

CITATION: WCJ v VR [2024] NTLC 5

PARTIES: WCJ
v
VR

TITLE OF COURT: LOCAL COURT

JURISDICTION: PERSONAL VIOLENCE

FILE NO(s): 22335629

DELIVERED ON: 2 May 2024

DELIVERED AT: DARWIN

HEARING DATE(s): 12 March 2024

JUDGMENT OF: Judicial Registrar Gordon

CATCHWORDS:

Leave to admit evidence - Mediation confidentiality - Commissions of an offence - Public interest test - Leave refused

Personal Violence Orders Restraining Act 2016

Community Justice Act 2005, s34

Evidence (National Uniform Legislation) Act 2011, ss131(1), 131(2)(j)

Crown Resorts Limited v Zantran Pty Limited [2020] FCAFC 1

Kadian v Richards [2004] NSWSC 382

X (a pseudonym) v Y (a pseudonym) [2022] WADC 85

REPRESENTATION:

Counsel:

Applicant: Ms Grimster

Respondent: Ms Martin

Solicitors:

Worker: Piper Grimster Jones

Employer: Gabrielle Martin Legal

Judgment category classification: B

Judgment ID number: [2024] NTLC 5

Number of paragraphs: 49

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22335629

BETWEEN:

WCJ
Applicant

AND:

VR
Defendant

REASONS FOR DECISION
(Delivered 2 May 2024)

Reasons for Decision

1. The substantive proceedings in this matter concern an application for a Personal Violence Restraining Order. On 13 February 2024 the Applicant sought leave to rely upon an Affidavit which contained evidence of a statement which was made during a mediation between the parties ordered pursuant to s14 of the *Personal Violence Orders Restraining Act 2016* ('the PVRO Act').
2. Directions were made for the filing of submissions and oral argument was heard on 12 March 2024. On this date I declined to grant leave for the Applicant to rely on the without prejudice statements made at mediation and indicated that, given the unusual nature of the application, and to ensure the parties fully understood the reasons for the determination, written reasons would be available at a later date. These are those reasons.
3. The PVRO Act requires at section 14 (subject to some limited exceptions), that the Court must refer parties to an application for a personal violence restraining order to the Community Justice Centre (CJC) for mediation. The parties in the current matter were so referred on 21 November 2023.
4. The Community Justice Centre subsequently reported to the Court that the parties attended a mediation on 20 December 2023, but were unable to reach agreement. The parties returned to Court and the Applicant made an application for an Interim Personal Violence Restraining Order, based in part, on the events that occurred at the mediation.

5. The Respondent opposed both leave to introduce the evidence of comments made at mediation and the Interim Personal Violence Restraining Order.
6. Prior to participating in the CJC mediation the parties are given an 'Agreement to Mediate' form¹ by the CJC which sets out various ground rules for participation in the mediation, including at items 7, 8 and 9 the following conditions:

"7. We understand that mediation is a confidential process and that the mediator will not discuss the mediation with anyone outside of the CJC, unless we give permission.

8. We understand that we cannot use the information shared in mediation as evidence in court. This includes any statement, documents, records or any other thing made for the mediation session.

9. Unless all of the participants agree:

** We will not share any information discussed in this mediation with anyone who is not present*

** We will not record, share, publish or produce any information, documents or other thing from this mediation"*

7. Further, the Community Justice Act 2005 provides, at s34:

"Protection of Information

The following are not admissible as evidence in any proceedings before a court, tribunal or any other body that has the powers to take evidence on oath:

- (a) A statement, documents or any other thing made for a mediation session;*
- (b) A record of the statement, document or thing."*

8. The Applicant argues that 'statement document or thing' referred to in s34 should be interpreted to *exclude* verbal comments exchanged by participants in a mediation.

9. I cannot accept this submission.

10. The Collins online dictionary defines statement as "*something that you say or write which gives information in a formal or definite way*"² while Merriam-Webster provides:

"1 : something stated: such as

a : a single declaration or remark...

b : a report of facts or opinions

*2 : the act or process of stating or presenting orally or on paper"*³

¹ Annexure "GLM-02" of the Affidavit of Gabrielle Lovegrove Martin filed 27 February 2023.

² <https://www.collinsdictionary.com/dictionary/english/statement>.

³ <https://www.merriam-webster.com/dictionary/statement>.

