IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-8020

UNDER	the Copyright Act 1994
IN THE MATTER OF	Copyright Infringement and Breach of Contract
BETWEEN	SPECIALIZED BICYCLE COMPONENTS INC Plaintiff
AND	SHEPPARD INDUSTRIES LIMITED First Defendant
AND	AVANTI BICYCLE COMPANY LIMITED Second Defendant

Hearing: 26 August 2010

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

Judgment: 19 November 2010

RESERVED JUDGMENT OF PETERS J.

This judgment was delivered by
The Hon. Justice Peters
on
19 November 2010
pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

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[1] The issue I have to decide is whether the Defendants, in support of an application for a stay of proceedings or to strike out proceedings, may adduce evidence of communications made in the course of mediation. The Defendants' position is that they may and they rely on s 57(3) of the Evidence Act 2006 ("Act"). The Plaintiff's position is that the Defendants may not and they rely on the terms of the agreement on which the parties agreed to submit their dispute to mediation.

[2] A determination of this issue requires consideration of:

a) the terms on which the parties agreed to mediation;

b) whether an agreement between parties prevails over s 57 of the Act.

[3] I set out below:

a) the procedural steps taken by the parties to date, so as to put the determination of the issue in context;

b) the evidence which is relevant to the issue and the terms of the mediation agreement which the parties signed;

c) the parties' submissions;

d) the analysis I consider is required by s 12 of the Act.

Application to stay

[4] The Plaintiff commenced this proceeding in December 2009, by filing and serving a notice of proceeding and statement of claim.

[5] In its pleading, and the following points are admitted in the Statement of Defence, the Plaintiff says that it is based in California and that, amongst other things, it designs and sells high end, quality bicycles and bicycle components and

accessories. The Plaintiff says it has distributed its products in New Zealand through the First Defendant, pursuant to an agreement dated 31 August 1999. Pursuant to that agreement the Plaintiff granted the First Defendant the exclusive right to sell and distribute the Plaintiff's products in Australia and New Zealand.

[6] In late 2007 a dispute arose between the parties in connection with performance of obligations under the agreement and in respect of an allegation by the Plaintiff that the Defendants had copied some of the Plaintiff's products. The Defendants denied the copying allegation. In August 2009 the parties entered into a deed of settlement to record the terms of a settlement they had agreed ("August deed").

[7] In the present proceeding, the Plaintiff's causes of action against the Defendants largely concern allegations of copying. The statement of claim comprises 26 pages and the Plaintiff seeks various remedies in respect of various causes of action. The Defendants deny the critical aspects of the claim.

[8] On 4 and 8 February 2010 the parties attended mediation in respect of the dispute, some of the detail of which is set out below. The parties entered into a written mediation agreement ("mediation agreement"), the terms of which are critical to the determination of this matter.

[9] The Defendants filed their statement of defence on 17 March 2010. By way of an affirmative defence, the Defendants alleged, amongst other things, the existence and terms of an accord and satisfaction between the parties dated 8 February 2010.

[10] Also on 17 March 2010 the Defendants applied to the Court for an order staying or otherwise restraining the Plaintiff from continuing this proceeding. This application was also made on the ground that the parties reached an accord and satisfaction on 8 February 2010.

[11] The Defendants filed two affidavits in support of their application to stay the proceeding. One is from Mr Christopher Darlow, a solicitor of Auckland, whose

firm acts for the Defendants. The other was from Mr John Struthers, the managing director of each Defendant.

[12] On 23 March 2010 the Plaintiff filed a notice of opposition to the Defendants' application for stay. The grounds on which the Plaintiff opposed the Defendants' application are as follows:

a) the terms on which the parties agreed to attend mediation of their dispute preclude reliance by the Defendants on exchanges concerning the dispute, passing between the parties at the mediation;

b) in any event, the parties did not reach a binding and enforceable oral accord and satisfaction at the mediation.

[13] In support of its application, the Plaintiff filed an affidavit sworn by Mr Edward Mitchell, general counsel of the Plaintiff.

[14] On 30 April 2010 the Plaintiff applied to the Court for determination of a preliminary question under r 10.15.[1]

[15] The Defendants did not object to determination of this question and on 14 April 2010 the Court ordered that such determination should be made.

[16] The preliminary question for determination is:

> 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 prevented from adducing:
>
> i) The evidence in paragraphs 6 and 7 of Mr Darlow's affidavit and paragraphs 7 and 9, part of paragraph 10(b), and paragraphs 10(d) and 10(e) of Mr Struthers' affidavit; and/or
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> ii) Any evidence of exchanges and/or statements made and/or discussions held during the course of the mediation, or of any aspect

[1] High Court Rules r 10.15.

of the mediation, or any statement made or communication within the mediation.

