

Observing mediation from the public gallery – Opes Prime

Alan L Limbury explores some of the questions raised about mediation in the Opes Prime case.

It's not often that one gets a hint of the progress of mediation from public reports. The collapse in October of mediation talks in the Opes Prime case prompts interesting questions about mediation in multi-million dollar, multiparty disputes.

The Opes Prime Group went into receivership and voluntary administration in March 2008. In May, a class action funded by a US-based litigation funder was commenced by Slater & Gordon on behalf of more than 50 Opes Prime clients against Opes Prime and its financiers, ANZ Banking Group and Merrill Lynch.

The plaintiffs claim that Opes Prime, to the knowledge of ANZ and Merrill Lynch, misled its clients into entering into margin lending agreements in the mistaken belief they retained beneficial ownership of the shares they provided as security for their loans.

The financiers sold shares in over 600 companies deposited under such agreements by over 1200 Opes Prime clients, valued at more than \$1 billion. The plaintiffs' losses were estimated at more than \$100 million.

Other claimants started their own separate actions. Some are reported in an article by Jason Harris, of the UTS Law Faculty¹. In one of them, *Beconwood Securities Pty Ltd v.*

¹ Harris J, *Implications of margin lender insolvency*, Australian Insolvency Journal, July-September 2008.

ANZ Banking Group (2008) FCA 594, Finkelstein J decided that the wording of the securities lending documents contemplated an outright transfer of the client's securities (worth approximately \$7 million) to an Opes Prime subsidiary, rather than the grant of a mortgage or charge over them.

Thus the Opes Prime subsidiary could, as it did, transfer the shares to an ANZ subsidiary to secure funding from ANZ to Opes Prime, and ANZ was therefore entitled, as against the Opes Prime client, to sell the shares to protect its interests *vis à vis* Opes Prime.

It is not clear from media reports exactly when mediation commenced before Alex Chernoff QC, former judge of the Court of Appeal in Victoria. By 15 October, however, when Opes Prime creditors voted for liquidation, the mediation had been under way for some time, since some creditors wanted to postpone the winding-up until the results from mediation were clear.

However, they were outnumbered by the proxies, which included \$26.8 million held by Australian litigation funder IMF. The liquidators believed ANZ should pay up to \$200 million to reverse what they alleged were unfair and uncommercial transactions struck in the days before the Opes Prime collapse. ANZ is reported to have a claim against Opes Prime of about \$145 million.

Within a few days another action on behalf of 67 former Opes Prime clients, funded by

IMF, was filed in the Federal Court, seeking in excess of \$150 million from ANZ.

The mediation was scheduled to end on 20 October, just 3 days before ANZ was due to present its full-year results, but one of the liquidators is reported as saying: "I am not going to take a die-in-the-ditch stand on the date – because I know the outcome is not pretty for creditors". He described the "Armageddon scenario" as three to five years of litigation.

The Opes Prime liquidators are said to have asked the banks to pay more than \$300 million to resolve the creditors' claims. This was reported as having been rejected as "exorbitant and unrealistic".

Another report described another "ANZ-exposed failed margin lender", Primebroker Securities, as lending credence to the idea that "the long-winded mediation exercise" at Opes was "not worth the effort".

Apparently mediation had been considered but the Opes experience had convinced Primebroker's liquidator that taking ANZ directly to court would be "more fruitful". Its clients want damages of about \$160 million and a return of the Primebroker assets seized by ANZ when the company was put into administration.

Harris comments²:

"The Opes Prime debacle provides a useful illustration of the collective problem raised by insolvency and the need for a centralised, co-ordinated process for administering the insolvent estate, particularly the problems caused by multiple creditors seeking to enforce their rights individually".

A mediator might be tempted to say this is just the sort of situation crying out for his or

her special skills: large numbers of claimants whose claims arise out of similar circumstances (albeit not necessarily identical, depending on the precise wording of their margin lending agreements) versus a small number of defendants, some of whom have money, even in these troubled times. All parties have an interest in minimising court costs and duplication and in an outcome they can each accept as fair. The defendant financiers would no doubt have an interest in emerging with honour, without having to pay any more than may be appropriate, if at all. The prospect of enlarging the pie by at least the huge amount that would otherwise be spent on litigation should be attractive to the parties, if not to the lawyers.

