IN THE COURT OF APPEAL OF NEW ZEALAND

CA805/2010
[2011] NZCA 346

BETWEEN	SHEPPARD INDUSTRIES LIMITED First Appellant
AND	AVANTI BICYCLE COMPANY LIMITED Second Appellant
AND	SPECIALIZED BICYCLE COMPONENTS INCORPORATED Respondent

Hearing: 23 June 2011

Court: O'Regan P, Glazebrook and Arnold JJ

Counsel: B D Gray QC and T J G Allan for Appellants
A H Brown QC and N M Alley for Respondent

Judgment: 26 July 2011 at 2:30 PM

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the preliminary question as indicated in [53] below.

C The respondent must pay the appellants costs for a standard appeal on a band B basis plus usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Arnold J)

A mediation gives rise to a disputed settlement

[1] The first and second appellants (collectively Sheppard) distributed bicycles and other cycling products manufactured by the respondent, Specialized Bicycle Components Ltd (Specialized), under a distribution agreement entered into in 1999. In 2007, a dispute arose between them in which Specialized alleged that Sheppard had copied some of its products. The dispute was resolved and the parties entered into a written settlement agreement in August 2009 (the 2009 Deed).

[2] Subsequent to that, Specialized became concerned that Sheppard was copying its cycling gloves and, on 3 December 2009, again issued proceedings against Sheppard alleging copying. On 4 and 8 February 2010 the parties participated in a mediation in respect of this second dispute. The mediation was conducted by the Hon Barry Paterson QC under a written mediation agreement dated 4 February 2010. Sheppard say that the mediation was successful in the sense that the parties reached an oral agreement as to the settlement of the dispute and Sheppard has performed it, at least in part. Specialized denies that. Its stance is that the mediation agreement provides that there can be no settlement unless a written and signed settlement agreement is completed and, as this has not happened, there has been no settlement.

[3] Sheppard filed a statement of defence in the proceedings on 17 March 2010. It pleaded accord and satisfaction, alleging that the parties entered into an oral settlement agreement on 8 February 2010, and estoppel. Sheppard also applied for an order staying the proceeding or otherwise restraining Specialized from continuing with it. In support of the application, Sheppard filed two affidavits. One was from Mr Christopher Darlow, an Auckland practitioner who acted for Sheppard at the mediation, and the other from Mr John Struthers, the managing director of both appellants who was also present at the mediation on 4 February 2010.

[4] In his affidavit, Mr Darlow said that the mediation meetings which took place on 4 and 8 February 2010 dealt with the copying dispute as well as other matters in dispute between the parties. He said that on the afternoon of 8 February 2010 "the parties reached agreement on all issues between them". He then identified the terms

of the agreement and said that they represented "an all encompassing settlement". Mr Darlow said that the agreement was not subject to documentation and that, except to the extent that it was recorded in the notes of the participants, was not recorded in a written document. He said that Sheppard had performed aspects of the agreement. In his affidavit Mr Struthers confirmed Mr Darlow's evidence and identified a number of steps that Sheppard had taken in part performance of the settlement agreement.

[5] Specialized opposed Sheppard's application. It considered that evidence of what occurred at the mediation was inadmissible and accordingly sought to have passages of the affidavits struck out. Further, it denied that the parties had reached a binding oral agreement, saying that there was simply an agreement in principle which had to be documented before it became binding. Specialized filed an affidavit from its general counsel, Mr Edward Mitchell.

[6] Consistent with Specialized's argument that what occurred at the mediation could not be disclosed, Mr Mitchell did not go into the detail of what happened at the mediation other than to say that no settlement agreement had been reached. Rather, he said, "there was resolution in principle". Mr Mitchell said that the expectation was that a written agreement would be needed before there was a binding arrangement. He noted that, in the month following the mediation, the parties had exchanged correspondence and draft agreements in an effort to reach a concluded agreement but had been unsuccessful. He said that one of the reasons why this process was necessary was that the 2009 Deed had to be amended and this contained a clause that no amendment to it would be effective unless in writing and duly signed.

[7] Sheppard then applied to the Court for the determination of a preliminary question,[1] an application which Specialized did not oppose. The question was:

> Whether, on the terms of clause 5 of the mediation agreement and the confidentiality agreement signed by the parties on 4 February 2010, and in the absence of a written and signed settlement agreement, the defendants are preventing from adducing:

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1 High Court Rules, r 10.15.

(i) the evidence in paragraphs 6 and 7 of Mr Darlow's affidavit and paragraphs 7 and 9, part of paragraph 10(b), and paragraph 10(d) and 10(e) of Mr Struthers' affidavit; and/or

(ii) any evidence of exchanges and/or statements made and/or discussions held during the course of the mediation, or any statement made or communication within the mediation.