[17] I refer below to the contentious paragraphs of Mr Darlow's and Mr Struthers' affidavits as the "evidence in dispute".

[18] It does not appear from the Court's records that either party served the mediator (the Hon Barry Paterson QC) with the relevant documents. Mr Paterson's position, if any, on the matter in issue is unknown. I did consider whether steps ought to be taken to ascertain Mr Paterson's position but, given the conclusion reached, decided it was unnecessary to do so.

Evidence

[19] So far as it is relevant, the evidence regarding the mediation is as follows.

[20] In his affidavit, Mr Darlow gives evidence:

a) that the parties met in Auckland on 4 and 8 February 2010 in an attempt to resolve the issues which are the subject of the proceeding and also other matters in issue between them.

b) Mr Paterson facilitated the discussions.

c) Mr Darlow and another partner in his firm, Mr Allan, attended the meetings. Mr Struthers attended on 4 February 2010 and Kim Struthers, the Defendants' Group Products Manager, attended on 8 February 2010. Mr Schnell, the Defendants' Chief Financial Officer, also attended on behalf of the Defendants.

d) Mr Mitchell and the Plaintiff's New Zealand solicitors, Ms Walker and Mr Grey of Simpson Grierson, Auckland, attended for the Plaintiff. Mr Mitchell travelled from San Francisco to New Zealand to attend.

e) The parties reached agreement on all issues between them on 8 February 2010. Mr Darlow sets out the terms of the agreement which the Defendants contend was reached. This is the evidence to which the Plaintiff takes exception because it discloses exchanges and statements at the mediation.

f) The agreement reached was not "subject to documentation" and, except to the extent the terms of the agreement are recorded in notes made by those present, including Mr Paterson, the terms of the agreement were not recorded in a written document "then and there".

g) With the exception of two matters, the Defendants have performed their "side of the bargain".

[21] Mr Struthers was not present at the mediation when it resumed on 8 February 2010. Accordingly, to the extent Mr Struthers purports to give evidence of what transpired at the mediation that day, his evidence is hearsay. Mr Struthers does, however, seek to give evidence as to aspects of part performance of the settlement agreement alleged to have been reached.

[22] In his affidavit, Mr Mitchell denies that a binding and enforceable oral settlement was reached at the mediation. His evidence is that the parties reached a resolution in principle but the expectation was that a written agreement, signed by the parties' representatives, would be required before any resolution was binding on the parties. Mr Mitchell also gives evidence that this expectation was borne out by events after the mediation. Mr Mitchell says that the parties exchanged correspondence and draft agreements over a month long period after the mediation, with both parties revising the proposed terms. However, no written agreement was ever finalised let alone executed.

[23] Mr Mitchell goes on to say that one reason why the parties expected that there would have to be a written and signed agreement was that any settlement would require a variation of the August deed. Mr Mitchell's evidence is that he and Mr Darlow negotiated the August deed over many weeks. The August deed contains

provisions as to how any course of dealing or waiver is, or is not, to be construed and provides that any variation of the deed must be in writing and signed by an authorised representative of each party.

[24] Mr Mitchell also puts in evidence a copy of the mediation agreement, a copy of which is attached to this decision. As stated, the terms of the mediation agreement are critical to determination of the preliminary question.

Mediation

[25] As counsel for the Plaintiff submitted, mediation is a consensual, voluntary process. Heath J said in *Jung and Anor v Templeton*:[2]

> [19] The term "mediation" is not defined in the [Evidence Act 2006]. In its standard form, it is a consensual process by which parties to a dispute meet in an attempt to resolve their differences. The difference between direct negotiation and a mediation is one of process. An independent facilitator (the mediator) is engaged contractually to assist the parties to reach agreement.
>
> [20] Usually, a formal process is followed involving a civil exchange of competing positions, articulation of the reasons why a particular party takes a specific stance, a discussion (led by the mediator) to tease out factual and legal differences between the parties, an analysis of the strengths and weaknesses of respective cases and a consideration of the risks and costs of litigation. Depending upon the style adopted by a particular mediator, there may be a greater or lesser degree of intervention on each of those issues, particularly the strength or weakness of aspects of the respective cases.
>
> [21] Some mediators will caucus with individual parties to promote resolution of the dispute. The process of caucusing involves the mediator seeing a party (usually with his or her adviser) privately, in the absence of the opposing party or parties. When that process is used the mediator might conduct "shuttle diplomacy", to maintain a dialogue at a time when the parties might find it too stressful to deal directly with each other.
>
> [22] The nature of the mediation process demands confidentiality attach to it. When parties attempt in good faith to negotiate a settlement of prospective or pending proceedings, they need to have confidence that what is said in the mediation process is not admissible in any subsequent curial or arbitral hearing, should settlement not be reached. Such confidence fosters frank communications and enables each party to make informed decisions, based on solid factual and

[2] *Jung and Anor v Templeton* HC Auckland CIV 2007-404-5383, 30 September 2009, Heath J.

