

Mediation and incapacity: whether an agreement should be set aside

Claire Roberts reports on *Macura v Sarasevic* [2019] NSWSC 1409

Ward CJ in *Eq* has considered whether a settlement agreement reached during a mediation should be set aside in circumstances where one party claimed to have been under an incapacity. In concluding that the agreement in this case should stand, her Honour provided guidance in cases required to examine similar questions.

Claim

The dispute arose following the death of an archpriest in the Serbian Orthodox Church. The deceased died in his nineties having never married and with no living children, leaving behind an estate said to be worth in excess of \$10 million. He did not leave money to the (male) plaintiff, or a second unrelated (female) claimant: both those individuals claimed to have been in a *de facto*-type relationship with him, and therefore entitled to funds from the estate. The plaintiff also claimed, in the alternative, to have been given a testamentary gift of property.

The parties attended a mediation on 20 March 2018 at which the plaintiff agreed to drop his claim in exchange for \$100,000, inclusive of legal costs of around \$70,000. During the following week, the plaintiff appointed a new solicitor, and he informed Hallen J at a directions hearing on 27 March 2018 that he believed he had lacked capacity to enter into the agreement. The stated reasons included that he suffered from two forms of cancer – the treatment for which caused side effects such as dizziness and vomiting; suffered post-traumatic stress-disorder following service in Vietnam; and was experiencing grief-related symptoms following the death of the deceased.

A tutor was appointed for the plaintiff on 18 April 2019. Ward CJ in *Eq* concluded that a tutor should be appointed ‘on the basis of the evidence that [the plaintiff] had a persistent delusion as to his Vietnam war service that made him incapable of providing proper instructions in relation to the conduct of the proceedings going forward... [This] conclusion involved no finding as to [the plaintiff’s] capacity to give instructions in relation to the proceedings at any earlier time’ (at [45], original emphasis). Her Honour later confirmed that the ‘issue at that stage was not an incapacity to provide instructions *per se*’ ([222]).



Whether the plaintiff lacked capacity

The executors raised factual questions about the nature of the cancer treatment being received by the plaintiff, and emphasised that the plaintiff, in fact, had never served in Vietnam. Witnesses, including the mediator present on 20 March 2018, gave evidence that the plaintiff had shown no obvious signs of physical illness.

Her Honour noted that the test for capacity was ‘issue specific’ and to be tested by reference to the particular transaction or conduct in which the person proposed to engage. Here, the relevant transaction was the settlement of legal proceedings by entering into or signing the short minutes (at [207], [208]). Whether a person has ‘capacity to give sufficient instructions must be examined against the facts and subject matter of the particular litigation and the issues involved in that litigation’ ([211], citing the decision in *Dalle-Molle v Manos* [2004] SASC 102). The test would be higher in circumstances where a person was unrepresented (at [213], citing *Murphy v Doman* [2003] NSWCA 249). The rationality of decisions that may be made was a relevant, but not determinative, consideration ([214]).

Her Honour indicated that she was not satisfied that, at the time of the mediation, evidence showed that the plaintiff was unable to understand information carefully explained to him or to give proper instructions. Ultimately, however, whether the plaintiff had actually been under an incapacity did not need to be resolved for the reason referred to below.

Executors’ knowledge – actual and/or constructive

The determinative issue in the case was whether the executors knew that the plaintiff

had been under an incapacity at the time of the mediation.

Ward CJ in *Eq* noted that there has been debate about whether actual or constructive knowledge of incapacity was required and said that while ‘the weight of authority favours the knowledge that actual knowledge is required’ ([226]), the issue remains live. Her Honour mentioned a concern raised by the authors of *Cheshire & Fifoot, Law of Contract* that to treat only actual knowledge of incapacity as sufficient may not be consistent with the approach taken in unconscionability cases (at [233], citing [17.53] of the 11th edition).

The executors did not have actual knowledge of incapacity. Even constructive knowledge could not be found – at its highest, the executors were on notice that the plaintiff had a serious illness which would eventually prove terminal. Even if the plaintiff had exhibited signs of physical illness – which was not apparent on the evidence – this would not have, in her Honour’s opinion ‘put the executors on notice of a mental incapacity. Someone can be physically ill ... but still capable of providing instructions.’ ([235]).

Fairness, consent, and costs

Her Honour commented briefly on the plaintiff’s complaints that the settlement agreement was unfair to him, and had been ‘foisted upon him by his Counsel’ (at [236]). Though the merits of that claim could not be assessed at that stage, there were many factual difficulties that were likely to have attended the plaintiff’s case. Whether counsel had acted appropriately was an entirely separate issue for which the executors were not responsible. However, the plaintiff’s allegation was ‘unsubstantiated by any independent evidence... [and] inconsistent with the professional obligations of his Counsel and the fact that the experienced mediator appears not to have had any such concerns’ (at [236]).

Costs were awarded against the plaintiff. Further, his tutor (who ‘presumably gave the instructions that led to the hearing being prolonged’: [242]) was ordered to indemnify the defendants for any costs payable by the plaintiff, that remained unpaid, from the date of the tutor’s appointment. **BN**