11. The ordinary interpretation, in my view, which is supported by online dictionary definitions, is that a statement can be made both orally and in writing. Noting 'statement' is not defined in the *PVRO Act*, there is no indicia or rationale for the *Community Justice Act 2005* to adopt an alternate definition and exclude oral statements from the confidentially afforded by s34.
12. Indeed, it is improbable, in my view, that a written summary of facts or outline of argument, which a participant may reduce to writing as an aid for their participation in mediation, remains confidential pursuant to s43, but when spoken to during the course of the mediation, the oral statements become admissible while the documentary material remains protected.
13. It should be noted that both parties, in written submissions⁴, referenced the operation of Rule 32.11 of the *Local Court (Civil Jurisdiction) Rules 1998* which pertains to confidentiality in relation to Mediation Conferences ordered pursuant to Rule 32.07. I note however that this personal violence mediation is not a mediation conference pursuant to the Rules⁵ but rather a legislated mediation prescribed by the *PRVO Act*.
14. I have not, therefore, dealt with the parties submissions in relation to Rule 32.11 and ultimately, in my view nothing turns on this.
15. The Applicant relies however, on other legislative mechanisms and interstate precedents to argue that, even if s34 of the *Community Justice Act 2005* captures oral statements in its confidentiality provisions, the Court should nonetheless grant leave for the Applicants evidence to be admitted.
16. The Applicant submits that the *Evidence (National Uniform Legislation) Act 2011* could be invoked to allow the evidence relating to the mediation to be adduced. Section 131(1) excludes the admission of evidence of settlement negotiations, while subsection 2 provides for exceptions to the exclusion.
17. Notably s131(2)(j) overrides the exclusion provided for in subsection (1) where:

"the communication was made, or the document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty"
18. Here, the Applicant submits that the statements made by the Respondent during the course of the mediation may constitute the offence of stalking under s189 of the *Criminal Code Act (NT) 1983*.⁶ The Applicant also submitted that a 'myriad' of civil liabilities may be available, although no specific example was identified.

⁴ "Outline of Submissions – Applicant/Protected Person" filed 21 February 2024 and "Defendant's Outline of Submissions" filed 27 February 2024.

⁵ See for instance R32.07(2) which provides who may hold a mediation conference, noting CJC does not meet this criteria.

⁶ Paragraph 19 "Outline of Submissions – Applicant/Protected Person" filed 21 February 2024.

19. The Applicant submits, and I accept, that they need not establish that a finding of guilt, beyond reasonable doubt, or other guaranteed success in any claim or prosecution must be shown, once they have identified the potential offence or liability to civil penalty.
20. Nonetheless, s131(3) states the Court must be satisfied *on reasonable grounds* that firstly, the fraud offence or act was committed and further that the communication was made in furtherance of the commission of the fraud, offence or act.
21. The evidence the Applicant seeks to admit relates, broadly, to the Respondent's knowledge of the Applicant's motor vehicle, a comment about attending the Applicant's workplace and an explanation regarding a message sent to the Applicant's beautician.⁷
22. I note that the Applicant has already entered into evidence the following statements:
- a. *"co worker has told me the offender has photos of my car and office"*⁸
 - b. *"...she is not going to stop and she has stated in the message she (sic) not the only [illegible] at... [place of work] who isn't happy with me... I have a right to work at my office in peace."*⁹
 - c. *"Defendant is continuing to harass me and is now messaging a business I go to. She is a Beautician"*¹⁰
23. The Applicant notes that the process of granting leave to file the further Affidavit, does not require an assessment of the evidence therein. Testing that evidence, if admitted, will happen in the usual course as part of any final hearing.
24. Whilst I accept this premise generally, in order to be satisfied on reasonable grounds that the offence or act was committed and the communications were in furtherance of the commission of an offence, so to admit the evidence under s131(2)(j) of the *Evidence (National Uniform Legislation) Act 2011*, I must undertake some exercise in assessing the veracity of the evidence.
25. In the absence of same I cannot reach a position where I have formed a view on reasonable grounds.
26. In doing so I make two observations. Firstly, each of the statements complained of in paragraph 19 above appear to be responsive in nature to the allegations made against the Respondent in the proceedings as set out in the Applicant's Affidavit at paragraph 22 above.
27. On balance, I am minded to find that the comments are the Respondent's explanations of the events which preceded the personal violence restraining order application. The

⁷ Paragraph 2 of Annexure AG-1 of the Affidavit of Alanna Mariah Florence Grimster filed 21 February 2023.

⁸ Affidavit of WCJ filed 25 October 2023 at page 1.

⁹ Ibid at page 2.

¹⁰ Affidavit of WCJ filed 16 November 2023 at paragraph 1.

statements complained of are expressed in past tense, things that the Respondent did or contemplated doing, for example, 'I was going to', 'if I wanted to' and 'I messaged'.