> legal foundations, about whether or not to settle, having regards to the risks and costs of litigation.
>
> [23] The need for continued confidentiality is less clear once a settlement agreement has been formalised. In *Vaucluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 (CA) at 559, the Court described the "point of mediation" as "to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later rebound to the detriment to any party, *should the mediation fail to achieve settlement*".

Terms of the mediation agreement

[26] The mediation agreement in this case commences by recording the parties' appointment of Mr Paterson as mediator of the dispute described in the schedule and Mr Paterson's acceptance of appointment on the terms and conditions set out in the mediation agreement. It is common ground the dispute was not described in the schedule but nothing turns on that.

[27] Although the mediation agreement is dated 4 February 2010, being the first day of the mediation, cls 2 and 3 deal with matters which might arise before the mediation commenced.

[28] Clause 2 provides for the presentation of relevant documents. More significantly, cl 3 allows a party to submit, or the mediator to require a party to submit, in advance of mediation a summary of the party's case including suggested settlement proposals.

[29] By cl 7 the parties and mediator agreed that the mediator would be free throughout the mediation to communicate privately with them, subject to certain terms which are not relevant in this context. This is the "caucusing" approach Heath J referred to in *Jung*.

[30] Accordingly, by cls 2, 3 and 7, the parties agreed that the mediator should have certain powers as between them, to be used for the purpose of seeking to achieve a settlement of the dispute.

[31] Clause 5 of the mediation agreement is the critical provision insofar as concerns admissibility issues. The Plaintiff alleges that the Defendants are in breach of cl 5(i)(a) in seeking to rely on the evidence in dispute.

[32] By cl 5(i) of the agreement, the mediator, the parties and all persons brought into the mediation by either party, agree that they will not seek to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not relating to the dispute, the various communications and documents which are referred to in cls 5(i)(a)-(f) of the agreement.

[33] Clauses 5(i)(a)-(f) speak for themselves. It is difficult to think of any type of communication which would fall outside their ambit.

[34] Clause 5(ii) of the agreement required the parties and all non-parties brought into the mediation to sign a "confidentiality agreement" in a form set out in the agreement. With the possible exception of Kim Struthers, it appears all present at the mediation signed the confidentiality agreement. A party who executed the confidentiality agreement agreed to:

> ... 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. ...

[35] A party is not usually precluded from adducing evidence regarding information in respect of which the party has agreed to preserve confidentiality. If disclosure was to be restrained on the grounds of confidentiality alone, there would need to be a direction under s 69 of the Act. The Plaintiff did not make an application in the present case. In the absence of such a direction, cl 5(ii) and the confidentiality agreement would not of themselves render the evidence in dispute inadmissible.

[36] Clause 5(iii) states that every aspect of and communication within the mediation shall be “without prejudice”. Counsel for the Plaintiff submitted that this was something of "a belt and braces" provision, given the breadth of cl 5(i).

[37] Clause 5(iv) of the agreement provides that cl 5 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 the mediation.

Parties' submissions

[38] There was a measure of common ground between the parties in their submissions.

[39] Both agreed that, at common law, communications between parties, made for the purpose of settling a dispute, are treated as having been made "without prejudice". As a result, and subject to certain exceptions, those communications are inadmissible in subsequent proceedings if the dispute is not resolved.

[40] Both parties also agreed that s 57 of the Act is intended to replicate the common law privilege. I add here that, although s 57 was intended to state the common law privilege, it does not purport to be a complete restatement of the common law. This is clear from Keane J's judgment in *New Zealand Institute of Chartered Accountants v Clarke*.[3]

[41] Section 57 of the Act is in part 2 subpart 8 of the Act. This subpart contains provisions addressing the circumstances in which a person has a privilege, entitling them to withhold in a proceeding, or restrain another person from disclosing, a communication or information as defined in s 53.

[42] Section 53 sets out the nature of the privilege which is conferred and reads as follows:

> **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

[3] *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264, at [44] and [49].

(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.

(2) A person who has a privilege conferred by section 60 or 64 in respect of information has the right to refuse to disclose in a proceeding the information.

(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—

(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 compiled; or

(b) by any other person who has come into 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.

