



**Common Law Division  
Supreme Court  
New South Wales**

Case Name: **Murphy v State of NSW**

Medium Neutral Citation: [2021] NSWSC 927

Hearing Date(s): 26 July 2021

Date of Orders: 30 July 2021

Date of Decision: 30 July 2021

Jurisdiction: Common Law

Before: Harrison J

Decision: Stand over the motion to the hearing of the principal proceedings, with costs of the motion reserved to the trial judge.

Catchwords: COSTS – costs of mediation – whether defendant’s alleged failure to forewarn plaintiff’s legal representatives of its position in mediation would if proven contravene s 27 of Civil Procedure Act and justify that defendant pay costs of meditation – whether portions of affidavits sworn on behalf of plaintiff and his solicitor about the circumstances surrounding the mediation offend terms of s 30 of Civil Procedure Act – whether there is insufficient evidence that the defendant failed to participate in mediation in good faith – plaintiff provided opportunity to adduce additional evidence during hearing of principal proceedings with costs reserved to trial judge

Legislation Cited: *Civil Procedure Act* 2005 (NSW) ss 27, 30

Category: Procedural rulings

Parties: Liam Murphy (Plaintiff)  
State of New South Wales (Defendant)

Representation: Counsel:  
J Sheller SC (Plaintiff)  
M Hutchings (Defendant)

Solicitors:  
Greg Walsh & Co Solicitors (Plaintiff)  
Sparke Helmore Lawyers (Defendant)

File Number(s): 2019/376155

Publication Restriction: Nil

## JUDGMENT

1 **HIS HONOUR:** By his statement of claim filed on 29 November 2019, Liam Murphy claims damages from the State of New South Wales for wrongful arrest, false imprisonment and malicious prosecution. It is unnecessary for present purposes to include the particulars of Mr Murphy's allegations in these reasons.

2 On 4 March 2021, I ordered the parties to participate in mediation. In accordance with my directions, a mediation was scheduled to take place before Mr Richard Seton SC on 15 July 2021. The mediation commenced at 10.07am and concluded at 10.17am. It was unsuccessful. In the events that occurred, Mr Murphy now seeks orders in accordance with his notice of motion filed the following day that the costs thrown away in the circumstances be paid by the State forthwith.

3 In support of that application, Mr Murphy sought to read two affidavits, one sworn by him on 20 July 2021 and another sworn by his solicitor, Gregory Walsh on 16 July 2021. The State has objected to large portions of the affidavits upon which he relies upon the basis that they offend the terms of s 30 of the *Civil Procedure Act 2005*. That section provides as follows:

(1) In this section, "mediation session" includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

(2) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to--

(a) a mediation session, or

(b) a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged.

(3) The privilege conferred by subsection (2) extends only to a publication made--

(a) at a mediation session, or

(b) in a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged, or

(c) in circumstances referred to in section 31.

(4) Subject to section 29 (2)--

(a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and

(b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.

(5) Subsection (4) does not apply with respect to any evidence or document--

(a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or

(b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in section 31 (c).

4 The State's objection to Mr Walsh's affidavit included objection to the following paragraphs:

"16 At about 9.45am [on 15 July 2021], I received a call on my mobile telephone. The caller was Mr Michael Spartalis of counsel who was appearing on behalf of the defendant in the mediation...

17 Mr Spartalis then said to me words to the following effect, 'I'm very sorry to ring you, Greg, but I've just found out that we have no money. There's no point in proceeding with the mediation.'

18 I was somewhat surprised by this...I said to Mr Spartalis words to the following effect, 'look, this has taken me by surprise. This should be disclosed to the mediator. The mediation has, as you know, been fully prepared on behalf of the plaintiff. I am concerned that it has just been a waste of time'."

5 Having regard to the definition of "mediation session", it seems to me that these paragraphs would not be admissible by reason of s 30(4)(a) of the Act.

