The finality of mediated settlements

By Maria Kazmierow, barrister

In the Court of Appeal's significant decision in *Hildred v Strong* [2007] NZCA 475, mediated settlements were affirmed as final. Subject to limited grounds, the Courts would not "revisit" them or entertain a "second bite at the cherry". In the Court's view, mediated settlements were not "just contracts" nor were they "litigation in mufti". Their special status must be respected.

Facts

Gloria Hildred and Sharon Strong were in an 11-year de facto relationship. Separation occurred prior to the commencement of the *Property (Relationships) Act* 1976. Their separation was governed by other statutory provisions and common law and equitable principles which applied to de facto relationships.

The couple's property consisted of: a series of residential properties that they had either lived in or developed, a number of which were subject to property agreements; cars; the Unemployed Training Trust (UTT); and a company called Outlook Resources Limited (ORL). The status and division of these two entities was an issue of some discussion at the High Court level: *Hildred v Strong* (25 November 2005, High Court, Wellington CIV 2003-485-204, Justice MacKenzie).

At mediation, the division gave Strong $477,194 and Hildred $69,818 – effectively, 27 per cent for Hildred and 73 per cent for Strong.

Hildred told the Court that within days she felt "demoralised and dejected at the gross unfairness of the bargain" (at [7]). Since then, she has tried to void the settlement.

The High Court went some way in considering the legal merits of their settlement. It closely examined the grounds advanced by counsel for Hildred, which sought a different division on the basis of her having a beneficial interest in the property. The beneficial interest was achieved via an express trust, or *Lankow v Rose*-style constructive trust, or resulting trust, or unjust enrichment, or equitable estoppel. A further ground of mistake was also advanced. The Court also canvassed factors of duress, unconscionability, and misrepresentation. A key point was the argument that there was insufficient discovery of key matters to do with ORL and UTT.

The plaintiff argued that but for this "flawed" mediation and pre-mediation process, settlement at figures not reflecting legal entitlements would not have been reached. A Court-based settlement would have been more favourable to Hildred. The High Court looked to $214,500 for Hildred, and $242,000 for Strong – effectively, 47.6 per cent for Hildred, 52.4 per cent for Strong.

Despite the High Court's willingness to enter into the legal merits of Hildred's submissions for revising the mediated settlement, it was frank in commenting that mediated settlements were different to contracts entered into by other parties (at [47]):

> "A settlement agreement entered into by parties as a result of mediation is a contract, and is effective to alter what would otherwise be the legal rights of the parties, subject to the legal principles which determine when a contract may be vitiated... [They] have special features which distinguish them from other contracts... Mediation must therefore be seen as a voluntary alternative to an otherwise compulsory process... At the mediation ... [s]ome parties will be more willing to compromise than others. These factors must be borne in mind in applying the principles which are relevant to vitiation of contract. The fact that the parties have, with independent assistance, reached an agreement to resolve their dispute must be given weight. Parties ought not lightly to be able to resile from a settlement. There is a public interest in the finality of the resolution process which must also be given weight."

Justice MacKenzie's decision was for judgment of an amount payable under the settlement agreement and to vary two clauses of the mediation contract on the grounds of mistake, but otherwise leaving the mediation settlement untouched.

Court of Appeal

Hildred appealed this settlement. The Court of Appeal took an entirely different approach to that of the High Court. Justices Hammond, Robertson, and Wilson took the mediation agreement itself as the starting point for their analysis of whether or not a mediated settlement is final or can be voided. It focused on the nature of mediation and its intrinsic values.

