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Good faith as the absence of bad faith: The excluder theory in mediation

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Views vary as to the behaviour necessary to constitute good faith — or equivalent concepts such as genuine and reasonable attempts — in mediation and as to behaviour which falls below the standard. The excluder theory of good faith as articulated by Robert Summers has provided the doctrinal basis for much judicial determination on the topic.[1] It maintains that good faith is best, or at least more easily, described and applied in terms of the various forms of bad faith that it excludes.[2] As the table shows, examples of bad faith are often more concrete and tangible to grasp than examples of good faith. Good faith concepts are therefore often applied to fact situations using a negative definition.

The table sets out possible meanings of good faith and bad faith with illustrative references to Australian, English and American mediation cases and shows that the excluder theory is alive and well in mediation case law.[3] Ultimately, the practical meaning and application of good faith requirements will depend on the particular wording of the obligation and the canons of interpretation applied by the court in a given jurisdiction. ●

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Good faith participation as absence of bad faith conduct

Form of bad faith conduct	Meaning of good faith
Refusing to participate in a contractually agreed ADR process[4]	Performing contract as agreed
Not attending the court-referred ADR process[5]	Willingness to cooperate
Unreasonable refusal to consider/ engage in mediation[6]	Making reasonable and genuine efforts to avoid litigation
Obstructive attitude in attempt to narrow the issues[7]	Acting with procedural fairness
Lack of authority to settle[8]	Preparedness to settle
Not responding to initial offer and directing the mediator to tell other party it has five minutes to put a serious settlement offer on the table or the mediation is over[9]	Setting aside a reasonable amount of time for the mediation Signalling a preparedness to consider further offers, where the first offer is not acceptable
Not allowing the mediator to explain offers from other party[10]	Giving the mediator room to reframe and 'translate' offers
Not engaging in dialogue with mediator and other party to address perceived inadequacies in the process	Being prepared to negotiate the process as well as the substance
Refusal to consider reasonable options for settlement[11]	Refraining from abuse of bargaining power
Failing to offer options for settlement[12]	Participating meaningfully in the negotiation phase of mediation
Being unresponsive during an ADR process[13]	Acting cooperatively and responsively
Unilaterally terminating or abandoning the mediation process without reason[14]	Acting with honesty while preserving self-interest
Entering into a settlement for unconscionable reasons or reneging on an agreed settlement without justification[15]	Acting with integrity and honest intention in relation to settlement

Endnotes

1. R Summers, '"Good faith" in general contract law and the sales provisions of the Uniform Commercial Code' 54(2) (1968) *Virginia Law Review* 195.

2. Above note 1 at 196 and 203.

3. The table is adapted from Summers, above note 1 at 203.

4. See, for example, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct) at 10.

5. See, for example, the US case *Johnson v Johnson* (Minn Ct App July 11, 2006) where the court refused to award conduct-based attorneys' fees as sanction for a wife's failure to attend a court-ordered divorce mediation, where the conduct could be characterized as 'an isolated incident'. See also *Segui v Margrill* 844 So 2d 820 at 821 (Fla Dist Ct App 2003).

6. In the 2006 English case of *P4 Ltd v Unite Integrated Solutions plc* [2006] EWHC TCC 2924, the court awarded the losing party P4 some of their costs after the winning party refused mediation and as a result

denied P4 an opportunity to settle the case at minimum cost. In *Dunnett v Railtrack* PLC [2002] 2 All ER 850, Railtrack won the initial case and appeal, but the English Court of Appeal declined to order that the defeated claimant pay Railtrack's costs because Railtrack refused to consider an earlier suggestion from the court to attempt mediation. For an illustration from the US see: *People's Mortgage Corporation v Kan Bankers Surety Co* 62 F App'x 232 (10th Cir 2003) where lawyer's fees were awarded against one party partly on the basis of an unreasonable refusal to participate in mediation.

7. See *Capolingua v Phylum Pty Ltd (as trustee for the Gennoe Family Trust)* 1991 5 WAR at 337 where the Western Australian Supreme Court refused to award costs to the successful defendant for a number of reasons including the defendant's unreasonable conduct during mediation. Ipp J held that where it was later shown that issues would have been narrowed at mediation but for the defendant's behaviour, this was a relevant factor in awarding costs in respect of a later trial that had been unnecessarily extended.

8. See, for example, the following US cases: *Reliance Nat'l Ins Co v B Von Paris & Sons Inc* 153 F Supp 2d 808 (D Md 2001) and *Monroe v Corpus Christi Indep. Sch. Dist* 236 FRD 320 (SD Tex 2006). In the second case the court held that the school district did not act in bad faith when it participated in mediation without authority to bind the school board to a mediated settlement.

9. See *Brooks v Lincoln Nat'l Life Ins Co* (D Neb Aug 25, 2006).

10. See again *Brooks v Lincoln Nat'l Life Ins Co* (D Neb Aug 25, 2006).

11. See *Malmsbury v Strutt v Parker*, [2008] EWHC 424 (QB).

12. See, for example, the American case of Ferrero *v Henderson No C -3-00-462*, 2003 WL 21796381 at 5–6 (SD Ohio).

13. See the American case of *Gilling v Eastern Airlines Inc* 680 F Supp 169 (DNJ 1988) where the court upheld sanctions against a party for merely 'going through the motions'.

14. See *Brooks v Lincoln Nat'l Life Ins Co* (D Neb Aug 25, 2006) and *Hoffer v Moyer* (Minn Ct App Sept 12, 2006). In the latter case the court concluded that trial court did not abuse discretion in refusing to grant a husband's request that all future custody and parenting-time disputes be mediated, where the husband had been the one who previously 'walked out of the mediation sessions on all occasions' and the husband's counsel conceded that the parties had mediated in the past and that it 'wasn't terribly successful'. In contrast an Australian tribunal held there were no costs implications for vacating a mediation for health reasons where the party vacating maintained good faith and attended the mediation with full intentions of attempting to settle and did not necessarily disadvantage the other party. The facts of this case were that after some hours at the mediation the complainant requested an adjournment as she felt too unwell to proceed: *Sharp v the Canonical Administrators of St Monica's College Ltd* [2003] VCAT 42 (Unreported, Deputy President McKenzie, 22 January 2003) at [8].

15. See, for example, the US case *Peoples Mortgage Corp v Kansas Bankers Surety Trust Co*, 176 F Supp 2d 1199, 1206 (D. Kan. 2001) in which the court had to determine whether a mediated settlement agreement entered into by an insured was made in good faith and was reasonable so that the insured could recover indemnification against the insurance company. See also *In Herrin v The Medical Protective Co 471* where the Tennessee Court of Appeals reversed a grant of summary judgment for the defendant insurer, concluding there were genuine issues of material fact precluding dismissal of claims for breach of contract, fraud, breach of fiduciary duty, and breach of duty of good faith and fair dealing based on the insurer's decision not to renew the policy after allegedly telling the insured that his consent to a mediated settlement of a tort claim would not affect renewal. These cases and others are in J Coben and PN Thompson, 'Disputing irony: a systematic look at litigation about mediation' (2006) 11 *Harvard Negotiation Law Review* 43 at 134–135.