



The New South Wales Bar Association

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THE ETHICAL LIMITS OF ADVOCACY IN MEDIATION

by

Robert Angyal S.C.

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A. COMMUNICATING DIRECTLY WITH THE OPPOSING CLIENT

- 1 One ethical constraint that notably is absent at a mediation is the prohibition on communicating directly with the opposing client that is imposed by the advocacy rules.
- 2 The *Advocacy Rules* prohibit an advocate from dealing directly with an opponent's client¹. The rule does not apply when the opponent has previously consented².
- 3 Where a lawyer is present at a mediation with his or her client and the parties and their lawyers take part in a joint meeting with the mediator, no doubt it is inferred that the lawyer has consented to the opposing lawyer dealing directly with the client. This gives a lawyer representing a client at mediation the opportunity to employ advocacy against the opposing client.

B. RESTRAINTS ARISING FROM THE AGREEMENT TO MEDIATE

- 4 The conduct of a mediation typically is governed by an agreement to mediate. The mediator may by the agreement to mediate attempt to constrain the role of lawyers representing parties at the mediation. For example, Sir Laurence Street incorporates in his standard mediation agreement an acknowledgment by the parties that they will behave in accordance with an attached protocol. The protocol provides that “[I]legal advisers are not present as advocates ... A legal adviser who does not understand and observe this is a direct impediment to the mediation process”³.
- 5 The agreement to mediate usually is negotiable. Advise your client not to agree to restraints that impede your ability to be an effective advocate on their behalf.

C. RESTRAINTS ARISING FROM THE AUSTRALIAN CONSUMER LAW

- 6 There are several constraints on advocacy at mediation that apply independently of the agreement to mediate. They cannot be excluded. Prominent among them is the restraint on engaging in misleading or deceptive conduct, or conduct that may mislead or deceive.

¹ *The New South Wales Barristers' Rules*, Rule 54. The same rules apply to solicitors acting as advocates: *Rule 23 - Advocacy Rules* forms part of the *Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules)*.

² Rule 54(a)

³ See “*Representation at Commercial Mediations*”, (1992) 3 ADJR 255.

The prohibition on misleading or deceptive conduct applies during a mediation

- 7 Lawyers may think that the confidentiality and “*without prejudice*” character of mediations mean that, during a mediation, they are not subject to the prohibition on misleading or deceptive conduct in s. 18 of the *Australian Consumer Law* (formerly s. 52 of the *Trade Practices Act 1974* and the equivalent sections of the *Fair Trading Acts*). This belief is incorrect.
- 8 The prohibition on misleading and deceptive conduct applies during a mediation, despite its confidentiality and despite the fact that the parties are negotiating “*without prejudice*”. In *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd*⁴, the applicant claimed that, during “*without prejudice*” negotiations, the respondent had breached s. 52 by engaging in misleading and deceptive conduct. The applicant subpoenaed notes made at the meeting. The respondent applied to have the subpoena set aside.
- 9 Dismissing the application to set aside the subpoenas, Hill J held:
- “The public policy to be found in Part V of the Trade Practices Act is not to be rendered nugatory by permitting a party to hide behind the fact that his or her conduct, which is misleading or deceptive conduct, occurred during the course of ‘without prejudice’ negotiations. A party can not, with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of ‘without prejudice’ negotiations.”*⁵
- 10 There are two levels of confidentiality within a mediation. Joint sessions attended by the parties, their lawyers and the mediator are confidential to those attending, as against the rest of the world. When the mediator meets privately with a party and its lawyer, the meeting also is confidential with respect to the other participants in the mediation. The usual rule is that the mediator may not disclose to the other participants any information he or she is given, except with the prior permission of the person who gives the information to the mediator.
- 11 Consistently with *Quad Consulting*, the prohibition on misleading or deceptive conduct must apply not only in joint sessions during a mediation, but also during the private sessions. There is a good reason for this: Particularly if the mediator is an evaluative mediator, information given to the mediator in a private session

⁴ *Quad Consulting Pty Limited v David R Bleakley & Associates Pty Limited* (1990 - 1991) 98 ALR 659

⁵ *Id.* at 666

may influence the mediator's evaluation of the case and, as a result, influence the outcome of the mediation.