The Court of Appeal made reference to the standard LEADR agreement and the experienced and senior nature of the barrister who was acting as mediator for this mediation. The judgment referred to specific parts of the LEADR agreement, in particular:

- Full and final settlement – "This agreement shall constitute full and final settlement of all property and financial issues between the two parties and including Outlook Resources Limited, whether pursuant to the *Property (Relationships) Act* 1976 or any other statute or rule of common law or equity or howsoever arising" (at [6]).
- Good faith – "Each party agrees to take part in the mediation in good faith" (at [10]).
- Independent advisers – "Each party can, with the consent of the mediator, attend the mediation with one or more persons to assist or advise the parties" (at [12]).
- Confidentiality – "Confidentiality agreement to be signed by non-parties attending the mediation. As a condition of my [(mediators non-parties)] being present or participating in this mediation, I agree that I will (unless otherwise compelled by law) preserve total confidentiality in relation to the proceedings in this mediation and in relation to any exchanges that may come to my knowledge whether oral or documentary concerning the dispute passing between any other participants in the mediation and the mediator or between any of the participants during the course of the mediation" (at [14]).

The Court then focused on the purpose and function of mediations as part of an examination of when or whether such settlements should be voided.

The Court again stated that mediations were special contracts, and were an alternative means of resolving a dispute. It emphasised that because of their particular nature, there was no expectation that the parties would achieve an outcome consistent with the law. "Mediation is not a Court proceeding in mufti" (at [16]).

The Court commented at [22] - [23] that alternative dispute resolution places the parties at the forefront of decision making. They self-determine on the basis of factors which weigh most on them personally:

> "The parties decide that the value, benefit and advantage in putting a matter behind them outweighs the advantage which would flow from full scale litigation.
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> "Parties are often influenced by questions of cost, there are issues of containment, finality, emotional strain and commercial convenience which are weighed. Every piece of litigation has risk attached to it. If parties choose to make their own bargains so as to eliminate such risk, only in exceptional circumstances can they have the Court permit them the opportunity to start again by engaging in conventional litigation."

The Court of Appeal then stated explicitly on what basis they would consider voiding a mediation agreement. "[T]he most an appeal Court could do was to declare the agreement void" (at [34]). The grounds for doing so were very limited. "This Court will not enter into a critique or analysis of what took place at mediation. The exception to that principle is an enquiry as to whether a settlement was reached or, having been reached, could be set aside by invoking some other doctrine such as fraud" (at [44]).

The mediation contract and settlement, its terms, and the alternative dispute resolution process would dominate in this situation. "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 arrangement that they were each able to live with... 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 at the cherry" (at [44] to [46]).

Finally, the Court stated that "when parties elect alternative dispute resolution they embrace the advantages which it can provide and live with any downside which flows from it" (at [65]).

Where to from here?

The decision introduces a welcome certainty for those choosing to mediate. Subject to fraud, the decision is final. It highlights that this form of alternative dispute resolution operates under its own rules and values, and that this is appropriate and will be respected by the judiciary.

Senior mediators such as Tony Lendrum note this. Lendrum views the Court of Appeal decision as a "charter for mediators and lawyers". It is a "most helpful decision by the Court because it validates mediation as a form of alternative dispute resolution which has the absolute sanction of the Court".

That being said, there are also a number of issues which arise out of the decision that may need to be resolved at a future date.

The Court of Appeal affirmed that it is the responsibility of each party to a mediation to require disclosure of the information it needs to engage in the mediation process in a fully informed way. The Court stated that "[a]dult, able parties who are separately represented must decide for themselves how much 'hard information' they want before mediating" (at [46]).

With a final settlement being the outcome of a successful mediation, what disclosure is full enough? Will a lack of disclosure result in a complaint against advising and participating lawyers by their clients and questions of negligence being raised? Issues of waiver, or insisting on a full discovery process prior to the mediation, will need to be carefully negotiated between counsel and client.

The issue of confidentiality has not been dealt with fully. The decision left unanswered the question whether parties to a mediation can subsequently agree to waive confidentiality without the mediator's agreement to this, or whether indeed they should ever be allowed to do so. "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 the mediation cannot be used against them if the dispute is not settled at mediation. It should not be lightly undermined" (*Table Talk*, LEADR Association of Dispute Resolvers, February 2008).

There is also the issue of the good faith nature of the agreement. Could 'bad faith' be a ground for voiding an agreement? Mediators comment that employment law and law in general may be an appropriate point of reference. "A party through 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 mediations" (*Table Talk*, LEADR Association of Dispute Resolvers, February 2008).