[8] Peters J determined the question as follows:[2]

> On the terms of cl 5 of the mediation agreement executed by the parties on 4 February 2010, the defendants may not adduce:
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> (a) the evidence in paras 6 and 7 of Mr Darlow's affidavit;
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> (b) the evidence in paras 7, 9, 10(d) and 10(e) of Mr Struthers' affidavit and such parts of para 10(b) of Mr Struthers' affidavit as refer to Mr Smith; and
>
> (c) any evidence of exchanges and/or statements made and/or discussions held during the course of the mediation on 4 and 8 February 2010, or of any aspect of the said mediation, or any statement made or communication within the said mediation.

Sheppard appeals against these findings.

The mediation agreement

[9] We were told that the mediation agreement in issue is widely used in New Zealand. Its material terms are as follows:[3]

> A The parties hereby appoint Barry Paterson Queen's Counsel (the Mediator) to mediate in the dispute described in the Schedule, and the Mediator accepts such appointment upon the following terms and conditions.
>
> ...
>
> 5(i) The Mediator and the parties and all persons brought into the mediation by either party, will not seek to rely on or introduce as evidence in arbitral or judicial proceedings whether or not the proceedings relate to this dispute–
>
> (a) exchanges whether oral or documentary concerning the dispute passing between any of the parties and the Mediator or between any two or more of the

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2 *Specialized Bicycle Components Inc v Sheppard Industries Ltd* [2011] 2 NZLR 242 (HC) at [100].

3 The full text of the agreement can be found in the appendix in the report of the High Court's decision.

parties during the course of the mediation (including preparatory steps); and

(b) views expressed or suggestions or proposals made within the mediation by the Mediator or any party in respect of a possible settlement of the dispute; and

(c) admissions made within the mediation by any party; and

(d) the fact that any party has indicated within the mediation willingness to accept any proposal for the settlement made by the Mediator or by any party; and

(e) documents brought into existence for the purpose of the mediation; and

(f) Notes or statements made within the mediation by the Mediator or by any party.

(ii) The parties and all non-parties brought into the mediation by any party shall sign a Confidentiality Agreement in the accompanying form.

(iii) Every aspect of and communication within the mediation shall be without prejudice.

(iv) 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. Any constraints on disclosure included in such settlement agreement will have effect in accordance with their terms.

...

[10] The confidentiality agreement which the participants entered was as follows:

CONFIDENTIALITY AGREEMENT

As the condition of my being present or participating in this mediation I agree that I will unless otherwise compelled by law preserve total confidentiality in relation to the course of 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 of the parties and the Mediator or between any two or more of the parties during the course of the mediation. The agreement does not restrict my freedom to disclose and discuss the course of proceedings and exchanges in the mediation within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request I am present at the mediation including the advisers and insurers of that party provided always that any such disclosures and discussions will only be on this same basis of confidentiality.

[11] We make four points about these agreements:

(a) As Mr Andrew Brown QC emphasised in argument, mediation agreements routinely contain confidentiality and without prejudice provisions of the type at issue here. They play an important role in creating an atmosphere in which settlement is possible.

(b) There is, of course, a difference between a confidentiality provision and a without prejudice provision. This is reflected in the Evidence Act 2006 (the Act). As we discuss in more detail below, s 57 of the Act provides that without privilege communications are inadmissible subject to some exceptions; s 69 confers on the Court a discretion to prohibit the disclosure in a proceeding of confidential communications and information. Section 57 is the provision at issue in the present case – s 69 was not invoked.

(c) Unlike some forms of mediation agreement, this agreement does not explicitly provide that if the dispute is resolved the agreed terms will be recorded in writing (or a note made of the essential terms of the settlement) and signed by all parties before they leave the mediation (a "no settlement unless in writing" clause). Rather, cl 5(iv) states that the preceding provisions of cl 5 do not prevent "legitimate use" of written and signed settlement agreements resulting from mediation. At most, this might be said to carry an implication that a written and signed settlement agreement was intended to be the only way that the parties could settle the dispute.

(d) In cl 5(i) of the mediation agreement the parties agree that they will not seek to rely on or introduce the matters enumerated in paragraphs (a) to (f) in evidence in any proceedings. Several of the prohibitions in these paragraphs only apply pre-settlement, in particular cls 5(i)(b) ("in respect of a possible settlement") and 5(i)(d) ("willingness to accept any proposal for settlement"). Others, such as cl 5(i)(f), have more general effect. We return to this point when we discuss the scope of the mediation agreement.

