeals by way of a hearing de novo from a decision of a judicial registrar dismissing the discovery applications. He said:

> "This comment may reflect a misreading of what was said by Beach J in Davantage about the asymmetry of information that would flow from requiring production of insurance documents, and prejudice to the defendant that would result. *The asymmetry identified by Beach J arose because documents and information relevant to the motivation to settle would become known in respect of one party but not the other.* Similarly, in Simpson, Gleeson J recognised that an effect of ordering the discovery sought would be to confer a tactical advantage on one party and a corresponding disadvantage on the other. It is relevant to the application before me that the prejudice recognised by Beach J in Davantage and Gleeson J in Simpson would extend to an insurer who is not a party to the proceeding, and to whom the plaintiffs are strangers."[23] (emphasis added)

The discretionary power

20. The difficulty with applications of the sort considered in Watson, or in similar cases where documents are sought to enable the applicant to determine whether the respondent is likely to be able to meet the judgment is that they do not concern a matter in issue between the parties. In the ordinary course of discovery, "[o]nly a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of enquiry which would, either advance a party's own case or damage that of his adversary".[24]

21. As Lee J observed in Watson, the jurisdiction of courts to entertain such applications has been recognised. In Evans, which Wigney J followed in Owners, Beach J found that jurisdiction, not in contemporary case management practices, but in s 23 of the FCA which provides, "The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including

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22 Watson (at [7]).

23 Agnello (at [55]); see also *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 4) [2019] FCA 1229*, [26] (Gleeson J); note that the Federal Court decisions were based on a statutory discovery regime that differs from the provisions relevant in Agnello, a decision of the Victorian Supreme Court: see Agnello at [47]).

24 *Mulley & Marney v Manifold* (1959) 103 CLR 341 at 345; [1959] HCA 23 per Menzies J.

interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."[25] Nevertheless, the courts have held that s 23 afforded a discretionary power that should be exercised with a degree of circumspection and caution.[26]

The relevance of mediation

22. The fact that such an application may be sought in relation to a mediation is not irrelevant but has not consistently facilitated the making of such orders. *Regent Holdings Pty Ltd v State of Victoria & Anor*[27] concerned "an interlocutory appeal against orders made in a representative proceeding by the trial judge that 14 group members provide particulars and discovery of documents relating to quantum. The trial judge made the impugned discovery order to facilitate a mediation that had been ordered".[28] The Court of Appeal dismissed the appeal. It held:

> "…it is not improper for a judge to make orders for particulars and discovery calculated to facilitate mediation. We take to be self-evident that it is desirable that proceedings be settled;[13] and, in Victoria, Chapter 2 of the Civil Procedure Act 2010 obligates courts and litigants alike to strive to achieve that end. The kinds of orders for particulars and discovery which the judge made in this case are well within the ambit of s 33ZF of the Supreme Court Act 1986 and s 9 of the Civil Procedure Act 2010."[29]

23. However, in that case, the documents which were ordered to be discovered went to a matter in issue, "the quantification of the claim for damages made by group members".[30]])

24. On the other hand, in *Beneficial Finance Corporation v Price Waterhouse*[31] both Perry J and Lander J observed that the fact documents may be sought in the context of a court ordered mediation was not a factor militating in favour of an order for discovery. Perry J said:

> Mediation is an entirely different procedure from the trial of an action at law. While mediation may be mandated, nonetheless it is essentially a consensual procedure. It would be contrary to the proper disposal of pretrial procedures relating to proceedings in the civil jurisdiction of the court (as opposed to mediation) to confuse those procedures by taking steps which might be thought desirable if there was to be a mediation.
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> For example, it might be highly relevant to the process of mediation to know how much money the State government was prepared to put towards the costs of the plaintiffs' conduct of the proceedings. But no-one could suggest that documents

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[25] Evans (at[4] – [5], [16] – [17], [48] [111]; [76] – [80]); Owners (at [16] – [17]).
[26] See Owners (at [19]).
[27] (2012) 36 VR 424; [2012] VSCA 221 (Regent Holdings).
[28] Agnello (at 36]).
[29] At [20])
[30] Ibid (at [39]).
[31] (1996) 68 SASR 19 (Beneficial Finance).

> which might indicate the position in that regard could possibly be, for that reason, discoverable under r 58.[32]

25. Lander J said:

> Next his Honour relied upon alternative dispute resolution, because it was submitted to his Honour, the respondents may well give consideration to limiting the scope of their claim and thus the issues to be tried. So also his Honour said that the possibility of mediation was a fact relevant to the making of this order.
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> Again I cannot agree with the learned judge. Because a court may require parties to submit to mediation is not, in my opinion, in any way relevant to determine whether or not a party ought to make discovery of a document which records its commercial relationship with a party, not then a party to the proceedings, and in circumstances where the document is not relevant to any matter currently in the proceedings.
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> The matters of alternative dispute resolution or mediation are not good reasons to override a party's right to keep its commercial documents or any of its documents confidential, nor are they a reason to allow one party to intermeddle in the affairs of another party and its insurers.[33]

26. A like approach has been taken in *Kirby v Centro Properties Limited (ACN 078 590 682)*[34] in which Ryan J did "not accept that a lack of knowledge by the applicant and his advisers of the existence and extent of insurance cover held by the respondents would, at this early stage, preclude the applicant's advisers from forming, pursuant to s 33V of the Act, an opinion on the reasonableness of any proposed outcome of negotiations in a mediation. Nor do I accept that a mediation occurring in the absence of that knowledge would be "hollow" or inconsistent with the principles which this Court has developed for the mediation or case management of disputes like the present."[35]

27. Ball J followed Beneficial Finance in *Commonwealth Bank of Australia v ACN 076 848 112 Pty Limited*[36] in which the Bank sought access to documents disclosing details of the first defendant's professional indemnity insurance.

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32 (at 35).
33 (at 58).
34 [2009] FCA 695 (Kirby); see also *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2019] QSC 250 (at [27], [29]) per Mullins J.
35 At [25].
36 [2015] NSWSC 666 (at [19], [23]).