- 12 Non-binding *Guidelines for Lawyers in Mediations* published by The Law Council of Australia in 2007 state: "Never mislead and be careful of puffing."⁶

Providing professional services is conduct "in trade or commerce"

- 13 Section 18 of the *Australian Consumer Law* prohibits conduct by a person in trade or commerce that is misleading, deceptive, likely to mislead or likely to deceive. The definition of "trade or commerce" states that it "includes any business or professional activity (whether or not carried on for profit)"⁷. As a matter of interpretation, the courts have held that provision of professional services for reward falls within trade or commerce.⁸

An innocent misrepresentation can constitute misleading or deceptive conduct

- 14 A lawyer who makes a statement that is misleading or deceptive may engage in misleading or deceptive conduct in breach of the section 18 of the *Australian Consumer Law*. This is the case even if the lawyer believed the statement to be true and did not intend to mislead or deceive.⁹ In this respect, the restraint in the *Australian Consumer Law* is stricter than those in the *Advocacy Rules* (discussed below), which prohibit making statements **known** by the maker to be false or misleading.

⁶ Law Council of Australia, *Guidelines for Lawyers in Mediations* (2007), comment (a) to Rule 6.2. The Guidelines are available at http://www.nswbar.asn.au/docs/professional/adr/documents/LAWCOU_NCILGUIDELINESFORLAWYERSINMEDIATIONS.pdf

⁷ *Australian Consumer Law*, s.2

⁸ *Bond Corp. Pty Limited v Theiss Contractors Pty Limited* (1987) 14 FCR 215 at 220 (French J). See S Walmsley, A. Abadee and B. Zipser, *Professional Liability in Australia* (2nd ed 2007) at ¶ 4.130.

⁹ *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1982) 149 CLR 191 at 197; *S & I Publishing Pty Limited v Australian Surf Life Saver Pty Limited* (1998) 86 FCR 354 at 362. See, in particular, the discussion below of *Legal Services Commissioner v Mullins* [2006] LPT 012.

A statement without reasonable grounds about a future matter is misleading

15 Section 4 of the *Australian Consumer Law* is partly new and is important. It provides:

- “(1) If: (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
- (b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

(2) *For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:*

- (a) a party to the proceeding; or
- (b) any other person;

the party or person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) *To avoid doubt, subsection (2) does not:*

- (a) *have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have reasonable grounds for making the representation; or*
- (b) *have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.*

(4) *Subsection (1) does not limit by implication the meaning of a reference in the Schedule to:*

- (a) a misleading representation; or
- (b) a representation that is misleading in a material particular; or
- (c) *conduct that is misleading or likely or liable to mislead; and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.”*

Subsections (1) and (2) of s. 4 formerly were s. 51A(1) and (2) of the *Trade Practices Act 1974*). Subsections (3) and (4)(c) are new.

- 16 Section 4 has the consequence that a statement about a future matter is deemed misleading unless the person making it adduces evidence that they had reasonable grounds for making it. However, even if evidence is adduced, there may not be reasonable grounds for making it. Further, the statement may be misleading even if the maker had reasonable grounds for making it. Section 4 has important consequences for a lawyer representing a client at a mediation.
- 17 If a lawyer, without instructions, tells the mediator, the opposing lawyer or their client, *"This is my client's final offer. They will not make another offer"*, the lawyer probably does not have reasonable grounds for making the representation. Variations on this representation are the statements, without instructions:
- *"This is my client's bottom line/my client's top dollar. No counter-offer will be considered."*
 - *"If your client doesn't accept this offer within X minutes, my client will terminate the mediation and serve an offer of compromise tomorrow in the same terms as the offer."*
- 16 Even if you have instructions to make statements like these, there may not be reasonable grounds for making them if, in fact, you have been told by the client that they would consider a counter-offer from the other party or would consider making a higher offer.
- 17 Accordingly, you should not make statements about future matters during a mediation without firm instructions. Most experienced negotiators do not believe statements like these anyway. For this reason, they tend to erode your and your client's credibility.
- 18 The best course, therefore, is to dissuade your client from instructing you to make such statements. Explain to your client that avoiding making statements like these not only enhances your and your client's credibility but also avoids the possibility that you both might engage in misleading or deceptive conduct.
- 19 There is nothing misleading in statements like these, if you have instructions to make them:
- *"I'm not saying that this is my client's final offer, but I can say that there's very little room left for my client to move."*
 - *"My instructions are that my client feels that he/she/it should terminate the mediation unless significant progress towards settlement is achieved very soon."*