The Evidence Act 2006

[12] A number of provisions from the Act featured in argument. We will not recite them all here. Rather, we will focus on the provision principally at issue, namely s 57, although to place that in context we need also to refer to s 53.

[13] Section 53 describes what the effect of a privilege is. Relevantly, s 53 provides:

> **53 Effect and protection of privilege**
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> (1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding –
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> (a) the communication; and
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> (b) the information, including any information contained in the communication; and
>
> (c) any opinion formed by a person that is based on the communication or information.
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> ...
>
> (3) A person who has a privilege conferred by any of sections 54 to 59 and 64 in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document not be disclosed in a proceeding –
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> (a) by the person to whom the communication is made or the information is given, or by whom the opinion is given or the information or document is prepared or complied; or
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> (b) by any other person who has come into the possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.
>
> ...

[14] Section 57 deals with privilege in the context of settlement negotiations. It provides:

> **57 Privilege for settlement negotiations or mediation**
>
> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication–

(a) was intended to be confidential; and

(b) was made in connection with an attempt to settle or mediate the dispute between the persons.

(2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

(3) This section does not apply to–

(a) the terms of an agreement settling the dispute; or

(b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or

(c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that–

(i) is expressly stated to be without prejudice except as to costs: and

(ii) relates to an issue in the proceeding.

[15] Three things will be immediately apparent:

(a) First, s 57 does not use the term "without prejudice", although the term remains in common usage.

(b) Second, s 57 undoubtedly applies to settlement discussions occurring in the context of mediation agreements as well as to other forms of settlement negotiation. This is obvious from the section's heading and from the reference in s 57(1) to a mediator having a privilege in respect of communications intended to be confidential (which obviously includes an agreement to that effect) and made in an attempt to mediate a dispute. Mr Brown argued that settlement negotiations occurring pursuant to mediation agreements which contain their own rules as to the admissibility of evidence do not fall within s 57 at all but are to be addressed entirely by reference to the common law. In our view, that goes too far. We will address the issue in terms of the applicability of s 57(3)(b) to mediation agreements such as that at issue.

(c) Third, s 57(3) identifies three exceptions to the rule set out in s 57(1). Plainly, however, there are other recognised exceptions to the "without prejudice" rule. One is contained in s 67(1) of the Act, which provides that a Judge must disallow a claim of privilege if satisfied that there is a prima facie case that the communication or information was for a dishonest purpose or to facilitate the commission of an offence. In respect of other exceptions, however, resort must be had to the common law.[4] We will also deal with this point below.

The High Court decision

[16] Peters J addressed two issues:

(a) What was the effect of the mediation agreement? In particular, did it mean that the only exception to cl 5(i) was if there was a written and signed settlement agreement? The Judge concluded that cl 5(i) was clear and rendered all communications referred to in cl 5(i)(a)–(f) inadmissible, the only exception being in the circumstances set out in cl 5(iv). She accepted that this interpretation made it "difficult, probably impossible, for a party to prove an oral agreement to settle".[5] The Judge considered that the evidence at issue required disclosure of exchanges and/or statements falling within cl 5(1)(a) and (f). Accordingly she considered that Sheppard was in breach of the mediation agreement.

(b) What was the effect of s 57? In particular, could an agreement in a particular case prevail over the provisions of s 57(3)? The Judge concluded that that the parties could, by agreement, override the provisions of s 57(3). The Judge noted that s 57 was not exhaustive, so that by virtue of s 12 of the Act she could have resort to the

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4 Evidence Act 2006, s 12. There is no suggestion that Parliament considered that the exceptions not mentioned in ss 57(3) and 67 should no longer be available. See also *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [38]–[49] where Keane J reached the same conclusion.

5 At [58].

common law. She concluded that at common law, the terms of the mediation agreement as she interpreted it would be enforced.

Our evaluation

[17] We propose to outline the submissions of the parties in the context of our discussion of the two issues raised in the appeal, namely the meaning of the mediation agreement and the interpretation of s 57. We will start with s 57.

The interpretation of s 57

[18] As will be apparent, the key factual difference between the parties is that Sheppard says that a binding oral agreement was reached at the conclusion of the mediation which did not require documentation whereas Specialized says that, while agreement in principle was reached, it was not to be binding until a written agreement was concluded and that never eventuated.[6] Sheppard wishes to refer to what happened at the mediation to establish its contention. Specialized says that it is precluded from doing so by the terms of the mediation agreement. Sheppard responds by saying that even if the mediation agreement has the meaning for which Specialized contends, s 57(3) allows reference to what happened at the mediation for the purpose of proving the existence of a settlement agreement.

