The author reveals a narrative very different to that which had emerged from the press conference of 22 June 2004. The origins of the Bush announcement of the non-availability of the Geneva protections are connected to the Haynes/Rumsfeld memo. The Yoo/Bybee opinions turn out to be the legal advices relied upon by Rumsfeld and Haynes in approving the memo. And the proposals approved by Rumsfeld to throw out the time-honoured approach to interrogation of captured enemy personnel come, as it turns out, through a process of manipulation by the lawyers at the top of the Administration tree, and not from the ground at Guantanamo as was implied.

Professor Sands is interested in lawyers and how they behave when they take on political roles. He is interested in the way that lawyers are drawn from serving the law to subverting the rule of law. The *dramatis personae of Torture Team* give him plenty to feed his interest.

Torture Team, however, is not without its heroes. Interrogators from the military and FBI resented the subversion of their traditions and their professionalism by people who had power but knew nothing about the science of interrogation or the virtue of integrity. The legal tradition within the defense forces responded to the concerns of the professional interrogators. When Alberto Mora, General Counsel to the Navy, with the support of his colleagues and his supervisors, persisted in ringing the senior lawyers at the Department of Defence, Haynes and even Rumsfeld knew that they must buckle. And they did. The memo was rescinded and soon the cover-up, which is the subject of this book, commenced.

Torture Team is an exciting and important book. It is not surprising that the dust cover quotes a favourable review from John le Carré, himself an author of books of great excitement.

Professor Sands' book is a significant contribution to that process. Although, we frequently seem to be doomed to relive the worst experiences of our past, revisiting and analysing those experiences is worthwhile if it helps to avoid their repetition.

Torture Team makes a valuable contribution and carries a very warm recommendation from this reviewer. ■

Notes: **1** Philippe Sands is a Professor of Law and Director of the Centre on International Courts and Tribunals at University College London. See http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?sands. He is a member of Matrix Chambers in London. See http://www.matrixlaw.co.uk/WhoWeAre_Members_PhilippeSandsQC.aspx. He took silk in 2003. he practises mainly in public international law. He has been involved in cases in the English courts involving General Pinochet and detainees of Guantanamo Bay. He has also appeared before a number of international tribunals. See http://www.matrixlaw.co.uk/WhoWeAre_Members_PhilippeSandsQC_NotableCases.aspx.
2 The declaration was differential in its application but identical in its effect. Members of the Taliban had rights under the Conventions but could not access them. Members of Al Qaeda did not have any rights under the Conventions.

Stephen Keim SC *is a barrister at Higgins Chambers, Brisbane. Mr Keim SC gained fame for his defence of Dr Mohamed Haneef and shared* The Weekend Australian's *Australian of the Year for 2007 with the instructing solicitor, Peter Russo.*

MEDIATION COSTS

By Phillipa Alexander

The costs of mediation are often substantial, and recovery of such costs in the absence of a specific order is often subject to dispute. A recent decision of the NSW Court of Appeal[1] has refocused attention on this issue. Whether the costs of mediation are recoverable by a successful party in proceedings may depend not only on the nature of any agreement between the parties, but also the jurisdiction in which the proceedings are brought.

NEW SOUTH WALES

In a number of cases, the court has declined to order a successful party's costs of mediation to be paid by their opposing party. Austin J refused such an order in *Medulla v Abdel Hameed.*[2] While the mediation was not formally directed by the court, it had been supported by Austin J.

Similarly, in *Mead & Anor v Allianz Australia Insurance Ltd,*[3] an application that the defendants pay the plaintiffs' costs of mediation was unsuccessful. Formal court orders had been made by consent that the matter be referred to mediation. The parties entered into a mediation agreement, which provided that the parties were to be liable for payment of the mediator's fees in the following proportions:

> 'To be borne equally between the parties [the plaintiffs – 50% and Allianz – 50%] and if the mediation is not successful, then the plaintiffs reserve their rights to make an application at the hearing of [the proceedings], or at any relevant time thereafter, that Allianz pay the plaintiffs' costs of the mediation.'

The mediation was unsuccessful. However, the matter was settled later in the same month, when the defendant accepted an offer of compromise made by the plaintiffs, which included a provision for the defendant to pay the plaintiffs' 'costs of these proceedings'. The plaintiffs sought an order that the costs incurred by them in connection with the court-ordered mediation be costs of the plaintiffs' proceedings. Bergin J declined to construe the expression 'costs of these proceedings' as including

the costs of the mediation, and stated that 'where parties proceed to mediation on a particular basis and/or settle their differences on a particular basis it is important that the integrity of those steps are not adversely affected by a court order or declaration intruding over the top of it'. Her Honour held that any right of the plaintiffs to apply for the costs of the mediation was subsumed into, or waived by, the agreement that was reached.

