

It's not Litigation in Mufti

Hildred v Strong [2007] NZCA 475

The December issue of Table Talk alerted members to the decision of the New Zealand Court of Appeal dismissing an appeal by Gloria Hildred. Ms Hildred appealed a decision of the High Court holding that a settlement agreement entered into following mediation was a full and final settlement of all the property and financial issues between them.

The decision affirms the finality of mediated agreements, and the nature of mediation settlements as the parties' own bargain. It also emphasises the important public interest in preserving the integrity of the mediation process. Throughout the decision the Court reinforces the notion of confidentiality as fundamental to the mediation process, noting that much of the evidence available to it appeared to breach the parties obligations in that respect (although the Court reluctantly accepted, for the purpose of the appeal only, the assertion by counsel that confidentiality had been implicitly waived in this case). However, it also raises and leaves unanswered a number of important questions.

The facts of the case, which are set out in full in the High Court decision¹, are not unusual. Ms Hildred met Sharon Strong in 1990 and soon after they entered into a relationship. During the course of the relationship they bought and sold various properties, some of which they lived in together. They accumulated the usual chattels including cars. For several years they were involved in running training courses through various entities, but eventually under the auspices of a company called Outlook Resources Ltd (ORL) of which both had been directors. The relationship ended in December 2001². In May 2002 after considerable exchange of correspondence between their respective solicitors had failed to resolve their disagreements about what relationship property each was entitled to, they decided to mediate their dispute.

Prior to mediation the parties entered into a standard LEADR mediation agreement. Each prepared a detailed and comprehensive position statement. Each was supported and advised by her lawyer. At the end of the mediation conducted by "an experienced senior barrister", a settlement agreement, described by the Court as "a standard LEADR type" was signed by Ms Hildred and Ms Strong in the presence of their respective legal advisers.³ The agreement included a provision that it "...constituted full and final settlement of all property and financial issues between the two parties and including Outlook

¹ *Hildred v Strong* (25 November 2005, McKenzie J, H Ct Wellington, CIV-2003-485-204)

² This was before the amended Property (Relationships) Act 1976 came into force so that their relationship property fell to be divided under the prevailing common law principles rather than in accordance with the statutory regime.

³ It is set out in full in the judgment at paragraph [6]

Resource Ltd...” and provided for “the Outlook loan of \$75, 681.79” to be the separate property of Ms Hildred.

However as Ms Hildred subsequently told the Court, within days she felt “demoralised and dejected at the gross unfairness of the bargain”. The judgment records, without more, that there had been “endeavours since then to avoid the settlement”.

In the High Court Ms Hildred challenged the validity of the settlement agreement, arguing that the agreement did not accord with the equitable principles developed and applied by the courts in de facto property relationship cases, and also arguing that there had been a common or shared mistake by the parties as to the legal ownership of shares in ORL, which had materially affected her decision to enter into the agreement. The High Court upheld the agreement but severed the provisions relating to ORL, the Court having found that neither party, either jointly or separately, owned ORL.

Significantly, although the High Court considered in some depth the legal merits of the plaintiff’s claims, the Court of Appeal refused to do so, making it clear that the most it could do was declare the agreement void⁴.

The Court took as its starting point the Agreement to Mediate referring to:

- the agreement to engage a mediator to assist resolution of their dispute (Clause 1);
- the agreement to mediate in good faith (Clause 9) (leaving for another day the question of the meaning or enforceability of that clause);
- the agreement, with consent, that parties might attend with other persons to assist them (Clause 14), (noting that both had their lawyers with them throughout the mediation);
- the detailed provisions relating to confidentiality (Clauses 15 -19 and 21) and;
- the signing of a confidentiality agreement by non-parties attending the mediation.

The Court specifically noted that the agreement *did not*⁵ include any suggestion that resolution of the dispute would necessarily achieve a result consistent with the law adding:

*“Mediation is not a Court proceeding in mufti. It is an alternative means of resolving a dispute”*⁶

It is clear that if Ms Hildred and Ms Strong had issued proceedings for the resolution of their property matters on the basis of the common law principles applying to de facto relationships, the outcome might well have been different

⁴ At paragraph [34]

⁵ Emphasis added

⁶ At paragraph [16]

from that reflected in the settlement agreement. But, as the Court noted “These mature, advised and experienced women did not turn to the Courts but mutually agreed to deal with matters themselves”⁷ going on to outline some of the common reasons why parties might decide to make their own bargain rather than engage in court proceedings. Most mediators will be able to add a number more.

The Court also refused to accept that it could investigate what effect the mistaken belief as to the ownership of ORL had on the ultimate settlement stating:

*“We do not know (and should not know) what drove the mediation to settlement. ... None of us can know the extent to which either was influenced by extraneous (but important and understandable) factors in the bargain which they struck.”*⁸

And later:

*How exactly Ms Hildred and Ms Strong decided on a division is not before the Court, nor should it be.”*⁹

The contention that an agreement should not be upheld where parties had settled on a ‘wrong factual and legal basis’ and one had been “misled” was given short shrift by the Court. It affirmed the responsibility of each party to mediation acquiring the information they need to enable them to engage meaningfully in the mediation process. Throughout the judgment the Court refers to the ability of the parties to obtain or insist on more and better information prior to mediation.¹⁰

*“Adult, able parties who are separately represented must decide for themselves how much “hard information” they want before they enter into mediation. ... The court is not available as a means of enabling parties who say – we wish we had gone about things differently and been more careful and insistent – to get a second bite of the cherry.”*¹¹

Time and again in the judgment the Court returns to this critical point – the parties chose to resolve their dispute without resort to the Courts and made their own bargain.

*“This Court will not enter into a critique of what took place at a mediation. The exception to that principle is an enquiry as to whether a settlement has been reached or, having been reached, could be set aside by invoking some doctrine such as fraud. In this case those are not issues. A document was signed by the parties, and their signatures were witnessed by their own lawyers. It is clear that, at that stage, the parties were committed to an agreement they were each able to live with.”*¹²

However, what is not clear is the exact extent of any fraud exception and the effect such an exception would have on the obligations of confidentiality of not

⁷ At paragraph [19]

⁸ At paragraph [38]

⁹ At paragraph [74]

¹⁰ See for example paragraphs [53] and [64]

¹¹ At paragraph [46]

¹² At paragraph [44]

only the parties but also the mediator. Also left unanswered is the question of whether parties to mediation can subsequently agree to waive confidentiality (as they purported to do here) without the concurrence of the mediator, or even whether they should be allowed to do so at all. Confidentiality is one of the fundamental principles underpinning mediation; it promotes free and frank discussion between the parties, safe in the knowledge that views expressed in mediation cannot be used against them if the dispute is not settled at mediation. It should not lightly be undermined.

A further important point touched on by the Court but “left to another day” was the meaning of Clause 9 of the LEADR Agreement to Mediate – the agreement to take part in the mediation in good faith. In the context of pre-contractual negotiations the Court of Appeal has rejected the enforceability of an agreement to negotiate in good faith.¹³ However the concept is used extensively in employment law both generally and in the context of mediation where in certain circumstances a party to mediation may call for a “bad faith” report from the mediator for use in subsequent proceedings. It remains to be seen whether private mediation agreements will be considered the same as contracts to negotiate or whether the Court will draw analogies with statutory mediation.

¹³ Wellington City Council v Body Corporate 51702 (Wellington) [2002] 3 NZLR 486