Casenotes

COSTS OF MEDIATION v COSTS OF PROCEEDINGS, COSTS ARGUMENTS AS A QUALIFIED EXCEPTION TO CONFIDENTIALITY, AND MEDIATION MEDIA WATCH

BAULKHAM HILLS SHIRE COUNCIL v HAHN

In *Baulkham Hills Shire Council v Hahn* [2008] NSWLEC 184, the applicant Council alleged that the respondent was carrying out earthworks and land filling by virtue of the fact that the respondent had employed a third party to provide virgin topsoil as fill on his land without the requisite development consent. In a letter to the respondent dated 6 February 2006, the applicant sought undertakings from the respondent that any such work would cease and that suitably qualified consultants would survey the land and identify appropriate remediation measures.

On 8 February, the respondent's solicitors promised the applicant that no further activity would take place on the land until the dispute was settled. On the day before the first return date of the matter the respondent notified the applicant that they would seek an order for the matter to be referred to mediation and that there would be no opposition to the court making an order in terms of the applicant's first declaration that the respondent had carried out development without development consent pursuant to s 76(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW).

The parties participated in mediation on 27 September 2007 and agreement was reached which ultimately formed the basis of consent orders made by the court on 8 February 2008. The agreement struck at mediation stated, among other things, that the parties would be jointly and severally liable for the costs of the mediator.

On 20 October 2007, the respondent offered to pay the applicant two instalments of $2,000 each as a contribution to the applicant's costs. The offer was rejected by the applicant, stating that its costs and disbursements amounted to some $80,000. However, realising that these costs were excessive in relation to "what they could get", it would accept a payment of $70,000 in satisfaction of its costs. The issue for the court in these proceedings was who should pay the costs of the proceedings.

Lloyd J commenced his judgment by stating the statutory power of a court to decide costs, and the fact that costs usually follow the cause. His Honour noted the applicant's submission that the respondent's behaviour was to blame for the action being commenced and that, where there was no disentitling conduct (such as in this case) the applicant would be entitled to a favourable costs order. The respondent submitted that the applicant had not really been successful since the matter had avoided a litigated outcome, and that it was the respondent that had initiated the idea of mediation in the first place. Further, that the applicant may have lost the case and, in any respect, where both parties had acted reasonably there should be no costs order.

His Honour found that the applicant had commenced the action against the respondent for justifiable reasons. Lloyd J noted that on four occasions the respondent had made denials to the applicant over any wrongdoing and had acted defiantly in not simply providing the undertakings required by the appellant. His Honour then went on to state that the costs of mediation fell into a different category to those of costs of proceedings. Lloyd J stated (at [18]):

> The Supreme and Federal courts have held that costs of the proceedings do not encompass costs of mediation because, as a matter of policy, the court should be careful not to impede a consensual mediation or create disincentives to it: *Mead v Allianz Australia Insurance Ltd* [2007] NSWSC 500; *Innovative Agricultural Products Pty Ltd v Richard Crawshaw* [1996] FCA 7. In *Innovative Agricultural Products* Lee J stated (at 4):
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> > I consider that unless there are unusual circumstances which require such an order … no order should be made that the costs of any party incurred in the conduct of mediation proceedings are to be included in the costs of the litigation. Mediation is a consensual proceeding in which the parties are encouraged to resolve or compromise their differences without subjecting themselves to the

> risks and the costs of a trial. It is in the public interest that parties be encouraged to undertake mediation proceedings without being concerned that additional party and party costs will be incurred if they do so.

Lloyd J found that the mediation process that the parties had participated in was separate to the process of litigation and therefore the costs of mediation should be borne equally by the parties. His Honour ordered the respondent to pay the applicant's costs up to the date on which the court order for mediation was made, namely 20 July 2007, and no order for costs for the period thereafter.

While concise, *Hahn's* case is an important decision for two reasons. First, it clearly states that mediation costs are to be treated separately from the overall costs of litigation proceedings. Secondly, it reinforces the importance placed on the mediation process by the courts in not allowing costs that may be the subject of a costs order for the whole of proceedings to accrue for the period in which mediation takes place. The court was clear that it does not wish to provide a disincentive for parties to participate in mediation.