The Court of Appeal reached a different conclusion in *Newcastle City Council v Paul Wieland.*[4] Partway through the trial, the parties had agreed to mediate their dispute, and Sidis DCJ made orders that the question of mediation arrangements be left to the parties. The matter did not resolve at mediation, but settled shortly thereafter. Consent orders were made in terms that the defendants pay the plaintiffs' 'costs of the proceedings'. The plaintiffs claimed the costs of mediation in their application for assessment, and the defendants disputed that they were liable for those costs. The plaintiffs sought a declaration that the order for the costs of the proceedings included the costs of the mediation. Sidis DCJ upheld the plaintiffs' claim, holding that the mediation was clearly undertaken as part of the litigation process, and varied the orders to specify that the mediation costs were payable by the defendants.

The defendants appealed against Her Honour's decision. The Court of Appeal considered the question to be one of construction and examined whether the mediation could be regarded as part of the 'proceedings'. The mediation was ordered by the Court under s26 of the *Civil Procedure Act 2005* (CPA); as it fell within the definitions in s25, it therefore attracted the provisions of Part 4 of the CPA. On this basis, Ipp JA concluded that it was not possible to contend that the mediation did not form part of the Court's 'procedures'. However, s28 of the CPA deals specifically with the costs of mediation, and provides:

> 'The costs of mediation, including the costs payable to the mediator, are payable:
> (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
> (b) in any other case, by the parties in such proportions as they may agree among themselves.'

The Court agreed with the defendants' submission that the costs of mediation are payable only if they are ordered under s28(a) or agreed under s28(b). The crux of the dispute was therefore whether the agreement between the parties to pay the costs of the proceedings included the costs of mediation.

Ipp JA considered that Sidis DCJ was correct in allowing the costs of the mediation, and that there are compelling policy reasons why mediation costs should be included in the costs of proceedings.[5] Ipp JA approved Mansfield J's statement in *Charlick Trading Pty Ltd v Australian National Railways Commission,*[6] that 'there is a substantial public interest, as well as private interest, in the resolution of disputes by negotiation or by mediation'. Mansfield J also noted that 'apart from the benefit to the parties of resolution, such an outcome saves the costs associated with the trial and releases judicial and court resources to deal with other matters'. His Honour also considered that even where a matter was not resolved by mediation, it does not follow that the processes themselves were not necessary or proper for the purpose of allowing such costs on taxation.

Hodgson JA agreed with the reasons of Ipp JA, and added that any express agreement between the parties as to how the costs of a mediation ordered under Pt 4 of the CPA are to be paid will be made under s28(b) of the CPA, unless displaced by an order under s28(a). His Honour noted that there may be cases in which a question of construction would arise as to whether an order as to payment of 'the costs of the proceedings' displaces a pre-existing agreement.[7] The example was given of a case

> 'in which a pre-existing agreement so strongly conveys that the costs of the mediation are to be treated entirely separately from other costs of the proceedings as to justify a conclusion that a later consent order (or possibly even a judge-imposed order where the judge knows of the pre-existing agreement) concerning the costs of the proceedings was not intended to include the costs of the mediation.'[8]

His Honour concluded by stating that 'if it is intended that an order for the costs of the proceedings is not to extend to the costs of a court-ordered mediation, this should be made clear in the order'.

Public policy considerations were addressed by Lloyd J in *Baulkham Hills Shire Council v Hahn.*[9] In refusing to order that the costs of mediation were included in the costs of the proceeding, reliance was made on *Innovative Agricultural Products Pty Ltd & Ors v Richard Crawshaw & Ors*[10], a Federal Court decision in which Lee J had held:

> 'I consider that unless there are unusual circumstances which require such an order, ... no order should be made that the costs of any party incurred in the conduct of mediation proceedings are to be included in the costs of the litigation. Mediation is a consensual proceeding in which the parties are encouraged to resolve or compromise their differences without subjecting themselves to the risks and the costs of a trial. It is in the public interest that parties be encouraged to undertake mediation proceedings without being concerned that additional party and party costs will be incurred if they do so.'[11]

Lloyd J held that costs of the proceedings do not encompass costs of mediation because, as a matter of policy, the court should be careful not to impede a consensual mediation or create disincentives to it. This decision is in direct contrast to Ipp JA's comments regarding public policy in *Newcastle City Council v Paul Wieland.*[12]

In addition to the CPA, several legislative provisions in NSW address the issue of the costs of mediation. The provisions variously provide that the costs of mediation are to be borne by the parties to the proceedings in such proportions as they may agree among themselves or, failing agreement, in equal shares;[13] as agreed between the parties or, failing agreement, as ordered by the Tribunal;[14] or as agreed between the parties if the claim is settled or, failing settlement, by the defendant.[15]

OTHER JURISDICTIONS

Victoria

In *Johnstone v Mansfield SC,*[16] the Victorian Civil and Administrative Tribunal held that the power to award costs relates only to the proceedings before the Tribunal. Therefore, any costs incurred before the proceedings are not considered part of the costs of a proceeding. Costs of a mediation held prior to the institution of proceedings are not recoverable, as they are not part of the Tribunal proceedings.