[19] In short, then, the question is whether it is possible for the parties to, in effect, contract out of s 57(3)(b) by providing that it does not apply in respect of an oral settlement agreement achieved at or through a mediation. For the purpose of this discussion, we will assume that the mediation agreement has the meaning contended for by Specialized, ie, that cl 5(iv) is a "no settlement unless in writing" clause.

[20] As we have said, s 57(1) clearly applies to mediation agreements which contain without prejudice provisions. We do not accept Mr Brown's argument that s 57 has no application to mediation agreements which contain their own provisions

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[6] As we understood Specialized's argument, it was that the parties reached an agreement in principle of the sort held not to be binding in *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 (CA). However, even if all aspects of the settlement had been agreed orally, so that reducing it to writing was simply an administrative matter, the same analysis would apply.

as to the admissibility of evidence. Rather, we consider that the issue is best discussed in terms of the applicability of s 57(3)(b) in such circumstances.

[21] Section 57(3)(b) provides that the section does not apply to "evidence necessary to prove the existence of [a settlement] agreement in a proceeding in which the conclusion of such an agreement is in issue". Mr Gray QC submitted that Sheppard falls squarely within the terms of this paragraph: it alleges that an oral agreement was reached settling the dispute either at the mediation or immediately following it.

[22] Mr Gray referred us to two recent decisions from the United Kingdom. The first was the decision of the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*.[7] In that case Lord Clarke, delivering a judgment with which all members of the Court agreed, identified the issue as being:[8]

> ... [W]hether facts which (a) are communicated between the parties in the course of without prejudice negotiations and (b) would, but for the without prejudice rule, be admissible as part of the factual matrix or surrounding circumstances as an aid to construction of an agreement which results from negotiations, should be admissible by way of an exception to the without prejudice rule.

[23] His Lordship set out the legal principles in relation to the without prejudice rule, by reference to earlier cases.[9] His Lordship noted that the rule rests in part on public policy and in part on the express or implied agreement of the parties:

(a) The public policy consideration is that parties should be encouraged to settle disputes without resort to litigation and should not be discouraged from this endeavour by facing the risk that things said in the context of settlement negotiations might be used against them in court. To facilitate settlement, parties should be encouraged to discuss the matters in dispute freely and frankly and this can only be achieved if it is clear that things said in the discussions may not subsequently be used against them in proceedings.

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7 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662.
8 At [1].
9 At [19]–[29].

(b) As to the express or implied agreement of the parties, Lord Clarke referred to the judgment of Hoffman LJ in *Muller v Lindsay & Mortimer (a firm).*[10] There Hoffman LJ talked of "an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice".[11] Hoffman LJ said that in some cases both justifications (public policy and express or implied agreement) were present, in others only one or the other. Mr Brown argued that it was the express or implied agreement justification that was significant in the present case.

[24] Lord Clarke then went on to discuss the exceptions to the "without prejudice" rule.[12] He identified nine situations where evidence of without prejudice communications was accepted to be admissible, eight of which were:[13]

(a) When the issue is whether the communications resulted in a settlement agreement;

(b) To show that a settlement agreement should be set aside on the ground of misrepresentation, fraud or undue influence. (Mr Brown accepted that breach of the Fair Trading Act 1986 should be added to this exception in New Zealand);

(c) Where something said in the course of the settlement discussions is said to give rise to an estoppel;

(d) Where the exclusion of the evidence would act as a cloak for perjury, blackmail or other serious impropriety;

(e) To explain delay or apparent acquiescence;

(f) Where there is an issue as to whether a party has acted reasonably to mitigate loss;

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10 *Muller v Lindsay & Mortimer (a firm)* [1996] PNLR 74.

11 At 77.

12 At [30]–[35]. Lord Clarke relied principally on the judgment of Walker LJ in *Unilever Plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 at 2444–2446 (CA).

13 The ninth situation relates to reconciliation in a matrimonial context.

(g) Where an offer has been made "without prejudice except as to costs" (the *Calderbank* offer exception);[14]

(h) Where rectification is sought in respect of a settlement agreement.

[25] When discussing the *Calderbank* offer exception, Lord Clarke noted that it was based on an express or implied agreement of the parties and went on to say:[15]

> There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or limiting its reach.

