## Bar Speak

with Andrew Lyons

# enforcing settlements
# in the federal court

The Full Court of the Federal Court has again considered that Court's power to enforce settlement agreements within the compromised proceedings, rather than requiring the commencement of new proceedings.

In **Macteldir Pty Ltd - v - Dimovski** copyright proceedings were compromised by an agreement that the respondents would consent to orders including orders restraining them from making certain publications.

Despite the terms of the compromise, the only orders made were for dismissal of the proceedings and costs. The other proposed orders were replaced by undertakings to the Court given by the respondents.

Subsequently, the applicant alleged that the respondents distributed further publications that breached the compromise terms. It filed a motion, within the original proceeding, seeking damages and injunctions. The injunctions sought more than simply restraining breaches of the undertakings.

Section 22 of the Federal Court Act gives the Court power, in matters where it otherwise has jurisdiction, to grant remedies "in respect of a legal or equitable claim properly brought forward".

The respondents argued, inter alia, that the motion was outside section 22 because it claimed relief that was legally, factually and temporally removed from the claims in the original proceeding.

The applicant argued that the relief sought was within power because the compromise was of proceedings in the Court and concerned orders that were to have been made in the Court under the compromise.

The Full Court was prepared to assume that in assessing whether a claim for enforcement of a compromise of proceedings in the Court was "properly brought forward" under section 22 the relevant principles include that:

1. If the compromise involves matters extraneous to the original proceeding then ordinarily enforcement is to be done by separate proceedings. Extraneous matters include things beyond the ordinary range of what the Court would order in the original proceeding.

2. If there is a substantial question to be determined as to the terms of the compromise, or its enforceability, ordinarily separate proceedings are required.

3. Even in the above two categories of case, the Court may nevertheless enforce the compromise within the original proceeding, if justice can be done under the summary procedure. This depends on the extent to which there are extraneous matters and credibility issues and the desirability of pleadings and discovery.

4. Circumstances that may incline the Court to enforce, in the original proceeding, a compromise that would not otherwise be so enforced is a need for immediate interference to give effect to the compromise or an express stipulation in the compromise that an order for its enforcement may be made in the proceeding. However, such a stipulation does not bind the Court.

5. Otherwise, separate proceedings are required.

The Full Court held that the Court did not have power under section 22 to enforce this compromise within the original proceeding. The motion was not one "properly brought forward" because even if the undertakings were treated as orders, propositions 1 and 2 above applied. The publications said to breach the compromise were made after it and did not form part of the original proceeding. Thus the motion involved matters extraneous to the original proceeding and substantial questions about whether there had been a breach of the compromise.

The post-compromise publications also meant that the motion fell outside the associated jurisdiction conferred by section 32 of the Federal Court Act as the motion and original proceeding did not arise out of the same substratum of fact.

The significance of practitioners carefully considering these issues when negotiating and enforcing compromises is demonstrated by this case: The outcome was an avoidable disaster for the applicant – the matter had reached the first day of a five day hearing before this decision was made.

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