(4) If a communication, information, opinion, or document, in respect of which a person has a privilege conferred by any of sections 54 to 59 and 64, is in the possession of a person other than a person referred to in subsection (3), a Judge may, on the Judge's own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document not be disclosed in a proceeding.

(5) This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding.

[43] Sections 54 to 59 of the Act confer the privilege set out in s 53 in specified circumstances. Section 57 is the relevant provision for the purposes of this case and reads as follows:

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.

[44] The Defendants rely on s 57(3)(b) of the Act. The Plaintiff's case is that s 57 is subject to any agreement which the parties might have made and for that reason has no application in this particular case.

[45] The limitations or restrictions on the privileges conferred in subpart 8 are not absolute. I consider s 57(3) to contain limitations or restrictions on the privileges referred to in ss 57(1) and (2). Section 69 gives a judge discretion in particular circumstances to restrain disclosure in a proceeding of confidential information. The relevant parts of s 69 read as follows:

69 Overriding discretion as to confidential information

(1) A **direction under this section** is a direction that any 1 or more of the following not be disclosed in a proceeding:

(a) a confidential communication:

(b) any confidential information:

(c) any information that would or might reveal a confidential source of information.

...

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[46] There were, however, significant differences in the parties' submissions on other matters, and those other matters seem to me to come down to the following.

[47] The first concerns the meaning of cl 5(i) of the mediation agreement.

[48] On this issue, the Plaintiff submitted that the parties made deliberate and extensive provision in cl 5(i) as to the inadmissibility of communications made at the mediation. The parties agreed such communications were to be inadmissible except for the purpose provided in cl 5(iv).

[49] The Defendants submitted that, by cl 5(i), the parties simply invoked the common law without prejudice rule, now contained in s 57 of the Act. The common law rule is, and now ss 57(1) and (2) are, subject to exceptions. The rule at common law has never prevented a court from considering evidence of without prejudice communications for the purpose of determining whether the parties reached a binding settlement in the course of their negotiations. The Defendants also submit that communications made in mediation have typically been viewed the same way. Section 57(3) reproduces this exception. The Defendants submit that, if the Plaintiff is correct in its view as to the meaning of cls 5(i) and (iv), the parties could never reach an oral agreement. As a result, the Defendants submit they are not in breach of cl 5(i) by seeking to adduce the evidence in dispute.

[50] The second issue arises only if the Plaintiff is correct in its view as to the meaning of cl 5(i). It is whether an agreement between parties prevails over s 57 of the Act, so that the Defendants may not invoke s 57(3)(b) and may not adduce the evidence in dispute.

[51] The Plaintiff's submission on this issue was that s 57 operates as a "default" privilege. However, a party's claim to restrain disclosure may rest on agreement

rather than on s 57(1) or (2). Section 57(3) applies only if privilege is claimed on the basis of s 57 (1) or (2) and not if the claim rests on agreement.

[52] The Plaintiff's submission was that there is nothing in the Act to preclude the Court enforcing a provision such as that in cl 5(i). Quite aside from there being no prohibition, there is also good reason for such an agreement to prevail over s 57. The parties in this case made extensive provision in the mediation agreement as to the conduct of the mediation. They did so to create certainty and to avoid the very situation which has now arisen, namely a dispute about whether the parties reached an oral agreement to settle.

[53] The Defendants' submission was that a private agreement does not prevail over s 57. The Defendants' submission was that it is not open to the Court to enforce a private agreement which confers a privilege that is more extensive than that in s 57 (1) and (2), nor subject to the exceptions in s 57(3) of the Act. The starting point for determination of any issue as to the admissibility of evidence is s 7 of the Act, so that if evidence is relevant, it is admissible unless inadmissible or excluded under the Act or any other legislation. Sections 57(1) and (2) define the only circumstances in which the Act excludes evidence of communications made and confidential documents prepared for the purpose of seeking to negotiate a settlement. The privilege which is conferred is displaced if s 57(3)(b) applies, as the Defendants say it does in this case. Accordingly, the Defendants contend they are entitled to adduce the evidence in dispute.

[54] The parties also relied on various authorities which are referred to below.

First issue: meaning and effect of cl 5(i) of the agreement

[55] In my view, the meaning of cl 5(i) of the agreement is clear. It is to render all of the various types of communication referred to in cl 5(i)(a)-(f) inadmissible. In my view it does not permit any exception except in the circumstances of cl 5(iv).

[56] The prohibition in the opening words of cl 5(i) is reinforced by the reference to both arbitral and judicial proceedings and the breadth of the type of communication referred to in sub-cls 5(i)(a)-(f). At stated, it is difficult to think of any communication or document which might fall outside the ambit of cl 5(i)(a)-(f). Clauses 5(ii) and (iii) emphasise the prohibition in cl 5(i).