[26] His Lordship then turned to consider whether there should be an interpretation exception to the rule. He concluded that there should. He said:[16]

> The underlying principle, whether based in public policy or contract, is to encourage the parties to speak frankly and thus to promote settlement. As I see it, the application in both cases [that is, agreements made in the ordinary way and those resulting from without prejudice negotiations] of the same principle, namely to admit evidence of objective facts, albeit based on what was said in the course of negotiations, is likely to engender settlement and not the reverse. I would accept the submission ... that, if a party to negotiations knows that, in the event of a dispute about what the settlement contract means, objective facts which emerge during negotiations will be admitted in order to assist the court to interpret the agreement in accordance with the parties' true intentions, settlement is likely to be encouraged not discouraged.

[27] An important element of this reasoning is the link that it makes between the determination of the point at issue and the policy underlying the without prejudice rule. The interpretation exception was recognised because it promoted the policy underlying the rule.

[28] The second case Mr Gray referred to was *Brown v Rice*,[17] a decision of Mr Isaacs QC sitting as a Deputy Judge of the High Court. The parties were involved in litigation. Shortly before trial they agreed to participate in a mediation of their dispute. They entered into a written mediation agreement, cl 1.4 of which provided:

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14 *Calderbank v Calderbank* [1975] 3 All E R 333 (CA).
15 At [32](7) quoting Walker LJ in *Unilever*.
16 At [41].
17 *Brown v Rice* [2007] EWHC 625 (Ch).

> Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the Parties ('settlement agreement').

The agreement also contained confidentiality provisions.

[29] The mediation went for some 13 hours over the course of a day. At its conclusion, no settlement had been reached. But the following morning, one of the parties accepted an offer made by the other the previous evening, on the basis that an offer had been made in the course of the mediation and left open until noon the following day. The other party disputed this, so the question whether the proceedings had in fact been settled arose. To determine this, resort to what had transpired in the mediation was necessary. The issue before the Deputy Judge was whether this evidence was admissible.

[30] Although there had been some discussion in the submissions of a distinct privilege attaching to the entire mediation process, it was ultimately accepted that the issue could be determined under the existing without prejudice rule. The Deputy Judge concluded that evidence of communications occurring in the course of the mediation was admissible to determine whether a concluded settlement had been reached.

[31] It was argued that cl 1.4 overrode the exception relating to whether or not a concluded settlement has been reached. The Deputy Judge rejected this submission. He said:[18]

> The justification for the without prejudice rule in the present case is not founded on public policy but in the parties' agreement that what transpires in their negotiations should not be admissible in evidence in the litigation if a settlement does not result. The exception to the without prejudice rule where the issue is whether there was a concluded settlement operates just as much where the without prejudice rule is founded in the parties' agreement as it does where it is founded on public policy. In my judgment, the parties' agreement expressed in clause 1.4 does not have the effect of excluding that exception, either by its terms or impliedly. *The absence of a written settlement signed by or on behalf of each of the parties does not necessarily mean that the parties may never have arrived at a concluded settlement. For example, it is possible in any given case that the parties may have expressly or impliedly agreed to vary or waive those provisions or that a party may be estopped from relying on them or that a collateral contract has arisen which*

[18] At [25].

> *is not subject to clause 1.4, with the consequence that a concluded settlement was or must be treated as having been made. These are matters which a court is entitled to investigate and determine by way of exception to the without prejudice rule.*
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> (Emphasis added.)

[32] The Deputy Judge went on to say, however, that cl 1.4 was relevant to the question whether there was a concluded settlement. He accepted that the effect of cl 1.4 was that any offer of settlement was subject to contract, unless it could be shown that cl 1.4 had been varied, waived or could not be relied on for some other reason.[19] On the facts, he concluded that there had been no variation, waiver or such like.[20]

[33] Before we leave the authorities, we should mention one further case which has emerged from our own researches, *Vero Insurance Ltd v Tran*.[21] In that case there was a claim for specific performance of an oral agreement to settle proceedings reached at a mediation. The defendants denied that any settlement agreement had come into existence.

[34] The mediation was conducted under a written mediation agreement which contained the following clauses:

> 9. The Mediation may be terminated:
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> (a) by agreement between the parties to terminate the mediation;
>
> (b) upon execution of a Settlement Agreement in respect of the proceedings;
>
> (c) by the Mediator giving written or oral notification to the parties if, after consultation with the parties, the Mediator forms the view that the Mediator will be unable for whatever reason to assist the parties to achieve resolution of the proceedings.
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> 10. (a) In the event that one or more of the disputed issues is or are settled, as the case may be, either of the parties is at liberty to enforce the terms of the settlement agreement by judicial proceedings.
>
> (b) In those proceedings the parties may adduce evidence of and incidental to the settlement agreement.

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19 At [53].
20 At [56].
21 *Vero Insurance Ltd v Tran* [2008] NSWSC 363, (2008) 15 ANZ Insurance Cases ¶61-759.