Silence or failure to disclose can constitute misleading or deceptive conduct

- 20 The common law rule is that there is no duty to disclose material facts known to a party but not to the other party: *Behan v Obelon Pty Limited*¹⁰.
- 21 The general rule, however, does not apply if there is an obligation of full disclosure. In *Lam v Ausintel Investments Australia Pty Limited*¹¹, the New South Wales Court of Appeal unanimously said:

“Where parties are dealing at arms’ length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice.

It would normally only be if there were an obligation of full disclosure that a different result would follow. That could occur, for example, by reason of some feature of the relationship between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information.”

The first paragraph above is often quoted for the proposition that there is no obligation of disclosure in negotiations. The second paragraph, however, contains an important qualification that often is ignored. The qualification is important for the reason that, by the time parties engage in a mediation, there usually have been previous communications between them. As a result, there well may be an obligation of full disclosure.

- 22 The general rule now is subject also to the prohibition on misleading and deceptive conduct contained in s. 18 of the *Australian Consumer Law* (formerly s. 52 of the *Trade Practice Act 1974* and the corresponding sections of the *State Fair Trading Acts*). Under s. 18, silence can amount to misleading or deceptive conduct where failure to disclose is misleading or deceptive. It can also constitute professional misconduct; see the last section of this paper.

¹⁰ [1984] 2 NSWLR 637 at 639, Samuels JA (Glass JA concurring)

¹¹ (1989) 97 FLR 458 at 475, Gleeson CJ (with whom Samuels and Meagher JJA agreed)

- 23 In the leading case of *Demagogue Pty Limited v Ramensky*¹², the Full Federal Court, considered whether silence could constitute misleading or deceptive conduct under s. 52 of the *Trade Practices Act 1974 (Cwth)*. Black CJ said:

“Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.

To speak of ‘mere silence’ or of a duty of disclosure can divert attention from that primary question. Although ‘mere silence’ is a convenient way of describing some fact situations, there is in truth no such thing as ‘mere silence’ because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.”¹³

- 24 Gummow J, with whom Black CJ and Cooper J agreed, said:

“... [C]onsistently with regard to the natural meaning of the terms of s. 52, the question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. Conduct answering that description may not always involve misrepresentation ... I agree also with the remarks by French J ... :

‘[U]nless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.’¹⁴

- 25 Silence thus can constitute misleading or deceptive conduct; see, e.g. *Hardy v Your Tabs Pty Limited (in liq.)*¹⁵ and *EK Nominees Pty Limited v Woolworths Limited*¹⁶.

¹² (1992) 39 FCR 31

¹³ *Id.* at 32

¹⁴ *Id.* at 40 - 41. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 270 ALR 204; (2010) 84 ALJR 644; BC201007172 at [18] per French CJ and Kiefel J.