[57] In my view, the parties did not intend to invoke the general without prejudice rule by cl 5(i). The parties were making deliberate and extensive provision for inadmissibility, except in a case to which cl 5(iv) might apply.

[58] The Defendants submitted that this construction of cl 5(i) would mean the parties could not reach an oral agreement to settle. I accept that this construction of cl 5(i) would make it difficult, and probably impossible, for a party to prove an oral agreement to settle. That, however, is a necessary consequence of the terms the parties agreed.

[59] The evidence which the Defendants seek to adduce and to which the Plaintiff objects requires disclosure of exchanges and/or statements falling within cls 5(i)(a) and (f) respectively. I consider that the Defendants are in breach of cl 5(i) of the mediation agreement accordingly.

Second issue – does a private agreement prevail over s 57 of the Act, so that in this case the Defendants cannot invoke s 57(3)?

[60] Section 57, and subpart 8 of part 2 of the Act in which it is contained, are silent as to whether the Court may recognise a party's claim to restrain disclosure of evidence, where the claim is founded on agreement rather than on ss 57(1) and (2).

[61] Counsel for the Plaintiff submitted that the matter fell to be governed by s 10 of the Act. Section 10 deals with interpretation of the Act. I consider that s 12 is the correct provision to apply. Section 12 provides how a decision regulating the admission of evidence is to be made, when the Act makes no, or only partial, provision. The Act does not make provision as to whether an agreement between parties prevails over s 57.

[62] Section 12 reads as follows:

12 Evidential matters not provided for

If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence—

(a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and

(b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.

Sections 6 to 8 of the Act

[63] Sections 6 to 8 read as follows:

6 Purpose

The purpose of this Act is to help secure the just determination of proceedings by—

(a) providing for facts to be established by the application of logical rules; and

(b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and

(c) promoting fairness to parties and witnesses; and

(d) protecting rights of confidentiality and other important public interests; and

(e) avoiding unjustifiable expense and delay; and

(f) enhancing access to the law of evidence.

7 Fundamental principle that relevant evidence admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is—

(a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[64] Of the matters referred to in s 6, I consider that ss 6(c) and (d) are relevant.

[65] Section 6(c) provides that the purpose of the Act is to help secure the just determination of proceedings by promoting fairness to parties and witnesses.

[66] Section 6(d) provides that the purpose of the Act is to help secure the just determination of proceedings by protecting rights of confidentiality and other important public interests.

[67] In this case, both of those matters point to enforcement of the terms of the mediation agreement and excluding the evidence in dispute. I consider the terms of the mediation agreement to be clear. I also consider that there is a public interest in requiring the parties to adhere to the terms of their agreement and on which they have proceeded.

[68] I have considered whether the purpose referred to in s 6(e) might also be relevant. If the Defendants were to adduce evidence that the parties reached an oral agreement, those present at the mediation, and possibly also the mediator, might have to give evidence as to who said what to whom and when. Probably there would also be argument as to the effect of communications after the mediation and the

effect of provisions of the August deed. The process would be expensive and take considerable time. However, the parties would reasonably take different views as to whether the expense and delay were justified. Given that, I do not propose to put any weight on s 6(e) in this case.

[69] Turning to s 7(1), there is no doubt that the evidence in dispute is relevant and that is a point which weighs in favour of the Defendant's position. However, relevance is not decisive. If it were, s 12 would say so.

[70] Section 8 is not relevant in this instance.

Common law

[71] The next matter to consider under s 12 is the common law, to the extent it is consistent with the promotion of the purpose and principles of the Act and to the extent it is relevant to the decisions to be taken.

[72] Having considered a number of authorities, I am of the view that the common law is consistent with ss 6-8 of the Act and is relevant to the decision to be taken. Although the vast majority of the authorities concern instances of parties doing no more than agreeing that their negotiations, often by correspondence, are to be "without prejudice", many of the principles laid down in the authorities are relevant to determining this different issue.

[73] At common law, the general without prejudice rule is that evidence of communications, written or oral, made by parties in the course, and for the purpose, of seeking to negotiate a resolution of a dispute is inadmissible in subsequent litigation. This is evident from the authorities to which counsel referred me including *Tomlin v Standard Telephones and Cables Limited;*[4] *Vaucluse Holdings*

[4] *Tomlin v Standard Telephones and Cables Limited* [1969] 1 WLR 1378.