[35] The defendants contended that the effect of cl 9(b) was that, to be effective, a settlement agreement had to be in writing and signed by the parties. By contrast, the plaintiff submitted that cl 9 did not affect the enforceability of an oral settlement agreement. Hamilton J accepted the defendants' contention. Although the Judge considered the language to be "spare", Hamilton J held that cl 9(b) "should be taken as specifying that, where the termination is by the parties entering into a settlement agreement, the settlement agreement should not be taken to be concluded until reduced to writing and executed".[22]

[36] However, the Judge went on to hold that the parties could vary the mediation agreement orally. Hamilton J said: "They could have come to an agreement to the effect that the requirement of an executed written [settlement] agreement was waived and that they intended to be bound immediately by an oral settlement agreement that they had then reached".[23] The Judge concluded, however, that there was nothing to show that this had in fact occurred.[24]

[37] Mr Brown submitted that the Deputy Judge's reasoning in *Brown v Rice* in relation to the possibility of an oral agreement was erroneous.[25] He argued that it did not sufficiently recognise the unique place of mediation as a dispute resolution technique. Mr Brown accepted that the various exceptions to the without prejudice rule identified by Lord Clarke in *Oceanbulk Shipping* continued to apply in New Zealand, but argued that the first exception (proving the existence of a settlement agreement) could be excluded by agreement, as had occurred in the present case. In making this argument, he emphasised the second of the two justifications for the rule, namely the express or implied agreement of the parties. He also emphasised that the purpose of requiring a written and signed settlement agreement was to ensure certainty and to avoid the type of dispute that has arisen in this case.

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22 At [34].

23 At [35].

24 This decision was upheld on appeal, on the basis that the alleged settlement agreement was incomplete: see *Vero Insurance Ltd v Tran* [2008] NSWCA 358. Gyles AJA, who delivered a judgment with which the other members of the Court agreed, said that he preferred to base his decision on this ground rather than on the construction of the mediation agreement. While he said that there was much to be said for Hamilton J's construction, he was concerned that there may be some special considerations arising from the fact that this was a Court-ordered mediation conducted under statutory provisions and rules: at [19].

25 Presumably he would say the same of Hamilton J's reasoning in *Vero*.

[38] While we accept that mediation has an important role to play in dispute resolution and that certainty and avoiding disputes such as the present are desirable objectives, we do not agree the appellant is precluded from leading evidence of what occurred at the mediation in the circumstances of this case.

[39] In the course of argument we put an example along the following lines to Mr Brown. Assume that A says B owes him $500,000 for certain services. B denies it, saying that the services were never fully provided and those that were provided were substandard. A issues proceedings against B seeking judgment in the amount of $500,000. The parties agree to mediate and enter into a mediation agreement which contains the usual without prejudice and confidentiality provisions and a "no settlement unless in writing" clause. After an intense, day-long mediation B offers to pay A $200,000 in full and final settlement and says that, if the offer is accepted, he will deposit the money into A's bank account by electronic transfer the following day. A accepts the offer. The parties being tired and under time pressure, nothing is reduced to writing. The day after the mediation, B deposits $200,000 into A's account by electronic transfer. A later denies that any settlement occurred at the mediation, and wishes to maintain his proceedings to recover the remaining $300,000. Can B plead the oral settlement agreement?

[40] Mr Brown's response was to say that perhaps the estoppel exception could be relied upon in such circumstances. But if evidence of what occurred at the mediation could be led to support an estoppel argument, it is difficult to see why it could not be led to support an argument that, despite the "no settlement unless in writing" clause, the parties did in fact enter into an oral settlement agreement. As was recognised by the Deputy Judge in *Brown v Rice* and Hamilton J in *Vero,* contracting parties are able to vary their agreement, waive their rights or enter a collateral contract.

[41] Moreover, it was part of Mr Brown's argument that the various exceptions to the rule identified by Lord Clarke continued to apply, save that the first (whether or not there was a settlement agreement) was subject to the intention of the parties. Accordingly, he accepted that, where there was a written settlement agreement, evidence of what occurred at the mediation could be given in support of a claim for

rectification[26] or an argument that the agreement resulted from misrepresentation, a breach of the Fair Trading Act, mistake, undue influence or fraud.[27] He also accepted that such evidence could be given to show the factual matrix against which the agreement was made, thus assisting in its interpretation.[28] And this could occur despite cl 5 of the mediation agreement. We consider that Mr Brown was right in this respect as the exceptions noted simply reflect the fact that settlement agreements are contracts and are subject to the same principles as apply to other contracts.