¹⁵ [2000] NSWCA 150

¹⁶ [2006] NSWSC 1172

- 26 Two recent Queensland disciplinary decisions provide insight into how silence while representing a client at a mediation can constitute deceptive conduct, as well as professional misconduct. In *Legal Services Commissioner v Mullins*¹⁷, the Queensland Legal Practice Tribunal found that a barrister had committed “*intentional deception*”¹⁸ and “*fraudulent deception*”¹⁹ by remaining silent at a mediation about the fact that it had recently been discovered that his client had a reduced life expectancy. And in *Legal Services Commissioner v Garrett*²⁰, the same finding was made against the barrister’s instructing solicitor.
- 27 Although *Mullins* and *Garrett* involved disciplinary proceedings, these holdings indicate that breaches of the *Australian Consumer Law* could have been found on the same facts.
- 28 Mr Mullins’ client, Mr White, had been rendered a paraplegic in a car accident. He retained solicitors to pursue a claim for compensation against the relevant insurer. Mr White’s solicitors provided the insurer with a series of reports assessing Mr White’s damages. All the damages reports were based on medical reports saying that Mr White’s life expectancy was that of a normal 48-year old, reduced by 20% because of the injuries he had sustained in the accident.²¹
- 29 Mr White’s life expectancy was highly significant in the assessment of his damages because he would require care, equipment and home modification for the rest of his life and because he claimed compensation for losing the capacity to earn income to the normal retirement age of 65.
- 30 No proceedings were commenced. The claim for compensation was made under Queensland legislation dealing with motor accident insurance.²² Under the statute, if, while a claim was pending, the claimant became aware of a significant change in his or her medical condition relevant to the claimant’s financial loss, the claimant was obliged to inform the insurer of the change within a month of discovering it.²³

¹⁷ [2006] LPT 012 (Byrne J)

¹⁸ *Id.* at [28], [30]

¹⁹ *Id.* at [31]

²⁰ [2009] LPT 12

²¹ *Legal Services Commissioner v Mullins* [2006] LPT 012 at [2] - [6]

²² *Motor Accident Insurance Act 1994 (Qld)*

²³ *Id.*, section 4(3)

- 31 A mediation of Mr White's claim was scheduled for 19 September 2003. Three days before, Mr White told Mr Mullins and his instructing solicitor that it had been discovered on 1 September 2003 that he had been diagnosed with secondary cancers in his lungs and other places throughout his body and that he was to receive chemotherapy. Mr White instructed Mr Mullins and his solicitor that he did not want to disclose the cancers unless legally he was obliged to do so and that he wanted the mediation to proceed because he wanted his claim resolved.²⁴
- 32 The barrister and solicitor thus were confronted with a tragic situation: Their client, already rendered a paraplegic by a car accident, now was very ill with cancer. Delaying the mediation might result in his dying before his claim was resolved, with the result that his claim would die with him.
- 33 Understandably, the client did not want his illness disclosed unless required by law, and he so instructed his barrister and solicitor. If the scheduled mediation proceeded, it would take place before the client was required by the legislation to inform the insurer of his illness.²⁵
- 34 Mr Mullins then provided the insurer's barrister with a document headed "*Plaintiff's Outline of Argument at Mediation*". It contained a schedule of the damages claimed by Mr White. The document said that the damages had been calculated by reference to the damages reports served earlier - which had assumed a normal life expectancy less 20%. Mr Mullins and the insurer's barrister discussed the outline. Mr Mullins told his opponent that it was based on the damages reports.²⁶
- 35 By this time, Mr Mullins believed that his client's life expectancy was likely to be reduced by his cancer. His initial reaction to being told about the cancer had been that it had to be disclosed to the insurer. After doing some research and consulting senior counsel, however, he came to the view that, as long as he did not positively mislead the insurer about Mr White's life expectancy, he would not violate any professional ethical rules.²⁷

²⁴ *Legal Services Commissioner v Mullins* [2006] LPT 012 at [7] - [10]

²⁵ Mr White became aware of his cancer on 1 September 2003. The mediation was scheduled for 19 September. Mr White was not required to inform the insurer of his illness until the end of September; see footnote 22.

²⁶ *Legal Services Commissioner v Mullins* [2006] LPT 012 at [11] - [16]

²⁷ *Id.* at [17] - [19]