WESTERN AREAS EXPLORATION PTY LTD V STREETER [NO 2]

In *Western Areas Exploration Pty Ltd v Streeter [No 2]* [2009] WASCA 15, the facts are not set out in the judgment; however, the judgment does record the fact that the dispute between the parties was sent to mediation by a court order of 29 August 2007 pursuant to Pt VI of the of the *Supreme Court Act 1935* (WA). The mediation was scheduled to take place on 27 November 2007 but was abandoned shortly before it was due to commence.

The appellant, Western Areas Exploration Pty Ltd, successfully had a chamber summons issued applying for an order for the respondents, Terence Streeter and others, to pay the appellant's costs for the abandoned mediation. It filed affidavits of certain people that came to bear on the decision to abandon mediation and the respondents objected to the tender of those affidavits. The respondents based their objection, the subject of these proceedings, largely on the decision of the Western Australian Supreme Court in *Pinto v Kinkela* [2003] WASC 126 which, according to the court, found that (at [7]):

> [t]he only evidence of the substance of a mediation conference which is admissible in a proceeding is a report from the Registrar [under O 29, r 3(2)] on the failure of a party to co-operate, and then only with respect to the issue of costs.

Her Honour said (at [6]-[9]):

> Section 71(1) confers a statutory confidentiality or privilege on the mediation process. It renders inadmissible any evidence of the substance of the process. Subsection (3)(c) creates an exception in relation to costs applications but that exception is qualified by reference to admissibility of the evidence under the Rules of Court for the purposes of determining any question of costs. The Rules deal specifically with evidence of the substance of a mediation conference only in O 29. Rule 3 prohibits the Mediation Registrar from reporting to the Court on a mediation conference but entitles the Registrar to report "any failure by a party to co-operate in a mediation conference". Such report is not to be disclosed to the trial judge except for the purpose of determining any question as to costs: O 29 r 3(2)(b). The Rules do not elsewhere address the admissibility of evidence of the substance of a mediation conference for the purposes of determining costs or, indeed, for any other purpose.
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> Counsel for the plaintiffs submits that the effect of s 71 of the Act and O 29 r 3(2)(b) is that the only evidence of the substance of a mediation conference which is admissible in a proceeding is the report from the Registrar on the failure of a party to co-operate, and then only with respect to the issue of costs.
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> Counsel for the defendant contends for a less restrictive interpretation of s 71(3)(c) and submits that the qualification that the evidence must be admissible under the Rules of Court is satisfied by reference to those parts of the Rules which deal with evidence generally; for example, O 36.
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> In my view, the correct interpretation of s 71(3)(c) is that advanced by the plaintiffs. In particular, I consider that the inclusion in s 71(3)(c) of the phrase "for the purposes of determining any question of costs" requires that the Rule of Court said to justify the admission of the evidence relates specifically to admissibility in proceedings to determine costs. Otherwise, the inclusion of the phrase would have no purpose.

Buss JA commenced his judgment by citing the relevant statutory references to privilege and confidentiality, the primary one being O 29, r 3 of the *Rules of the Supreme Court 1971* (WA) which states:

> (1) In the absence of any other order:
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> (a) mediation conferences will take place at the time and place as directed;
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> (aa) each party shall, subject to any directions, take such steps as may be necessary to ensure that the mediation conference occurs as soon as possible;
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> (b) each party shall attend the conference or if a party is not a natural person, a representative of that party familiar with the substance of the litigation and with authority to compromise it, and the solicitor or counsel, if any, representing each party;
>
> (ba) each party's costs of and incidental to a mediation conference shall be the party's costs in the cause, unless it is ordered otherwise or the parties agree; but a party may apply for those costs if they have been unnecessarily incurred due to the conduct of the other party;
>
> (bb) the fees and expenses of any mediator who is not a Mediation Registrar shall be paid by the parties in equal shares, unless it is ordered otherwise or the parties agree;
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> (c) within 2 weeks after the conclusion of the conference, the plaintiff shall lodge with the Court a report, signed by or on behalf of each party:
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> (i) confirming that the conference has occurred as directed; and
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> (ii) recording the substance of any resolution or narrowing of the points of difference between the parties resulting from the conference.
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> (2) A Mediation Registrar or a mediator:
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> (a) shall not, unless the parties agree, report to the Court on a mediation conference;
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> (b) whether or not the parties agree, may report to the Court on any failure by a party to cooperate in a mediation conference; but the report shall not be disclosed to the trial judge except for the purposes of determining any question as to costs.