[42] In each of the instances just identified, the policy underlying the without prejudice rule is reinforced rather than undermined by the admission of the evidence. This is because the evidence goes either to whether there was a genuine settlement agreement or to its meaning – it does not go to the parties' positions in the mediation on the merits of the underlying dispute, which is what that the rule seeks to protect. In *Rudd v Trossacs Investments Inc* Lederman J made this point in the following terms:[29]

> The notions of privilege and confidentiality which cloak mediation sessions encourage parties to be frank and candid in seeking resolution without concern that, if no settlement is forthcoming, anything that they may have said at the mediation could be used against them. However, once a settlement is achieved but its interpretation is in question, disclosure of mediation negotiations may be necessary to ensure substantive justice. In such circumstances, disclosure of discussions will not undermine the mediation process as it is sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that the parties have arrived at.

[43] In our view, the same is true in the present case – the admission of the contested evidence reinforces rather than undermines the policy considerations underpinning the without prejudice rule. The policy reasons which Mr Brown gave in support of his submission that what was said at the mediation should be inadmissible did not relate to the policy considerations underlying the rule but rather went to the desirability of first, preserving the integrity of the mediation process by maintaining absolute confidentiality and second, ensuring certainty. Undoubtedly those are important objectives, but so is that of enforcing settlement agreements.

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[26] An example is *Rudd v Trossacs Investments Inc* (2004) 244 DLR (4th) 758 (Ont SCJ).

[27] Examples are *Allison v KPMG Peat Marwick* (1994) 8 PRNZ 128 (HC) and *Page v Accident Compensation Corporation* HC Auckland CIV 2004-404-3356, 2 December 2005.

[28] As in *Oceanbulk Shipping*.

[29] *Rudd v Trossacs Investments Inc* (2004) 244 DLR (4th) 758 (Ont SCJ) at [19].

[44] Returning to s 57(3), the effect of Mr Brown's argument is that s 57(3)(b) cannot apply where there is a "no settlement unless in writing" clause. The language of s 57(3) indicates that the third of the three exceptions, that in s 57(3)(c) dealing with *Calderbank* offers, depends on the intention of the party making the offer. This is clear from the language of s 57(3)(c)(i). But the other two exceptions, which relate to the terms of a settlement agreement or the existence of such an agreement, do not, on their wording, depend on the intention of the parties (beyond the fact that each involves a settlement agreement). That is, there is nothing in them which indicates that parties may agree that the exceptions they contain should not apply to them. Moreover, if the parties did attempt to contract out of s 57(3)(b) in their mediation agreement, it is difficult to see how they could exclude the possibility of waiver, variation or a collateral contract arising.

[45] We therefore consider that Sheppard is entitled to argue that the parties did reach an oral settlement agreement at the conclusion of the mediation, which Sheppard has in part performed, and is entitled to lead evidence of what occurred at the mediation to support that contention. As in *Brown v Rice*, cl 5(iv) will go to the question whether the parties in fact intended to enter into such an agreement.

The interpretation of the mediation agreement

[46] We assumed for the purposes of our discussion of s 57 that cl 5(iv) of the mediation agreement was a "no settlement unless in writing" clause. Although it is not necessary for us to reach a decision on effect of the mediation agreement given our decision on s 57, we will nevertheless consider the point.

[47] As we indicated earlier, unlike some other mediation agreements, this agreement does not contain an express clause to the effect that, if the parties agree to settle their dispute, the agreement or its essential principles must be reduced to writing and signed before the end of the mediation. Rather, cl 5(iv) relevantly provides that cls 5(i)–(iii) do not fetter "the legitimate use in enforcement proceedings or otherwise of any written and signed settlement agreement reached in or as a result of this mediation". Specialized's argument is, then, that because the

only exception to cl 5(i)–(iii) is for a written and signed settlement agreement, that is the only way under the mediation agreement that the dispute can be settled.

[48] However, it is by no means clear that this was what was intended. The fact that the mediation agreement makes specific provision for a written settlement agreement in cl 5(iv) does not, in our view, necessarily mean that it was intended to rule out the possibility of an oral one. Such a clause may indicate an expectation as to the process to be followed rather than imposing an absolute requirement for the completion of a written and executed settlement agreement.

[49] Nor do we see cls 5(i)–(iii) as ruling out the possibility of an oral settlement agreement:

(a) At least two of the prohibitions in cl 5(i), namely cl 5(i)(b) and (d), relate to the pre-settlement agreement stage and do not purport to prevent disclosure of what occurred in the course of mediation where the objective is to show that a settlement agreement was reached. They do not refer to any particular form of settlement agreement.