Limited v Lindsay;[5] *Unilever plc v The Procter & Gamble Co*;[6] *Wicks v Waitakere City Council*[7] and *Jung v Templeton*.[8]

[74] *Rush & Tompkins Ltd v Greater London Council and Anor*[9] and *Ofulue v Bossert,*[10] both decisions of the House of Lords, are also important authorities. Counsel for the Plaintiff also referred me to an article by Professor David Vaver, "Without Prejudice" Communications – Their Admissibility and Effect.[11]

[75] The explanation for the development of the rule was/is twofold.

[76] First, as a matter of public policy, parties should be encouraged to settle their disputes. Parties must be able to communicate with each other freely while they negotiate, safe in the knowledge that, if agreement is not reached, their communications are not be admissible as evidence against them subsequently.

[77] The second reason is that the law recognises an agreement, generally implied, between the parties that they will not seek to rely on such communications if their negotiations are unsuccessful. The without prejudice rule enforces the agreement the parties have made, or which they are taken to have made, when commencing negotiations.

[78] At page 2441 H of his judgement, Walker LJ set out the explanation for the rule in this way:

> In *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739–740, [1989] AC 1280 at 1299, Lord Griffiths said:
>
> > 'The "without prejudice rule" is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is

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[5] *Vaucluse Holdings Limited v Lindsay* (1997) 10 PRNZ 557 (CA).
[6] *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436.
[7] *Wicks v Waitakere City Council* HC Auckland CIV-2005-404-5146, 13 October 2006, Rodney Hansen J.
[8] *Jung v Templeton* [2010] 2 NZLR 255 (HC).
[9] *Rush & Tompkins Ltd v Greater London Council & Anor* [1988] UKHL 7.
[10] *Ofulue v Bossert* [2009] 2 WLR 749.
[11] Professor David Vaver: "Without Prejudice" Communications – Their Admissibility and Effect (1974) 9 UBCLR 85.

> nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* ([1984] 1 All ER 597 at 605–606, [1984] Ch 290 at 306): "That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability." The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.'
>
> This well-known passage recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues.

[79] As counsel for the Defendants submitted, the general common law rule does not prevent the admission of evidence of without prejudice communications in particular circumstances.

[80] Common exceptions to the rule are listed in *Unilever* and were more recently considered in the *Ofulue* decision. In that latter case, their Lordships emphasised that exceptions to the rule were not to be too readily developed or applied, as to do so would be likely to undermine the public policy reason for the rule, namely that parties should be encouraged to resolve their differences. Their Lordships considered that exceptions to the without prejudice rule reflected circumstances in which justice clearly "required" or "demanded" admissibility (see [38] and [57] of Lord Rodger's and Lord Walker's judgments respectively).

[81] One of the exceptions to the rule is relevant to this case and is that contained in s 57(3)(a) and (b) of the Act. In *Tomlin v Standard Telephones and Cables Limited*, a case to which the Defendants referred me, the issue before the Court was whether a concluded settlement agreement had resulted from the parties' written correspondence, which was marked without prejudice. By a majority, the Court of

Appeal decided that the correspondence was admissible because it would be impossible otherwise to decide whether agreement had been reached. The view taken was that, while the general without prejudice rule will protect communications in the absence of a resolution of the dispute, if in fact the parties reach a settlement, the public interest lies in enforcing that settlement.

[82] The Defendants also referred me to the decision of Rodney Hansen J in *Wicks v Waitakere City Council.*[12] In that case, the parties had attended a judicial settlement conference and reached an agreement, recorded in writing, during the conference. The conference was conducted on a without prejudice basis. One of the parties subsequently sought to rely on what was said at the conference in support of a contention that the written agreement did not record all of the agreed terms. The Court held that the interests of justice required the admission of statements made at the conference bearing on the discrete issue which had been raised.

[83] Accordingly, it is clear that, at common law, evidence of without prejudice communications is admissible to prove the existence of a settlement agreement.

[84] There is also authority at common law that parties may, by agreement, determine the scope of the privilege that is to apply to their communications.

[85] *Whiffen v Hartwright,*[13] a case referred to in the article by Professor Vaver, is an early instance of the court recognising an agreement between parties as to the admissibility or otherwise of communications between them. In that case the defendant had stipulated in writing "*that the correspondence should not be, in any way, referred to or used to the prejudice of the defendant, if an amicable arrangement was not come to*". No agreement was reached and the plaintiff sought discovery of the documents which the defendant opposed. The court refused to order production on the basis that it did not see "*how the plaintiff could get over this express agreement*".

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[12] *Wicks v Waitakere City Council* HC Auckland CIV-2005-404-5146, 13 October 2006.
[13] *Whiffen v Hartwright* (1848) 11 Beav. 111.