- 36 Mr Mullins was experienced in personal injuries litigation. He prepared a 67-paragraph advice on whether Mr White's illness should be disclosed to the insurer before the mediation. He gave the advice to his solicitor, Mr Garrett, on the day of the mediation. He advised that he, the solicitor and the client were not obliged to disclose the illness within a month of its being discovered. He also advised they could conduct the mediation, provided that they did not make positive assertions during the mediation that the facts were different from what was known, nor make positive assertions that there were no impediments to Mr White's life expectancy.²⁸
- 37 Mr Mullins, accompanied by his solicitor, conducted the mediation on this basis. He referred to and relied on the Outline document to support Mr White's damages claim. Mr White's claim was settled at the mediation.
- 38 After Mr White died, however, the insurer discovered he had been ill at the time of the mediation and commenced proceedings to set aside the settlement and recover the settlement sum. Those proceedings were settled on confidential terms.²⁹ Disciplinary proceedings were then commenced against Mr Mullins and, later, his instructing solicitor Mr Garrett.
- 39 The Queensland Legal Practice Tribunal summarised Mr Mullins' submissions:
- "The respondent argues that his conduct in continuing to rely on the [damages] reports without disclosing the cancer facts was not tantamount to some representation that he was not aware of the facts that could deleteriously impact on longevity. His case characterises the compromise negotiations as 'commercial', conducted on a tacit common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information. There would not, it is said, have been a reasonable expectation that influential information communicated during the negotiations would not knowingly be false."*³⁰
- 40 The Tribunal rejected these submissions, describing them as "*at first blush startling*"³¹. The Tribunal relied on Advocacy Rules 21, 51 and 52, which prohibit the making of false or misleading statements and are discussed later in this paper. It found that Mr Mullins had engaged in "*intentional deception*"³² and

²⁸ *Legal Services Commission v Garrett* [2009] LPT 12 at [6]; *Legal Services Commissioner v Mullins* [2006] LPT 012 at [19] - [20]

²⁹ *Legal Services Commission v Garrett* [2009] LPT 12 at [11] - [12]; *Legal Services Commissioner v Mullins* [2006] LPT 012 at [21], [22], [32]

³⁰ *Legal Services Commissioner v Mullins* [2006] LPT 012 at [25]

³¹ *Id.* at [26]

³² *Id.* at [28], [30]

“*fraudulent deception*”³³ of the insurer and its lawyers about his client’s life expectancy. Mr Mullins was found to have committed professional misconduct, was publicly reprimanded, fined \$20,000 and ordered to pay the costs of the Legal Services Commissioner.³⁴

- 41 The solicitor, Mr Garrett, remained silent during the mediation. He was found to have committed the same professional misconduct as Mr Mullins, despite having relied on Mr Mullins’ advice, was publicly reprimanded, fined \$15,000 and ordered to pay costs.³⁵
- 42 The Tribunal thus relied on rules prohibiting making false or misleading statements to reach the conclusion that Mr Mullins had engaged in fraudulent deception. The Tribunal’s reasoning, with respect, is not fully articulated. Its reasoning appears to be:
- 42.1 Mr Mullins’ instructing solicitor had served damages reports that assumed a normal life expectancy less 20%.
- 42.2 The service of the reports created a reasonable expectation in the insurer and its lawyers that they would be told of any material change in the assumption.
- 42.3 Mr Mullins relied on the reports at the mediation by propounding a schedule of damages that was based on the reports.
- 42.4 Given the reasonable expectation of the insurer and its lawyers, Mr Mullins’ reliance on the reports, while remaining silent about his client’s decreased life expectancy, constituted a representation to the insurer and its lawyers that Mr Mullins was not aware of any material change in the assumption.
- 42.5 Mr Mullins was aware, however, that the assumption was unsafe.
- 42.6 The representation therefore was false.
- 42.7 Mr Mullins knew that the representation was false.
- 42.8 The representation was made for the purpose of inducing the insurer to rely on it.
- 42.9 The representation therefore was fraudulent.

³³ *Id.* at [31]

³⁴ *Id.* at [31] and [36]

³⁵ *Legal Services Commission v Garrett* [2009] LPT 12 at [27] and [36]