Legislative provisions

Several other states and territories have enacted specific legislation in relation to the costs of mediation, in which these costs are generally regarded as costs of the proceedings.

Western Australia

In Western Australia, Order 29 r3(ba) of the *Rules of the Supreme Court* (WA) provides that 'each party's costs of and incidental to a mediation conference shall be the party's costs in the cause' unless otherwise ordered or agreed to.

Queensland

Rule 351 of the *Uniform Civil Procedure Rules 2005* (Qld) provides that 'each party's costs of and incidental to an ADR process not resulting in the full settlement of the dispute between the parties are the party's costs in the dispute' unless otherwise ordered by the court.

Tasmania

Rule 523 of the *Supreme Court Rules* 2000 provides:

'(1) Unless otherwise ordered or agreed by the parties, the costs of a party of and incidental to mediation are to be that party's costs in the cause.

(2) A judge may order that a party recover costs of and incidental to mediation from another party if those costs have been unnecessarily incurred by the conduct of that other party.'

Australian Capital Territory

Section 197 of the *Civil Law (Wrongs) Act 2002* provides:

'The costs of a mediation or neutral evaluation are payable –

(a) by the parties to the proceeding, in the proportions they agree among themselves; or

(b) if a tribunal makes an order about the payment of the costs – by 1 or more of the parties, in the way stated in the order.'

Northern Territory

Rule 48.14 of the *Supreme Court Rules* provides:

'Subject to this Order, as between the parties, the costs of and incidental to attending a directions hearing, settlement conference or mediation are to be costs in the proceeding unless the Court orders otherwise.'

CONCLUSION

Even where a plaintiff's costs of mediation are *prima facie* recoverable as costs of the proceedings in accordance with a relevant legislative provision or the general law, such entitlement can be displaced by agreement or order. Particularly where no specific legislative provision exists, such as in NSW, it is important to ensure that the terms of the mediation agreement deal specifically with all costs incurred in connection with the mediation.

In many instances reviewed by the author, no mediation agreement has been entered into, or the mediation agreement deals only with the costs payable to the mediator. The terms of the mediation agreement should be carefully drafted so as to ensure that at the end of the proceedings, a successful plaintiff can recover the entirety of his or her fair and reasonable mediation costs, including the costs of organising, preparing for and attending at the mediation, irrespective of whether or not the mediation has been ordered by the court. Counsel's fees often form a large component of mediation expenses, and a plaintiff's solicitor should also ensure that such fees can be recovered.

Taking into account the decision of Bergin J in *Mead & Anor v Allianz Australia Insurance Ltd,*[17] it would be prudent to address the issue of the payment of mediation costs in the event that the matter does not settle at mediation, but is subsequently settled by acceptance of an offer of compromise or other negotiations. Care should be taken to ensure that the reservation referred to by Hodgson JA in *Newcastle City Council v Paul Wieland,*[18] whereby an agreement so strongly expresses that the costs of mediation are to be treated separately from the costs of the proceedings, cannot be argued by the opposing party unless this is the intention of all parties. Where appropriate, a general provision that any order in a party's favour for the 'costs of the proceedings' includes all costs of mediation could be included for clarification and brought to the attention of the court if necessary. To avoid any potential argument, consent orders for costs, where possible, should also deal specifically with the costs of the mediation. ■

Notes: **1** *Newcastle City Council v Paul Wieland* [2009] NSWCA 113 (20 May 2009). **2** *Medulla v Abdel Hameed* [2003] NSWSC 747. **3** *Mead & Anor v Allianz Australia Insurance Ltd* [2007] NSWSC 500. **4** See note 1. **5** *Ibid* per Ipp JA at [41]. **6** *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629 per Mansfield J at [92]). **7** See note 1, per Hodgson JA at [3]. **8** *Ibid* per Hodgson JA at [4]. **9** *Baulkham Hills Shire Council v Hahn* [2008] NSWLEC 184 (12 June 2008). **10** *Innovative Agricultural Products* [1996] 758 FCA. **11** *Ibid* per Lee J at p4. **12** See note 1. **13** Section 21N *Local Courts (Civil Claims) Act 1970.* **14** Section 104 *Administrative Decisions Tribunal Act 1997* and Reg 21 *Consumer, Trader and Tenancy Tribunal Regulation 2000.* **15** Reg 46 *Dust Diseases Tribunal Regulation 2007.* **16** *Johnson v Mansfield SC* [2009] VCAT 287 (24 February 2009). **17** See note 3. **18** See note 1.

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