6 However, Mr Murphy maintains that, even without the evidence to which objection is taken, it is reasonably apparent that the State of New South Wales must have decided upon its approach to the mediation well in advance of 15 July 2021. That State has read no evidence on this application to suggest otherwise. Mr Murphy therefore contends that an inference arises that the State must have been in a position much earlier to advise Mr Walsh of this. If it had

done so, Mr Walsh would not have proceeded to prepare for the mediation in the way that he did, and the unnecessary costs generated by his work would not have been incurred. Mr Murphy contends that these costs have been wholly wasted and that they should be paid by the State. Mr Murphy submits that the State's failure to forewarn Mr Walsh of its position demonstrates that it did not participate in the mediation in good faith.

7 Section 27 of the Act is in these terms:

**27 Duty of parties to participate**

It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.

8 As a matter of generality, it could not in my opinion be a breach of the duty of good faith for a party to attend at a mediation and refuse to make or to consider any offer of settlement other than that the opposing party capitulate entirely and pay costs. For example, if the opposing party's case, objectively assessed, were entirely without merit and hopeless, it could hardly be a requirement of the good faith provision that a party must agree to pay money, or to make some other contribution to a meritless compromise, if it were not justified on any basis, even allowing for the vicissitudes of litigation. It cannot without more amount to an absence of good faith for a party to seek an adjudicated vindication of its position in litigation where it believes or has been advised on reasonable grounds that it should do so.

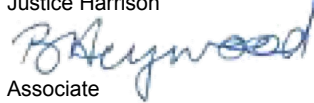
9 In the present case it appears from a cursory perusal of the pleadings and the evidentiary statements that have been filed that the State of New South Wales considers that Mr Murphy was arrested, detained and prosecuted upon the basis of a series of complaints of sexual assault made against him and that his claim for damages is doomed to fail. The State would not without more, on pain of falling foul of s 27, be required to resile from that view at a mediation. By the same token, there would be nothing to prevent the State from agreeing to settle the proceedings at a mediation upon what is usually referred to as "a commercial basis" if it chose to do so, notwithstanding its view about the probable outcome if the matter went to trial.

- 10 Having regard to my rejection of the evidence upon which Mr Murphy sought to rely, I am unfortunately left to operate upon unestablished facts or upon unproven assumptions about what took place in the mediation session. It is not possible in that constrained situation to express a view, let alone find, that the State of New South Wales failed to participate in the mediation in good faith.
- 11 However, Mr Murphy's case does not stand or fall by reference only to that obligation. It would not in my view be controversial to expect that one party to litigation should not be permitted to allow the other to incur costs on the basis of an assumed set of facts that the first party knew to be unfounded. For example, if it were hypothetically the position in the present case that the State of New South Wales, as a model litigant, had formed the view that it would never pay money to Mr Murphy unless ordered by a court to do so, and that this view was formed well in advance of a scheduled mediation, it would in my opinion be inappropriate to say the least, and probably misleading, for the State not to make that position clear to Mr Murphy or his solicitor in a timely way, without undue delay, so that unnecessary costs in preparation for it could be avoided. I would not expect that any such view was held by the State when I ordered the parties to mediate. Mr Murphy asks me to infer that it must have been formed shortly thereafter.
- 12 Having regard to the terms of s 30(4) of the Act, the State's objection to those parts of the affidavits upon which Mr Murphy relies should be upheld. As a result, there is currently no satisfactory evidence before me of what transpired in the mediation session. Moreover, there is yet no evidence of when the State formed any concluded view about the approach it would take at the mediation: the limited material does not permit me to make a finding about why the mediation lasted for only ten minutes or why it was unsuccessful.
- 13 In the normal course of events, that would lead to a dismissal of the present application. However, in anticipation that Mr Murphy may wish to adduce additional evidence touching the question of whether the State could have communicated with his solicitor at an earlier stage concerning the likely utility

of the mediation, I will stand over the motion to the hearing of the principal proceedings, with the costs of the motion to be reserved to the trial judge.

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I certify that this and the 6 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Harrison

A handwritten signature in blue ink, appearing to read "R. Reynolds".

Associate

Date: 30 July 2021