- 43 The fact that Mr Mullins believed that he, his solicitor and his client were not required by law to disclose the client's illness (and had so advised) was not regarded by the Tribunal as relevant in either disciplinary proceeding.
- 44 Given this reasoning, silence at a mediation in these circumstances could constitute misleading and deceptive conduct in breach of the *Australian Consumer Law*.
- 45 *Mullins* has been described as involving an "ethical shift" and as imposing "a new found ethical imperative".³⁶ A recent Western Australian disciplinary decision shows that *Mullins* and *Garrett* are not aberrations. In *Legal Practitioners Complaints Committee v Fleming*³⁷, a solicitor representing an estate was found to have behaved unprofessionally in negotiations towards a covenant not to challenge the will, by deliberately conveying the impression that the will was enforceable - whereas, in fact, it was an informal will. The solicitor had been instructed to keep secret the informal nature of the will.
- 46 The Tribunal in *Fleming* reasoned as follows:³⁸

"In seeking to settle a matter ... the practitioner, in some senses, gives up his 'adversary' role in favour of a 'negotiating' role. In that co-operative role it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute. If everything that a practitioner says in negotiations must be checked and verified, many of the benefits and efficiencies of a settlement will be lost or compromised.

Honesty, fairness and integrity are also of importance in such negotiations because they are conducted outside the Court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved. Outside the trial process, there is no impartial adjudicator to 'find the truth' between the opposing assertions.

Dishonesty or sharp practice by the practitioner to secure an advantage for his client might go undetected for some considerable time or for all time. A level of trust between the advisers involved is therefore essential. The fact that, in the normal course, the lawyer's improper conduct might be exposed, and the harm avoided by a 'due diligence' undertaken by the opposing lawyer, does not alter the impropriety in any respect."

³⁶ Dal Pont, *Lawyers' Professional Responsibility* (4th ed 2010), ¶ 21.50 at 485

³⁷ [2006] WASAT 352

³⁸ *Id.* at [75] - [77]

- 47 *Fleming* suggests that a lawyer representing a client at a mediation has a higher duty of disclosure than if the matter went to trial. So too does *Mullins*, where the Tribunal said³⁹:

“Supposing that no more candour was to be expected of him at this mediation than of an advocate in court, the respondent inquired of a senior colleague whether, at a trial, a plaintiff’s barrister had to lead evidence of contingencies that adversely affect the client’s claim - missing the significance of his continuing reliance on the life expectancy assumption.”

The Tribunal dismissed Mr Mullins’ inquiry as misdirected, saying that *“he posed the wrong question”*⁴⁰. Commenting on *Mullins*, the Queensland Court of Appeal said that *“[p]robity is essential to the utility of mediation as a form of alternative dispute resolution”*⁴¹.

- 48 *Mullins*, *Garrett* and *Fleming* provide a simple guide to conduct during a mediation:

- 48.1 If the other party has been provided with information that no longer is accurate, relying on that information at the mediation is misleading and deceptive conduct, as well as professional misconduct.
- 48.2 If the other party appears at the mediation to be relying on the information, not informing the other party that the information no longer is accurate also is misleading and deceptive conduct and professional misconduct.

³⁹ *Legal Services Commissioner v Mullins* [2006] LPT 012 at [34]

⁴⁰ *Id.*

⁴¹ *Legal Services Commissioner v Voll* [2008] QCA 293 per Wilson J at [67], Keane JA and Dutney J agreeing at [1] and [70]

D. RESTRAINTS ARISING FROM THE OBLIGATION TO PARTICIPATE IN “GOOD FAITH”

- 49 Where mediation is required by statute or court order, the parties may have an obligation to participate in the mediation “*in good faith*”⁴². Some agreements to mediate impose the same obligation⁴³. This obligation presumably extends to the parties’ lawyers because the parties participate in the mediation partly through their lawyers.
- 50 The Law Council of Australia’s *Guidelines for Lawyers in Mediations* require lawyers and clients to act in good faith at all times⁴⁴. The Law Society of New South Wales requires a solicitor representing a client at mediation to “*act in good faith and advise their client of the obligations to act in good faith*”⁴⁵.

A subjective test of “good faith”?

- 51 The content of the obligation to negotiate in good faith was recently considered in depth by the New South Wales Court of Appeal in *United Group Rail Services Limited v. Rail Corporation New South Wales*.⁴⁶ The case raises the important and difficult issue of whether there is “*an objective yardstick by which to measure the good faith or otherwise of a negotiating party*”⁴⁷.