His Honour noted that the appellant had argued before the learned Master who had issued the chambers summons that *Pinto* had been decided incorrectly in that the admission of evidence, such as the affidavits in question, was governed by O 36 of the Rules and that such evidence should be admissible. The Master decided in the end to reluctantly follow *Pinto* and not allow the admission of the affidavit evidence.

Buss JA recorded that the Master's decision was interlocutory in nature and because of this, leave to appeal could only be granted if it could be demonstrated that the decision at first instance was wrong or at least attended with sufficient doubt to justify leave and that a substantial injustice would occur if the decision were left unreversed. Leave may also be granted if in all circumstances it is in the interests of justice to grant leave.

His Honour was persuaded by the intention of parliament which he noted from *Hansard* (at [20]) as being:

> Currently, the confidentiality of the mediation process and its "without prejudice" status have been underpinned by the Rules of Court and by the terms of the common form mediation order. This is now seen to be problematic, as recent cases indicate that these matters cannot be adequately addressed other than by amendments to the *Supreme Court Act*.
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> The amendments will reinforce the integrity of the mediation process in the Supreme Court by, first, imposing on parties and/or mediators a statutory obligation of confidence; secondly, clearly defining and extending the scope of the "without prejudice" basis of the mediation; thirdly, conferring on mediators who conduct mediation conferences under the director of the court, the obligations, privileges and immunities of judge; and fourthly, making clear the scope of the court's rule-making powers in respect of mediation.

Buss JA traversed the appellant's submission that s 71(3)(c) of the *Supreme Court Act 1935* (WA) (the Act) allowed the submission of evidence of matters occurring at mediation on an application for costs for the purpose of determining any question of costs as being conclusive of the right to admit the affidavit evidence in question. The appellant even argued that, under s 71(4), a party can call the mediator to give evidence in proceedings relating to a costs application where there is a dispute as to a fact stated or a conclusion reached in a mediator's report prepared under the rules of court on the failure of a party to co-operate in the mediation and the evidence or document is relevant to that issue.

The appellant also submitted that if the decision in *Pinto* was correct then the wording of O 29, r 3 would have been expressed differently and would only refer to the report of the mediator being admissible. Finally the appellant submitted that *Pinto* is distinguishable because it related to the costs of the entire proceedings including mediation whereas these proceedings were in relation to the costs of mediation alone.

In addressing the merits of the appellant's application, his Honour made reference to the usual exceptions to confidentiality in mediation mirrored in s 71 of the Act and noted that proceedings relating to a costs application is a statutory exception to confidentiality. Further, that O 29, r 3 does not allow any evidence to be admissible in connection with an application for costs of mediation; rather, it only allows the reporting to a court of the lack of co-operation by a party or parties to mediation when the court is determining the issue of costs of mediation. In other words, O 29, r 3 does restrict what can be classed as admissible in cases of a costs order for mediation.

Given the above interpretation of O 29, r 3, Buss JA found (at [40]-[41]):

> Order 29 r 3 did not, in the present case, authorise the admission into evidence of the affidavits sought to be relied on by the appellant. No other provision of the Rules specifically authorised the admission of the affidavits. The exception in s 71(3)(c) was therefore unavailable.
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> *Pinto* was not wrongly decided. Further, the decision in that case is not relevantly distinguishable. Section 71(1) and (3) apply not only to the admissibility of evidence or documents of the character governed by s 71 in the context of an application for the costs of a mediation only, but also in the context of an application for the costs of civil proceedings as a whole.

The court granted leave to appeal but then dismissed the appeal upholding *Pinto*.

Buss JA provided an interesting "postscript" to the case raising an issue which the court did not ultimately have to decide, that being the extent to which parties are entitled to lead evidence from a mediator who has reported to the court a failure by a party to co-operate in a mediation conference for the purpose of determining any question as to costs. How much evidence could be led from a mediator before breaching confidentiality or the laws surrounding privilege is an interesting question that has yet to come before the courts in any jurisdiction in Australia. As with many of the emerging issues in dispute resolution, we watch this space with some interest. For the academics reading this column – what a fabulous teaching and learning exercise a moot on this topic would provide!