28. The second observation is that the mediation occurred in the usual course. The parties were referred, the mediation occurred and the CJC provided the standard report noting an unsuccessful mediation. I accept the submission of the Respondent that had the behaviour of the Respondent appeared to constitute the commission of an offence such as stalking, or were even perceived, rightly or wrongly, as threatening, intimidating or untoward in the context of the matters to be discussed, the mediator is likely to have intervened or ceased the mediation.
29. Indeed the parties were on notice that any violence or threats would terminate the mediation¹¹. There is no indication any such actions were taken during the mediation and the Respondent submits there was no intervention regarding her comments or participation.
30. The Applicant submitted that nothing can be gleaned from the lack of intervention of the mediator and whilst I cannot make findings as to the mediator's view of the comments, I am satisfied that the absence of indicia that anything untoward occurred, does carry some weight.
31. I cannot be satisfied to the requisite standard, on the evidence before me that the conduct of the Respondent during the mediation constituted the furtherance of an offence or an act which would invoke s131(2)(j) and reverse the exclusion of the evidence of settlement negotiations.
32. The Applicant also referenced helpful case law including the observations of Judge Sweeney in *X (a pseudonym) v Y (a pseudonym)*¹² that "*rather, something said or done or a communication for an ulterior and criminal purpose, which would therefore not attract the protection of the section*"¹³, that being a comparable mediation confidentiality provision.
33. For the reasons set out above in relation to the *Evidence (National Uniform Legislation) Act 2011* I do not find that the statements made were for an ulterior or criminal purpose unrelated to the mediation process.
34. I should note, that I make such findings in somewhat of a vacuum, the Applicant has only briefly set out the Respondent's alleged comments and thereafter her interpretations of same. I do not have the benefit of the context or full text of the conversation in which they were uttered.
35. The Respondent declined to give evidence or elaborate on the alleged comments, in doing so upholding the confidential status of the mediation. I make no criticism of this position.

¹¹ "Defendant's Outline of Submissions" filed 27 February 2024 at paragraph 9.

¹² [2022]WADC 85.

¹³ *Ibid* at paragraph 97.

36. I infer, on the evidence available to me, they were made for the purpose of discussing / explaining the conduct alleged, not that they were indicative of planned or threatened criminal conduct.

37. The final aspect of the Applicant's application for leave to file evidence of confidential discussions is the public interest test. The Applicant's written submissions¹⁴ refer to the matter of *Crown Resorts Limited v Zantran Pty Limited*¹⁵ where Chief Justice Allsop and Justices' Lee and White considered *Kadian v Richards*¹⁶ which found:

"an obligation of confidentiality will not be enforced, or will be treated as void at law, only if it interferes adversely with the administration of justice... provided that some identifiable public interest relevant to the administration of justice... is affected by such interference"

38. The written submissions of the Applicant provide¹⁷:

"It is important that parties can talk about concerns freely and openly during mediation however, it is vital that the confidentiality is not abused to allow further violence to be perpetrated..."

There is a clear public interest in ensuring that the process, including the mandatory mediation process, does not add further trauma and distress..."

39. I accept this submission.

40. In determining this application for leave, I am not and cannot make final findings of the veracity of the evidence to be admitted. To determine however, whether it ought be admitted in the public interest to prevent an abuse of process within the sanctity of mediation, I must turn my mind to the weight and probative value of the proposed evidence.

41. In doing so, and with no disrespect to the subjective interpretations of the comments by the Applicant, I cannot on balance form a view that the allegations of purported "further violence" in this instance outweighs the public interest benefits afforded by the protection of confidentiality.

42. In order to facilitate a successful mediation, one must feel free to speak without fear or favour, including in relation to acts of alleged or actual personal violence. In order to foster forgiveness, to show insight, or to reassure a party about future conduct admissions of wrong doings may be made. A party must feel free to do so in the context of a confidential mediation.

¹⁴ "Outline of Submissions – Applicant/Protected Person" filed 21 February 2024 at paragraph 24.

¹⁵ [2020] FCAFC 1.

¹⁶ [2004] NSWSC 382.

¹⁷ "Outline of Submissions – Applicant/Protected Person" filed 21 February 2024 at paragraphs 26 – 27.

43. This is not, of course a free for all, and the trained mediators who conduct mediations for the CJC are educated and alert to any inappropriate behaviours, including covert or coercive behaviours, which are designed to cause harm.
44. It is an unfortunate reality of litigation for both court appearances and mediations for personal violence matters that some element of ongoing distress or discomfort may be experienced. This will always be managed to the Court's best ability to minimise harm, but it cannot be completely eradicated.
45. It is unfortunate that the Applicant's experience at mediation was an unsuccessful and upsetting one. However, based on the available evidence I do not find that her experience justifies a departure, on the basis of the public interest, from the usual course of maintaining confidentiality.
46. Accordingly, the application for leave to file evidence pertaining to matters said at the CJC mediation on 20 December 2023 is refused.
47. I then heard the application for an interim order and provided ex tempore reasons for declining same.
48. The matter has now been listed for hearing on 2 August 2024 and I make no further orders pertaining to the proceedings.
49. These reasons are to be published to the parties via email.