⁴² See, for example, *Uniform Civil Procedure Act 2005 (NSW)*, section 27; *Farm Debt Mediation Act 1994 (NSW)*, sections 11(1)(c)(iii) and 11 (2)(a); *Dust Diseases Tribunal Regulation 2001 (NSW)*, sections 27(1) and 31(2)

⁴³ See, for example, Law Society of New South Wales, “*Model Clause Making Mediation Mandatory*”, clause 3.5.2 (adopted 18 October 2006) at <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf> at page 30.

⁴⁴ *Supra*, note 6, Rule 2.2

⁴⁵ Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation*, Rule 5.3. The rule appears at page 17 of the *Mediation and Evaluation Information Kit* referred to in the previous footnote. The NSW Bar Association has not issued corresponding standards for barristers.

⁴⁶ [2009] NSWCA 177, 74 NSWLR 618

⁴⁷ *Id.* at [77]

52 Allsop P, with whom Ipp and Macfarlan JJA agreed, held that there was such a yardstick. The President said:

“[73] ... *An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such.* ... *It is sufficient to say that the standard required by the notion of genuineness and good faith within a process of otherwise tactical and self-interested behaviour (negotiation) is rooted in the honest and genuine views of the party about their existing bargain and the controversy that has arisen in connection with it*”

[74] ... *It may well be that it is difficult, in any given case, to conclude that a party has not undertaken an honest and genuine attempt to settle a dispute exhibiting a fidelity to the existing bargain. In other cases, however, such a conclusion might be blindingly obvious. Uncertainty of proof, however, does not mean that this is not a real obligation with real content.*”

(emphases added)

53 With respect, applying the test of good faith articulated by *United Group Rail Services* results in some serious difficulties:

- How can the Court know what the “*honest and genuine assessment of rights and obligations*” of each party was?
- How can the Court know whether each party negotiated by reference to her/his/its honest and genuine assessment of rights and obligations?

50 A Court usually determines whether a party has performed or breached a contract by reference to the party’s behaviour, not by reference to the party’s beliefs. What if a party honestly and genuinely held a view of the bargain and of the controversy that, assessed by an objective standard, was unreasonable and negotiated by reference to that unreasonable view?

51 It may be that paragraph [74] of *United Group Rail Services* is an admission that the Court cannot look into the parties’ minds and thus may not be able to determine whether they have undertaken “*an honest and genuine attempt to settle a dispute exhibiting a fidelity to the existing bargain*”.

An objective test of “good faith”?

- 52 Earlier decisions applying the test of “good faith” in the context of negotiations were based on the conduct of the parties, not on their beliefs.⁴⁸ For example, in *State Bank of New South Wales v Freeman*⁴⁹, the New South Wales Supreme Court determined that the Bank acted in good faith during a farm debt mediation by considering its conduct:

“An undertaking to mediate in good faith no doubt connotes a willingness on the part of a party to consider such options for resolution of the dispute as are propounded by the mediator or the opposing party; but it does not appear to me that an inference of lack of good faith can be drawn from the adoption of a strong position at the outset and a reluctance to move very far in the direction of compromise, without more.

The fact is in the present case, that the plaintiff [Bank] through its representative at the mediation, was prepared to enter into an agreement involving the partial sacrifice of its legal rights in exchange for a new arrangement which might be regarded by an objective observer as not more disadvantageous to the farmer than the possible outcome following strict insistence by the creditor upon its legal rights. That is to say, the heads of agreement in fact reached ... did represent some compromise by the plaintiff of its strict legal rights in the matter. In those circumstances, it does not appear to me that there is any warrant in the material before this court for a suggestion that the plaintiff was not at all times during the relevant three month period attempting to mediate in good faith.”⁵⁰

⁴⁸ The authorities are discussed in R. Angyal, “Enforceability of agreements to mediate: Seventeen years after Hooper Bailie” (2009) 83 *Australian Law Journal* 299 at 302 - 303 and in R. Angyal, “The enforceability of agreements to mediate” in G. Raftesath & S. Thaler (eds), *Cases for Mediation* (Law Book Co./LEADR 1999) at 9.

