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# Collins v Queensland

**Kerry Hogan-Ross** *KERRY HOGAN-ROSS MEDIATIONS*

An Australian judicial decision scrutinising the conduct of a mediation is sufficiently novel to be worthy of consideration.

In this case,<sup>1</sup> Holmes CJ of the Supreme Court of Queensland determined that a mediator expressing views in good faith about a party's poor prospects of success is not improper conduct. This is so even if it were accepted that those views were wrong and expressed in an aggressive manner.

The court also found that a commercial or professional relationship between a mediator and a party does not in itself give rise to a conflict of interest.

## Background

Mr Collins' yacht was wrecked on rocks near North Stradbroke Island. His alleged losses were around \$1,500,000. He sued the State of Queensland (respondent) for failing to provide a navigation light near the rocks and for failing to attempt salvage of the yacht.

He represented himself in the proceedings until the Supreme Court referred the matter to mediation. He retained solicitors and counsel to represent him at the mediation.

At the mediation, the respondent's best offer was \$15,000 inclusive of costs. Although Mr Collins was highly dissatisfied with the offer, he accepted it and signed a Deed of Settlement (Deed) and Notice of Discontinuance (Notice) at the mediation.

After Mr Collins had time to reflect overnight, he decided he had been denied justice at the mediation. After writing letters of complaint to the mediator and the solicitor who acted for him at the mediation, he filed an application in the Supreme Court seeking to set aside the Deed and the Notice. He also sought a declaration that the Deed was unenforceable or void.

## The allegations

Mr Collins alleged improper conduct in the mediation by the respondent, the mediator and his own legal representatives, specifically duress, undue influence and unconscionable conduct.

Holmes CJ noted that:

... some aspects of what was alleged in that regard might be relevant in consideration of the questions of duress, undue

influence and unconscionable conduct, which if made out, would give rise to the kind of relief Mr Collins seeks.<sup>2</sup>

Mr Collins' allegations of improper conduct included the following:

- The mediator was not impartial because he had from time to time been briefed by the respondent.
- After private discussions with the respondent, the mediator put to Mr Collins in an aggressive way that he, Mr Collins, caused the wreck. The mediator told Mr Collins that his case was weak and would not stand up at trial.
- Mr Collins' counsel agreed with the mediator's opinion and discussed Mr Collins' financial circumstances.
- The respondent had not acted in good faith in that it did not fully participate in the mediation process, including not engaging with Mr Collins after the plenary session.
- Mr Collins was denied the opportunity to discuss the issues with the respondent and that a second plenary session should have been convened for that purpose.
- Mr Collins signed the Deed under duress and "in indecent haste". He felt great pressure, felt extremely depressed, dismayed, overwhelmed, agitated and unable to grasp what was happening. He was observed to be submissive, almost silent, subdued and not hungry. Even though his lawyers advised him to postpone signing the documents for 24 hours, Mr Collins thought any delay would be pointless as it would not change the outcome.

As to unconscionability, his Honour cited *Thorne v Kennedy*:

[Unconscionable conduct] requires the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests". The other party must also unconscientiously take advantage of that special disadvantage.<sup>3</sup>

Mr Collins submitted the following:

- He lacked financial resources. This was a special disability which the respondent knew of and sought to exploit.

- The respondent improperly influenced the mediator and affected the mediator's impartiality.

## Findings

Holmes CJ found the following:

- There was no suggestion that the mediator was dependent on the respondent for work or that the outcome of the mediation could affect his livelihood. Therefore, Mr Collins failed to demonstrate any conflict of interest or impartiality on the part of the mediator.
- Even if the mediator's expressed view that Mr Collins caused the accident was not correct, the mediator was entitled to aggressively put that view to Mr Collins in good faith.
- There was no basis for a finding of improper conduct by Mr Collins' legal representatives.
- It was not improper for Mr Collins' counsel to put his concerns about Mr Collins' prospects of success and the financial risk.
- The mediation agreement gave the mediator wide latitude and how the mediation progressed was up to the mediator.
- There was no evidence that the respondent failed to participate in the mediation in good faith.
- There was no basis for a finding that either the counsel or the mediator applied illegitimate pressure to Mr Collins.
- Due to the pressure Mr Collins was feeling, he may have been deprived of his free will, but his reaction was not such that it should have been obvious to his lawyers or the respondent. If Mr Collins' will was overborne, it was not by the respondent; it was by the mediator and his counsel.
- As Mr Collins did not adduce any evidence that he was under financial disability, the fact that he did not have legal representation prior to the mediation was insufficient for this purpose. His claim of unconscionability against the respondent was not made out.

Mr Collins faced significant obstacles in his application. His substantive complaints were directed at the mediator and his counsel, yet his application sought to set aside the settlement, to the detriment of the respondent. As his Honour said:

... it would be an odd approach to public policy to deprive a party of the benefit of an agreement because of the behaviour of others (including the other party's own legal representatives) with which it had no connection.<sup>4</sup>

Without being there, it is difficult to see a salutary lesson in this case or discern whether this application could have been avoided by better management of

Mr Collins by his advisers and the mediator. Mr Collins was convinced he was not responsible for his yacht smashing against the rocks. He was convinced it was the respondent's fault. He might be right — the judge observed him to be an intelligent and highly literate man.

What the case does demonstrate is the fine line everyone treads in a mediation where a party's prospects are assessed by everyone else to be very poor. How far do you go to protect that party from a likely loss at a hearing and all the devastation it can entail, and when do you step back and say professional obligations dictate this person should not be pressured any further — if they really want to go to hearing, so be it? In this case, the court found that the advisers, the respondent and the mediator stayed on the right side of that fine line.

## Note on the mediator's immunity

The mediation was made under a "referring order" as defined by s 43 of the Civil Proceedings Act 2011 (Qld) (Act). As such, s 52 of the Act applied, affording the mediator with the "same protection and immunity as a Supreme Court judge performing a judicial function". Other than immunity from lawsuit, what protection does s 52 afford the mediator?

Section 53C of the Federal Court of Australia Act 1976 (Cth) (FCA) provides a similar or identical protection and immunity:

A mediator or an arbitrator has, in mediating or arbitrating anything referred under section 53A, the same protection and immunity as a Judge has in performing the functions of a Judge.

In *Winters v Fogarty*, Bromberg J found:

The protection and immunity conferred upon a mediator by s 53C [of the FCA] precludes the curial examination of the conduct of the mediator for the purpose of determining whether a finding ought to be made that the conduct constituted a civil wrong. In other words, whether a mediator engaged in civil unlawfulness in the course of mediating anything referred under s 53A is, in my view, not a justiciable issue.

I reject Ms [Winters'] contention that s 53C is merely a bar to the institution of proceedings against a mediator and provides the mediator no protection against a court holding that his or her conduct constituted a civil wrong. If the protection and immunity conferred was so confined, the rationale upon which the immunity is founded would be largely undermined.<sup>5</sup>

The alleged wrongdoings by the mediator are based on Mr Collins' allegation that the mediator had a conflict of interest and therefore was not impartial. This lack of impartiality amounted to, it was argued, improper conduct on the part of the mediator.

There is no question that the mediator was protected from suit in this scenario, but I would argue that the mediator's conduct was also protected from "curial

examination”. In other words, the mediator’s conduct could have avoided scrutiny had s 52 of the Act and the nature of judicial immunity been raised during the application.



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## Footnotes

1. *Collins v Queensland* [2020] QSC 154; BC202005014.
2. Above, at [25].
3. Above n 1, at [34], quoting *Thorne v Kennedy* (2017) 263 CLR 85; 350 ALR 1; [2017] HCA 49; BC201709420 at [38].
4. Above n 1, at [44].
5. *Winters v Fogarty* [2017] FCA 51; BC201700364 at [118]–[119].