SETTLEMENT REMORSE: WHEN WILL A COURT SET ASIDE MEDIATED CONSENT ORDERS?

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Matsen v Superannuation Complaints Tribunal [2017] FCA 765

The recent Federal Court case of *Matsen v Superannuation Complaints Tribunal [2017] FCA 765* concerned an application by Mr Matsen to set aside consent orders that had been signed by all parties following settlement being reached during a court- ordered mediation. The Court's decision reinforces the requirements that must be met if a consenting party wishes to set aside a consent order.

Factual background

In the initial proceedings, Mr Matsen appealed a decision of the Superannuation Complaints Tribunal relating to the payment of a death benefit from the superannuation fund of his deceased son. The Tribunal had ordered that the death benefit be distributed amongst Mr Matsen and two other people. Mr Matsen applied for the whole of the benefit to be paid out to him.

Mr Matsen and one of the other beneficiaries attended a court-ordered mediation in March 2016, with a Registrar of the Federal Court acting as mediator. During the course of the mediation, there was no direct contact between the mediating parties, as the mediator carried offers between them. Mr Matsen did not have legal representation during the mediation. The matter settled at the mediation, with the parties agreeing to distribute the benefit between them. Short minutes of order were signed, reflecting the agreement they had reached. The remaining parties (the third former beneficiary and the trustee of the superannuation fund) subsequently signed the short minutes of order.

In June 2016, the matter came back before the Court. Mr Matsen claimed that he no longer agreed to the short minutes of order (which had, by that time, been signed by all parties). As a result, the Court stood the matter over without making any orders.

In July 2016, the matter was again before the Court. On that date, Mr Matsen told the Court that he consented to the short minutes of order, even though he had been unwell and that influenced his decision to consent. However, there was no medical evidence to corroborate that he had been unwell. Mr Matsen also told the Court that he had "*obtained some legal counsel*" since the matter was last before the Court. On those bases, the Court made the signed orders by consent. The consent order was entered into the Court's records.

Mr Matsen's application to set aside the consent orders

In October 2016, Mr Matsen applied to the Court to set aside the consent orders made in July 2016. Mr Matsen claimed that the mediation was unfair, because he was unwell on the day and was not "up to the task" of negotiation. He was "locked in a most unsuitable room" and was in pain. He was unrepresented at the mediation, and

considered that this had also left him at a disadvantage. He felt that the mediator had pressured him to continue the process. Further, he felt it was not appropriate that there was no "face to face" contact between him and the other mediating party.

Ultimately, Mr Matsen claimed that he had only signed the short minutes of order to enable him to leave the mediation and the Federal Court building.

When can a consent order be set aside?

Justice Perry considered the relevant principles for setting aside or varying orders, being rule 39.05 of the Federal Court Rules 2011 (Cth), as well as the threshold set by the High Court in Harvey v Phillips (1956) 95 CLR 235.

Rule 39.05 lists the circumstances in which the Court can vary or set aside a consent order after it has been entered, including where there was an error arising from an accidental slip or omission, or the party in whose favour it was made in consents to changing the order. None of the circumstances applied to the present case.

The threshold in Harvey v Phillips provides that a consent order is similar to a contract: it must not be set aside unless there is some basis on which it can be said to be void, such as misrepresentation, undue influence, or mistake. A party cannot seek to have a consent order set aside merely because of a change of heart, or a perceived bad bargain.

How did the Court address the application?

Justice Perry considered the facts and found that, although the mediation may not have met Mr Matsen's expectations, there was no basis on which to set aside the consent order. Her Honour noted that it was neither unusual nor inappropriate for a mediation to have no "face to face" contact between the parties. Further, there was no medical evidence that Mr Matsen had been too unwell to consent.

Justice Perry observed that Mr Matsen's allegation of being physically detained and pressured by the Registrar was, at its highest, an argument that Mr Matsen had only settled the dispute and signed the short minutes of order under duress from the Registrar. Her Honour stressed the seriousness of this allegation, and noted that it would need to be proved to the standard of "reasonable satisfaction".

Justice Perry pointed to the "inherent unlikelihood" of the allegations, particularly given that the Registrar was an independent officer of the Court with no vested interest in the outcome of the mediation. Her Honour observed that Mr Matsen's complaints likely related to his subjective feelings given the subject-matter of the dispute, rather than the existence of any improper conduct. The Registrar's attempts to encourage Mr Matsen to resolve the issues at the mediation, rather than proceed to litigation, might have been perceived as pressuring him to consent to the orders, but they were not improper.

Ultimately, Justice Perry found that it was not necessary to determine the allegation of duress. Her Honour held that, even if Mr Matsen had felt pressured during the mediation in March, he subsequently agreed to the consent orders being made in July. He also obtained legal advice in the period following the mediation and before the consent orders were made. Mr Matsen did not allege to the contrary during the hearing of his application.

Conclusion

This decision recognises the binding nature of consent orders made by the Court after settlement during a mediation.

It clarifies that, although a mediation may not always be conducted in the way that a certain party expects, this is no basis for overturning an agreement reached during mediation and subsequently endorsed by court order. For a court to set aside consent orders after they have been entered, a party must prove that one of the circumstances provided by the relevant Court Rules applies, or that the bargain between the parties should be regarded as void or voidable.

From a mediator's perspective, the decision confirms that it is appropriate for a mediator to encourage parties to participate in a mediation process in preference to litigation, and that this will not necessarily constitute undue pressure or duress.