

ROYEL FITNESS EQUIPMENT PTY LTD V. SHEPPARD WEST PTY LTD [2002]

Supreme Court of Western Australia – 9 September 2002

FACTS

Royel issued proceedings against Sheppard for alleged negligence in preparing a report on a business purchased by Royel. The proceedings were referred by the Court to mediation, with the mediation to be conducted on 31 October 2001 before a Registrar of the Court. Two previous mediation conferences had been adjourned by consent of both parties.

On 27 September 2001, Sheppard's lawyer informed Royel's lawyer that a representative of Sheppard's insurer would be travelling from Sydney to attend the mediation conference. On 26 October 2001, Sheppard's lawyers sent an expert report to Royel's lawyers. Royel's lawyers prepared for the mediation conference but only received the expert report a few days before the mediation and had not received responses to questions sent to Sheppard's lawyers.

The mediation conference commenced on 31 October 2001. After three hours, Royel unilaterally decided that there was no point in continuing with the mediation and both Royel's lawyer and the principal of Royel concluded the mediation and attended other appointments.

The Registrar ordered that Royel's lawyers pay the costs thrown away by Sheppard as a result of the early termination of the mediation conference. Royel appealed the costs order.

ISSUES

Was the Registrar justified in making an order that Royel pay the costs thrown away as a result of the early termination of the mediation conference?

FINDING

The Court hearing the appeal did not have access to a confidential report prepared by the Mediation Registrar. This report was only to be opened by the trial judge.

Therefore, the Court held that there was insufficient evidence available to find that a potentially successful mediation conference had been aborted by the conduct of Royel and/or its lawyer. The costs of the aborted mediation conference were therefore reserved for determination by the trial judge.

QUOTE

"In allowing this appeal I would not like it to be thought that the decision offers succour to those who approach mediation with anything other than the utmost goodwill and honest intentions.

Moreover, the process of mediation is controlled by a Mediation Registrar and if the mediation is to terminate, then it should be after the Mediation Registrar has satisfied him or herself that nothing further is to be gained by negotiation.

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A unilateral decision to terminate a mediation taken by one party without consultation either with the Registrar or the other party is totally inappropriate.”

IMPACT

This decision indicates that the Courts expect parties to a court proceeding to approach a court ordered mediation with the proper attitude and to attend the mediation until the mediator determines that the mediation should conclude.

If one party abuses this process they could be exposed to an adverse costs order. Usually such a costs order would be made at the conclusion of the court proceeding.

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