[86] *Cutts v Head*[14] is another case in which the parties were taken to have modified the operation of the general rule by agreement. In that case, the plaintiff sent a letter headed "without prejudice" to the defendant's solicitors offering to settle a dispute, but reserving the right to refer to the letter on the issue of costs if the offer were not accepted, that is, the letter was written "without prejudice except as to costs".

[87] In *Cutts v Head* the question was whether it was open to a party in civil proceedings to modify the operation of the without prejudice rule, so as to allow the plaintiff to put the letter in evidence after trial on the matters of costs. The court held that there was no logical reason why, in appropriate circumstances, the conventional meaning of the phrase "without prejudice" should not be modified, so long as the intended modification was clearly expressed and brought to the attention of the recipient.[15]

[88] Passages in Walker LJ's judgment in *Unilever* also refer to parties' rights to agree the scope of the privilege to apply as between them. The relevant passages are as follows:

> The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in the *Rush & Tompkins* case, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Pt 44.3(4), attach to the conduct of the parties in deciding questions of costs). 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 by limiting its reach.[16]

And

> ... The circumstances of the Frankfurt meeting were as far removed as it is possible to imagine from the unilateral communication to which the debtor in *Re Daintrey* sought to add the "without prejudice" label. It was a high-level meeting between highly skilled professionals representing the interests of multinational groups which are household names. The meeting was in the judge's words held "in the context of ongoing discussions with a view to settling a number of issues between the two organisations" ([1999] 2 All ER

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[14] *Cutts v Head* [1984] 2 WLR 349.
[15] At 361, line C.
[16] At 2445, line C.

> 691 at 693, [1999] 1 WLR 1630 at 1632). It was an occasion for both sides to speak freely. There is nothing (beyond the bare and unembroidered pleading of a threat) to suggest that Procter & Gamble's representatives at the meeting acted in any way that was oppressive, or dishonest, or dishonourable.
>
> In my judgment the judge was right to conclude that it would be an abuse of process for Unilever to be allowed to plead anything that was said at the meeting either as a threat or as a claim of right. The circumstances were such that each side was entitled to expect to be able to speak freely, and their agreement to the meeting being arranged evinces that common intention. I would, if necessary, base my conclusion on the parties' agreement to extend the normal ambit of the rule based on public policy. But I do not think it is necessary to go that far. The Frankfurt meeting was undoubtedly an occasion covered by the normal rule based on public policy, and the pleading of the threat (or claim of right) has not been shown to come within any recognised exception. The expansion of exceptions should not be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation. ... [17]

[89] The Plaintiff referred to *Bell v University of Auckland*[18] as a case in which the court recognised a claim to privilege made on the basis of an agreement between the parties to the proceeding. In that case, the plaintiff sought discovery from the defendant of various references. The plaintiff had supplied the names of the referees and had undertaken that such references were to be kept confidential to the defendant and not disclosed to him. The court held that the plaintiff's undertaking meant the references were privileged from production to the plaintiff on discovery.

[90] The Plaintiff also referred to *David Instance v Denny Bros Printing Limited*[19] as a case standing for the same proposition. In that case, the court granted an application for injunction restraining parties related to the defendants from giving evidence in litigation in the United States. The evidence in question was of communications made for the purpose of negotiating a settlement. The parties had agreed at the outset that evidence of their negotiations would not be admissible in subsequent proceedings.

[91] Although that case assists the Plaintiff, the judge made it clear the circumstances required him to give a decision immediately and that he would have

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[17] At 2449, line E.
[18] *Bell v University of Auckland* [1969] NZLR 1029.
[19] *David Instance v Denny Bros Printing Limited* 2000 FSR 869.

preferred more time to consider the matter. Given that, I do not place great weight on that decision.

[92] The Defendants relied on a recent case, namely *Brown v Rice and Anor*[20], as authority for the proposition that a private agreement such as in issue in this case does not displace the common law exception referred to in *Tomlin*.

[93] In *Brown*, the parties attended mediation, the terms of which were governed by written agreement. Clause 7.2 of the agreement stated that all information provided during the mediation was without prejudice and inadmissible in any litigation or arbitration of the dispute.

[94] The question for the court was whether an offer said to have been made by one of the parties' representatives towards the end of the mediation remained open for acceptance the next morning.

[95] The court held that the exception to the without prejudice rule, which arises where the issue is whether there was a concluded settlement, applied. The court held this exception applied whether the without prejudice rule was founded on a party's agreement as much as where founded on public policy.[21] The court held that evidence of the terms of the offer was admissible.

