PROVIDING FOR THE COSTS OF MEDIATION WHEN NO AGREEMENT IS REACHED AND LITIGATION CONTINUES

Mediation is often a good method of reaching an outcome in a dispute and can save time and money. However, there is no guarantee that parties will reach an agreement at mediation. If no agreement is reached and litigation continues, how should the costs of mediation be dealt with?

There are a number of costs associated with mediation, which include the mediator's fees, room hire and the legal costs of the parties to the mediation. These costs can be significant, especially when there are multiple parties.

If an agreement is reached between parties at mediation, the mediation agreement usually provides that the parties share the costs of the mediation, equally or in some other proportion.

If no agreement is reached at mediation, it is sometimes necessary for the parties to continue with litigation. Where this happens it is important that the costs of the mediation be addressed: should the costs of the mediation become costs of the proceedings, i.e. costs that are recoverable from the unsuccessful party in the proceedings, or not?

Section 28 of the *Civil Procedure Act 2005* (NSW) acknowledges that parties may make an agreement about the costs of mediation and also provides that the court may make an order as to costs of mediation:

> **28 Costs of mediation**
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> The costs of mediation, including the costs payable to the mediator, are payable:
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> a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
> b) in any other case, by the parties in such proportions as they may agree among themselves.

The courts have given some consideration to the operation of this provision.

Newcastle City Council v Paul Wieland

In *Newcastle City Council v Paul Wieland* the NSW Court of Appeal considered whether the expression 'costs of the proceedings' included the costs of mediation.[1] In this case, the parties were in dispute with respect to a retaining wall. An order was made by the Court by consent for mediation and the mediation was held at the District Court. An Acting Judge was the mediator. The mediation took place after the commencement of the trial and during an adjournment. The matter did not settle at mediation.

The parties subsequently settled and the trial judge made consent orders for the council to pay one half of the plaintiff's costs of the proceedings as agreed or assessed. The parties failed to agree on the plaintiff's costs of the proceedings and a costs assessor was appointed. During the costs

[1] [2009] NSWCA 113.

assessment, the council (costs respondent) asserted that the parties had not agreed that the costs of mediation would be costs in the proceedings.

The costs applicant (plaintiff) and respondent in the appeal brought proceedings for a declaration that the costs of the proceedings included the costs of the mediation and the District Court judge agreed.

The District Court judge, Sidis DCJ, took into account that:

1. there was an initial agreement that the council would meet the plaintiff's costs of the mediation; and
2. the mediation was a matter discussed in the course of the proceedings before the court on several occasions, before the mediation took place. The mediation was conducted by a judicial officer and held on the court premises.

On appeal, the Court noted that s 28 of the *Civil Procedure Act 2005* does not create a special category of costs but makes it plain that, in the absence of an order or agreement, costs of mediation are not payable.[2] At the appeal it was common ground that Sidis DCJ erred in holding that there was an initial agreement that the appellant would meet the respondent's costs of the mediation. Accordingly, there was no agreement between the parties within s 28(b) of the *Civil Procedure Act 2005*.

The court went on to consider whether the District Court had ordered the payment of mediation costs within s 28(a) of the *Civil Procedure Act* by ordering that the council pay one half of the plaintiff's 'cost of proceedings'. This required the Court of Appeal to focus its attention on the construction of the expression 'costs of the proceedings'.

Justice Ipp, with Beazley JA and Hodgson JA in agreement, considered the decision of Bergin J in *Mead & Anor v Allianz Australia Insurance Limited*[3] where her Honour had declined to construe 'costs of these proceedings' as including the costs of the mediation for two reasons:

1. The construction would be inconsistent with the agreement to mediate.
2. The parties had regarded the mediation as a separate aspect of their litigious process.[4]

Justice Ipp distinguished the subject case as in *Wieland* the mediation was not outside the litigation process. Rather, there was a court order to mediate, the mediation was undertaken by an acting District Court judge and it took place on the court premises. All these factors indicated the mediation was part of the court process.

Justice Ipp also noted that, while he accepted the force of Bergin J's remarks:

> '... there are compelling policy reasons why costs of mediation should be included in the costs of the proceedings.'[5]

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[2] *Newcastle City Council v Paul Wieland* [2009] NSWCA 113 at [37].
[3] [2007] NSWSC 500.
[4] *Mead & Anor v Allianz Australia Insurance Limited* [2007] NSWSC 500 at [39]

Ultimately the Court of Appeal held that the term 'costs of the proceedings' in the consent orders were to be construed as including the costs of mediation.

Subsequent application

Arnold v Minister Administering the Water Management Act 2000 (No 4) cited *Wieland* as authority for the proposition that the costs of proceedings generally include the costs of court ordered mediation. [6] The decision in *Wieland* was also applied by the Supreme Court in *Robert John Downing v WIN Television (NSW) Pty Ltd (No 4)* with the result that costs of a court ordered mediation were determined to be within the plaintiff's costs. [7]

The decision in *Wieland* was later referred to and applied by Barrett JA in the Court of Appeal's consideration of s 46(1) of the *Civil Procedure Act 2005* in the case of *Wende v Horwath (NSW) Pty Ltd*.[8]

The decision of the Land and Environment Court in *Hurstville City Council v Jacobs & Anor (No 4)* determined mediation costs to be part of the costs of the proceedings, although the judge did not expressly state whether the relevant mediation had been court ordered. [9] Similarly, in *Sedgwick v Varzonek (No. 3)* Slattery J interpreted the effect of *Wieland* broadly and stated that s 28 of the *Civil Procedure Act 2005* should be read in light of *Wieland* with the effect that mediation costs are recoverable. [10] He went on to say that it 'would be rare indeed that a court could say that the costs of mediation were unreasonably incurred, unless they were excessive in amount'.[11]

What this means for practitioners

In circumstances where proceedings are on foot and there is no order for mediation (as is commonly the case), there is still some uncertainty as to whether or not costs of a mediation will be considered costs of the proceedings. This is particularly the case if the parties to the mediation agreement have failed to direct their attention to the issue and the mediation agreement does not deal with the matter of costs in the event that parties do not reach an agreement at mediation.

It is therefore important that when preparing for mediation lawyers turn their mind to the question of whether the costs of the mediation are recoverable from an unsuccessful party in the event that litigation continues after the conclusion of the mediation and that the parties reach an agreement on this, to be included in the mediation agreement.

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[5] *Newcastle City Council v Paul Wieland* [2009] NSWCA 113 at [41].
[6] [2009] NSWLEC 87.
[7] [2011] NSWSC 1257.
[8] [2014] NSWCA 170.
[9] [2015] NSWLEC 208.
[10] [2015] NSWSC 1982.
[11] [2015] NSWSC 1982 at [28].