(b) Clause 5(i)(a) prohibits reference to exchanges "concerning the dispute". Given the context provided by cl 5(i)(b) and (d), this language does not necessarily cover the *settlement* of the dispute.

(c) Clause 5(iii) provides that "[e]very aspect of and communication within the mediation shall be without prejudice". This language indicates that the parties intended that what occurs in the mediation is without prejudice to the position of each party in relation to the dispute should the mediation fail to produce a settlement. There is nothing in it which indicates that the first exception to the without prejudice rule identified by Lord Clarke was to be excluded. Rather, the reference to "without prejudice" seems to invoke the rule in its entirety (ie, including the exceptions).

[50] We acknowledge, however, that the interpretation advanced by Specialized is an available one. Such an argument was accepted in *Vero* despite the "spare" language of the clause in that case, although it was differently worded from cl 5. Further, Specialized's interpretation is consistent with the approach usually taken in mediation agreements of indicating that any settlement be recorded in writing at the mediation.[30] Moreover, there are generally worded prohibitions in cl 5(i) which are not limited in any way, in particular cl 5(i)(f) which prohibits any party from adducing in evidence any statement made within the mediation. Mr Gray submitted that a settlement agreement was not "within the mediation" but rather was the outcome of the mediation and so outside it. While we see some force in that,[31] we think it unlikely that the parties had in mind so subtle an interpretation. We accept, then, that there are factors which provide some support for Specialized's interpretation.

[51] On balance, however, we consider that cl 5(iv) of the mediation agreement should not be interpreted to mean that a written and signed settlement agreement was the only form of settlement agreement that could be entered into. We consider that a clear statement to that effect was necessary to show such an intention, and such a statement could readily have been included in the agreement.[32] However, even if that had been the parties' intention, there was nothing to prevent them from changing their view in the course of the mediation. As the earlier discussion of *Brown v Rice* and *Vero* illustrates, the parties could have varied or waived a "no settlement unless in writing" clause during the mediation. While it is obviously desirable to document an agreed settlement at the conclusion of a mediation, a failure to do so might arise for any number of understandable reasons, such as exhaustion, a party facing unavoidable time pressures or a genuinely-felt spirit of cooperation.

Conclusion

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30 See David Foskett *The Law and Practice of Compromise* (7th ed, Thomson Reuters, London, 2010) at [35–19].

31 See *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC) where Ramsey J accepted that a prohibition on a mediator being called as a witness in any litigation "in relation to the Dispute" did not preclude her being called as a witness in litigation where the issue was whether an agreement reached at mediation had been reached under duress. In that case, however, "the Dispute" was defined in the mediation agreement to refer to the underlying dispute between the parties.

32 We do not see the factual matrix as assisting on the interpretation of the mediation agreement.

[52] To summarise, then:

(a) We do not consider that it is possible to contract out of s 57(3)(b) and, even if it were possible, the agreement would not necessarily be effective given the parties' ability to vary or waive its terms.

(b) In any event, the mediation agreement at issue does not say that settlement can only be effected by way of a written and signed settlement agreement, although cl 5(iv) indicates an expectation that any settlement would be so recorded.

(c) In the absence of clear language, we are unwilling to read into the mediation agreement a requirement that settlement can only be effected by way of a written and signed settlement agreement.

(d) That is not decisive, however, as even if there had been such a requirement, the parties could have agreed at the mediation to vary the mediation agreement or to waive the requirement.

(e) The fact that a mediation agreement contemplates or requires a written and executed settlement agreement will be relevant to whether the parties intended to be bound by an oral arrangement. Where the parties have signalled their expectation that there will be a written and executed settlement agreement, or have required one, that will undoubtedly be an important element in a judge's assessment of whether they have in fact decided to depart from what they contemplated or agreed at the outset.

Decision

[53] Accordingly, we allow the appeal. We answer the question as follows:

In the terms of cl 5 of the mediation agreement executed by the parties on 4 February 2010, the appellants may adduce:

(a) the evidence in paras 6 and 7 of Mr Darlow's affidavit;

(b) the evidence in paras 7, 9, 10(d) and 10(e) of Mr Struthers' affidavit and such parts of para 10(b) of Mr Struthers' affidavit as refer to Mr Smith; and

(c) any evidence of what occurred during the course of the mediation on 4 and 8 February 2010 that goes to the issue of whether the parties reached a binding oral settlement agreement at the conclusion of the mediation.

[54] The respondent must pay the appellants costs for a standard appeal on a band B basis plus usual disbursements. We certify for two counsel.

Solicitors:
Grove Darlow & Partners, Auckland for Appellants
Simpson Grierson, Auckland for Respondent