Yet one hesitates. The main reason is the uncertainty of the situation. The claims mentioned above would appear to be in the realm north of \$510 million and this does not take into account all the other pending claims. How many more claimants are waiting in the wings? And how can a "global" settlement be achieved which will see the end of the saga?

The class actions are "closed" class actions, that is, each class is limited to claimants signing up with their particular litigation funder by a certain date. Other possible claimants have either brought their own individual proceedings or are presently either not interested or lying in wait.

Putting oneself metaphorically in the financiers' shoes for one moment (I should be so lucky!), settling "closed" class actions, without knowing whether or not there will be further class actions, does not seem particularly attractive. The settlement of one such action could awaken dormant claimants and spawn a plethora of other actions arising out of the same events.

² Ibid

There is a strong interest in certainty and finality. It is notable that the Aristocrat class action was settled on the basis that the previously closed class was opened, by leave of the court, and while an agreed sum was paid to settle with the original closed class (and its all important litigation funder) another agreed sum was made available to pay new class members joining before a cut-off date, whereby certainty for the defendant was achieved³.

The financiers may also have an interest in not appearing to be a “soft touch” to presently dormant potential claimants, who might be aroused to action they might not otherwise take if there were a quick and clean mediated settlement of the present claims. The late Sir Frank Packer would never settle libel claims even when he was advised there was no defence, so as to discourage anyone else from taking him on.

The Federal MP Tom Uren learned this lesson. He won significant damages at trial over being called a “pawn” of Russian spy Ivan Skripov in trying to get defence secrets by asking questions in Parliament about defence establishments; over “stubbornly adher[ing] to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle”; and over being described as one of a “divided, warring rag-tag and bob-tail outfit” behind the Labor leader, Arthur Calwell, “which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country”.

After the verdict was set aside in the High Court for misdirection as to the availability of exemplary damages for some of these

³ *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2008] FCA 1311 (26 August 2008).

imputations⁴, he won virtually the same amount at the second trial. That went on further appeal until, finally, over a one-on-one lunch, the case was settled. Thereafter, Uren’s was one of the loudest voices discouraging Labor politicians from suing the Packer press (another being Leslie Haylen MP, who, having been “caught” shaking hands after the Second World War with Emperor Hirohito, was forever called “Hirohito Haylen” by the worthy Packer publications).

But that sort of message can be effectively transmitted so as to dissuade putative plaintiffs from taking action without having to go all the way through the “Armageddon scenario”. As the current claims progress and the issues are clarified, the documents (including, heaven help us – the e-documents) discovered, the witness statements procured and what may now be some pretty strongly held feelings (on all sides) soften into a weariness of battle, further opportunities may arise when mediation may prove to be effective. For all we know, the “backchannel” may still be open.

From our grandstand, let us hope so.

About Alan L Limbury

A mediator, arbitrator and negotiation advisor, Alan has over 40 years experience in the conduct and resolution of major commercial disputes and in advising how to reduce exposure to legal challenge, particularly in trade practices, intellectual property, franchising and administrative law.

⁴ See *Australian Consolidated Press Ltd v Uren* [1966] HCA 37; (1966) 117 CLR 185 (2 June 1966).

Since 1986, and virtually full time since 1996, he has experience mediating over 1,000 significant commercial disputes in Australia, New Zealand and the UK in which the parties have usually been legally represented. He has also represented clients in mediation. Topics have included a vast range of issues and industries.

He is an Advanced LEADR member and is on the panel of the World Intellectual Property Organization, the National Arbitration Forum (Intellectual Property panel), CEDR Solve Direct (UK), as well as The Chartered Institute of Arbitrators, ADR Group Ltd., ADR Chambers International, Middlesex and Thames Valley Mediators, the New South Wales Supreme Court and Land & Environment Court, the NSW Retail Tenancy Unit and the NSW Rural Assistance Authority.