⁴⁹ Unreported, Supreme Court of New South Wales, Badgery-Parker J, 31 January 1996, BC9607062. See also *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 257 per Gleeson CJ.

⁵⁰ BC9607062 at 19-20

53 In *Western Australia v Taylor*⁵¹, the National Native Title Tribunal listed 18 criteria for determining whether a government had negotiated in good faith about native title. Criteria indicating lack of good faith included:

- Sending negotiators without authority to do more than argue or listen.
- Shifting position just as agreement seemed in sight.
- Adopting a rigid non-negotiable position.
- Failure to make counter-proposals.
- Refusal to sign a written agreement in respect of the negotiation process.
- Failure to do what a reasonable person would do in the circumstances.

54 Very recently, in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*,⁵² Allsop P seems to have emphasised the objectively ascertainable nature of good faith:

[12] The usual content of the obligation of good faith ... is as follows:

- (a) obligations to act honestly and with a fidelity to the bargain;*
- (b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;*
- (c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.*

[13] None of these obligations requires the interests of a party to be subordinated to those of the other. It is good faith or fair dealing between arm's length commercial parties by reference to the bargain and its terms that is called for.

⁵¹ (1996) 134 FLR 211 at 224-225 (National Native Title Tribunal, Member Sumner)

⁵² [2010] NSWCA 268

[14] *It is important to recognise that these obligations must be assessed and interpreted in the light of the bargain itself and its contractual terms. Those terms, however, must be assessed and interpreted in the light of the presence of the obligation of good faith, here pursuant to an express clause.*” (references omitted)

55 It is likely that we have not heard the last word on this issue.

E. RESTRAINTS ARISING FROM THE ADVOCACY RULES

56 The Advocacy Rules also impose restraints on advocacy in mediation. Breach of the rules can constitute unsatisfactory professional conduct or professional misconduct.⁵³ Compliance with the rules provides a defence to a charge of professional misconduct.⁵⁴

Rules 21 and 22

57 Rules 21 and 22 of the *Rules* provide:

“21 *A barrister must not knowingly make a misleading statement to a court on any matter.*

22 *A barrister must take all necessary steps to correct any misleading statement unknowingly made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.*”

58 By force of Rule 15, “*court*”:

*“means any body described as such and all other judicial tribunals and ... all statutory tribunals and ... all statutory of Parliamentary investigations and inquiries, Royal Commissions, the Independent Commission Against Corruption, arbitrations and **mediations**.”* (emphasis added)

59 Rules 21 and 22 apparently apply to all statements made by a lawyer during a mediation.

⁵³ See *Legal Profession Act 2004 (NSW)*, s. 488(1)(a).

⁵⁴ See Dalpont, *Lawyers’ Professional Responsibility* (4th ed 2010) ¶23.85 at n. 99.

Rules 51 - 53

60 Rules 51 - 53 provide:

"51 A barrister must not knowingly make a false statement to the opponent in relation to the case * (including its compromise).

* see Fair Trading Act, 1987 (NSW) sections 4 and 42

52 A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.

53 A barrister will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the barrister by the opponent."

(The footnote forms part of rule 51.)

61 Rules 51 - 53 apply to statements made to an opponent during attempts to settle a case, whether during a mediation or not.

62 Rules 21 - 22 impose a higher standard of conduct than Rules 51 - 53 because Rules 21 - 22 prohibit making misleading statements, whereas Rules 51 - 53 only prohibit making false statements.

Section 18 of the Australian Consumer Law and Mullins revisited

63 The prohibition against making misleading statements contained in Rules 21 - 22 presumably has the same content as s. 18 of the *Australian Consumer Law*, which is discussed in part C of this paper.

F. CONCLUSION

64 There are very significant restraints on your conduct when representing a client at mediation. The most far-reaching restraints stem from the prohibition of misleading and deceptive conduct in the *Australian Consumer Law* and the *Advocacy Rules*.

65 *Mullins* and *Fleming* suggest that there may be a higher duty of frankness at a mediation than at trial, where the adversarial process is relied on to reveal the truth.

Robert Angyal S.C.

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