[96] The facts of *Brown* are similar to the present case but, as counsel for the Plaintiff submitted, a distinction can be drawn between the terms of the two mediation agreements. The terms of the mediation agreement in the present case, as to the inadmissibility of communications made at the mediation, were more extensive that those in *Brown*. I do not consider the decision in *Brown* to be of assistance in making the decision required by s 12 of the Act, mainly because of the obvious differences between the terms of the agreements. It also is not clear to me that counsel in *Brown* drew to the court's attention the passages in *Unilever* which

[20] *Brown v Rice and Anor* [2007] EWHC 625 (Ch).
[21] Page 73.

make it clear that parties may agree the scope of the privilege to apply as between themselves.

[97] To conclude, on the analysis required by s 12(b) of the Act, I consider that, at common law, the terms of the mediation agreement would be enforced. I consider the Defendants would be restrained from adducing the evidence in dispute or any other evidence proposed to be adduced in breach of cl 5(i). I bear in mind the exception to the common law rule which was applied in *Tomlin* and which has been referred to in other authorities. However, the authorities also provide that parties may agree as between themselves the scope of the privilege which is to apply to their discussions. For whatever reason, that is what the parties did in the present case.

Result

[98] Returning now to s 12, I take into account the matters considered under ss 6(c) and (d) and 7. I also take into account the view I have reached as to the enforceability, at common law, of cl 5(i). Having done so, the decision I make under s 12 is that the terms of the mediation agreement prevail over s 57 and the Defendants may not adduce evidence in breach of cl 5(i) of the mediation agreement dated 4 February 2010.

[99] I answer the preliminary question as follows.

[100] On the terms of cl 5 of the mediation agreement executed by the parties on 4 February 2010, the Defendants may not adduce:

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

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

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.

[101] The Plaintiff is entitled to costs and disbursements. If the parties are not able to agree costs within 10 working days of this judgment, the Plaintiff should file a memorandum by mid-day on 7 December 2010 and the Defendants should respond by 5:00pm on Monday 13 December 2010.

.....
PETERS J

latasha Alley

Subject: FW: mediation agreement (2)

MEDIATION AGREEMENT

Agreement dated the 4th day of February 2010.

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.

1. The parties will meet the Mediator at a time and date to be arranged.

2. Prior to the meeting the parties or their legal advisers will agree between themselves regarding the collation and presentation of the necessary documentation to enable the mediation to take place and other necessary administrative matters including the time and venue of the mediation.

3. Prior to the mediation the parties may and will if required by the Mediator submit to the Mediator for his confidential information a short summary of their case including if desired suggested settlement proposals.

4. The parties warrant that they or their representatives at the mediation will have full authority to settle the dispute.

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 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 o

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.

6. The parties will not be bound by any comments, opinions, suggestions, statements or recommendations made by the Mediator.

7. The general procedure for the mediation will be discussed by the Mediator with the parties at the outset of the mediation. Throughout the whole course of the mediation process the Mediator will be free, at his own unfettered discretion, to communicate and discuss the dispute privately with any of the parties or other persons brought into the mediation by them including their legal advisers provided always that the mediator will preserve absolute secrecy of the content of any such communications and will not convey the content to any other party unless specifically authorised to do so.

8. The parties and the Mediator agree that no statements or comments, whether written or oral, made or used by them or their representatives during the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded in bar to any such action.

9. The parties jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to this mediation.

10. Each party confirms that he/she/it enters into the mediation with a commitment to attempt in good faith to negotiate towards achievement of a settlement of the dispute.

11. (a) The parties jointly and severally agree to pay to the Mediator not later than 21 days after the conclusion of the mediation:

(i) a fee of $5000.00 plus GST per day;

(ii) $500 plus GST per hour for attendances prior to the mediation;

(iii) Disbursements, including accommodation and travelling expenses where applicable.

(b) Such payment will be shared equally between the parties.

12. Each party will pay its own costs and expenses of the mediati.

02-04-10 .....

Signature and Date **Signature and Date**

Specialized Bicycle Components, Inc

John Bradley STRUTHERS .....

Name Printed **Name Printed**

.....

Signature and Date **Signature and Date**

.....	.....
Name Printed	**Name Printed**
.....	.....
Signature and Date	**Signature and Date**
.....	.....
Name Printed	**Name Printed**
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.....
Mediator

SCHEDULE

(Briefly identify the matter in dispute)

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. This 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.

Dated

EARL CAMERON GRAY	.....
Name (Block Letters)	**Signature**
TRACEY JEAN WALKER	
Edward A. Mokrzecki	
Chris Darlow	
John Butler	
3/02/2010 Paul Schwell	