MEDIATION MEDIA WATCH

DOO-DOO DISPUTE ENDS IN SETTLEMENT

In October 2008, an allegation was made by Mr and Mrs Whyte that faeces were served to them in a dessert at the Coogee Bay Hotel in Sydney during an NRL grand final luncheon. At the time, the hotel retorted that the Whytes were attempting to extort money from the hotel and that their claim was false. Later on, laboratory tests proved that there were faeces in the dessert. This set the scene for several potential actions such as an action for negligence and defamation against the hotel and the potential for criminal action by police and civil action by the hotel if the Whytes were falsifying their claims.

The matter was mediated and, according to *The Australian*, the mediation was conducted over a 12-hour period without breaks for lunch or dinner concluding at 10 pm with a settlement between the parties. *The Australian's* Nick Leys reported in an article on 9 November 2008 that although the dispute was settled, the hotel has employed three former New South Wales detectives in a bid to find out what happened and who was responsible for this rather tragic affair.

As is common in these sorts of disputes, the mediated agreement included confidentiality provisions that prevented the parties from divulging the contents of the agreement. However, *The Australian* reported that the mediation produced a settlement sum of around $50,000 for the Whytes who, prior to the commencement of mediation, threatened to commence proceedings if mediation did not produce a settlement.

ROCKET DOCKETS FILL MEDIATORS' POCKETS

The Wall Street Journal has reported that, in order to clear the huge backlog of foreclosure cases as a result of the sub-prime mortgage crisis (also commonly known as the global financial crisis), it has

introduced an expedited way to deal with people self-representing themselves in court. The paper stated that up to 1,000 cases a day have clogged the foreclosure courts to the point where retired judges were being called back to help handle the case load.

The "rocket docket" system consists of judges asking defendants whether they are up-to-date on their mortgage payments and whether they are living in the house. If the answer to the first question is "no", the judge orders a period to vacate in which the owners are encouraged to try and work out a deal with their bank to stay in the house. The time taken to hear each case has now come down to about 15-20 seconds each!

The report noted that the judges sympathise with the homeowners and the hardship they must be experiencing but the cases usually have no legal issues attached to them so can be dispensed with quickly. In fact, most judges are giving homeowners more time to stay in their homes than the law requires.

The Wall Street Journal reported that "Lee County judges say they are trying to screen for cases that would benefit from mediation, but Chief Judge G Keith Cary opposes making such a requirement". The rationale for not encouraging parties into mediation is that there would be nothing to talk about with a person who has not paid his or her mortgage in over a year.

An arguable rationale by most in the mediation field!

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THE CALAMITOUS CASE OF THE COBBLED COURTYARD

BRADFORD V JAMES [2008] EWCA CIV 837

Dispute resolution practitioners will no doubt agree wholeheartedly with the warning of Lord Justice Mummery contained in the opening paragraph of his judgment in this case and quoted here in full:

> There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.

This case, heard before Lord Justice Mummery, Lord Justice Jacob and Lord Justice Wilson, concerned a dispute over a 3.7 m wide cobbled area that adjoined a converted barn. The barn had previously formed part of a farm that was sold (minus the barn) in 1976. The barn was then sold separately in 1977 before being converted into a residence. The 1976 conveyance, followed by the 1977 conveyance, left the ownership of the cobbled area adjoining the barn in some doubt, though the farm owners (the Jameses), believing the cobbled area to be within their title, seemed not to dispute its use by the barn owners (the Foxes).

It was not until 2002, when relations between new owners of the barn (the Bradfords) and the neighbouring farm owners turned sour, that use of the cobbled area became an issue, leading the disputants all the way to the Court of Appeal.

The vagaries of this kind of property dispute will sound familiar to many a dispute resolution practitioner, as will Lord Mummery's warning in para [9] about the high costs of litigation "about a little strip of farmyard worth much less than the legal costs of fighting over it". Having had orders made against them in the first instance, the owners of the barn had already been ordered to pay £20,500 in costs to the Jameses and one shudders to think what the final costs to both parties were following the Court of Appeal decision.

Ultimately, the Court of Appeal found in favour of the Bradfords, with the court deciding that extrinsic evidence of surrounding circumstances and subsequent acts, such as the lack of objection to

the barn resident's use of the cobblestone area, could be used to clarify uncertainty about its ownership. One can only wonder what might have happened had the parties been steered more forcefully toward mediation in the early stages of their dispute. Having outlaid so much money and emotional energy into fighting with one another, one is also left to wonder how they can possibly go on living side by side.

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