

Have you checked your mediation agreement lately?

Maria Dew outlines a recent test on mediation's confidentiality and privilege in New Zealand's courts.

Given the steady growth in mediation, it is hardly surprising that the law relating to mediation confidentiality and privilege continues to develop.

In November 2010, Justice Peters in the High Court at Auckland issued a judgment in *Specialized Bicycle Components Inc v Sheppard Industries Limited & Anor*, HC AK, CIV 2009-404-8020, which prompts lawyers and mediators with some useful reminders about mediation and the written agreement to mediate;

- a) to carefully review the mediator's agreement with your client so they are clear what they are committing to;
- b) be aware of the inter relationship between s57(3) Evidence Act 2006, "Privilege for settlement negotiations and mediation" and the terms of the mediation agreement itself; and
- c) wherever possible, have the parties execute the written settlement agreement on the day of the mediation or otherwise be very clear with all parties that no binding or enforceable agreement has been reached until they have entered into a written settlement agreement.

Peters J decision is an interlocutory judgment relating to the defendants' application to stay proceedings. The defendants asserted the plaintiff's claim could not proceed as the claim, alleging breaches of copyright, had already been resolved between the parties at mediation. The defendants alleged that the parties had already reached an accord and satisfaction at the end of a two-day mediation and they filed affidavits in support of the stay application, which referred to communications made in the course of that mediation.

The parties had appointed Mr Barry Patterson QC as mediator. They had also signed a mediation agreement as offered by the mediator, a copy of which is annexed to the judgment. The mediation agreement included at clause 5 a wide ranging confidentiality and "without prejudice" protection for the mediation. It expressly restricted the parties from relying on or introducing as evidence in arbitral or judicial proceedings all communication between the parties and/or the mediator during the course of the mediation. At clause 5(iv) of the mediation agreement, it provided "This clause in no way fetters the legitimate use in enforcement proceedings or otherwise of any written and signed settlement agreement reached in or as a result of this mediation."

No written settlement was ever signed between the parties either at the mediation or afterwards. It appears from the judgment that the parties had continued to exchange correspondence and draft agreements for at least a month after the mediation. However, nothing was ever finalised which lead the plaintiff to issue the breach of copyright proceedings.

The issue for determination by Peters J was whether the defendants were entitled to give evidence of communication that had been made in the mediation to justify their allegation that an accord and satisfaction had been reached at mediation. The defendants relied upon s57 (3)(b) of the Evidence Act 2006 (“the Act”), which provides an exception to the general mediation privilege referred to in s57(1) and (2). The exception permits evidence to be called if it is necessary to prove the existence of an agreement settling the dispute.

The plaintiff argued the defendants could not rely upon the s57 (3) exception, as the mediation agreement did not permit such disclosure and the terms of the mediation agreement prevailed over s57 of the Act. They also submitted that s57 was only a default provision in the event that the parties had not agreed otherwise and that in any event no oral agreement was ever reached during the mediation.

In response, the defendants maintained the Act could not prevail over the mediation agreement as otherwise this would mean the parties could never produce evidence of an oral agreement reached at mediation and therefore could never reach an oral agreement. They argued that clause 5 of the mediation agreement simply invoked the previous common law “without prejudice” rule now contained in the Act and the parties remained subject to the exceptions now contained in s57(3) of the Act.

Peters J held that that the mediation agreement did prevail over s57 of the Act, and that evidence of the alleged oral agreement at mediation could not be produced to the Court. Her Honour noted that the Act was silent on this issue, but relied upon s12 of the Act “Evidential matters not provided for”, to draw her consideration back to the purpose and principles of the Act and consistency with common law. Peters J determined that the public policy considerations of protecting the rights of confidentiality, encouraging settlement of disputes and certainty of contract, pointed to enforcement of the mediation agreement and excluding the evidence. The judgment also relies on several United Kingdom case authorities which have held the parties, by agreement, may determine the scope of privilege that is to apply to their communications.

The Specialised Bicycle decision has been appealed by the defendants. Therefore, we will need to wait a little longer for the final word on whether this confidentiality clause will prevail over s57 of the Act. However, the lessons from this case can be taken and used now by lawyers and mediators. We can all probably become overly familiar with our “standard” confidentiality clauses and this case highlights the care that needs to be taken with the scope of such clauses.

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