Mixing with the grown ups

Mark Beech, Chair of LEADR NZ, reflects on greater court scrutiny for mediation and the implications and opportunities for practitioners.

Less than 30 years ago, the 'A' in ADR definitely stood for 'alternative' and not in the sense that it might have been originally intended.

Conjuring up images of a soft option involving the 'touchy feely' approach, ADR was regarded as something hazy, mysterious and definitely best avoided by many commercial litigators. There was some comfort for the sceptics in that, as the 'new kid on the block', ADR wouldn't last the distance.

Fast forward to 2012, and mediation and other ADR processes are a core part of a savvy lawyer's skillset. This is true whether your skills are in understanding and working with these processes in your role as adviser, or whether you have also developed mediation practice as part of your toolkit.

Over the past 10 years, mediation has grown in New Zealand into the principal alternative to proceeding to trial. The High Court and District Court Rules now actively promote case management, consideration of judicial settlement conferences and other forms of alternative dispute resolution. Our professional rules as lawyers require that we advise our client of the alternatives to litigation to enable the client to make an informed decision regarding the resolution of their dispute. [1]

As mediation has taken a firmer foothold in the dispute resolution landscape, a small body of case law continues to develop and move both mediation process and principles into the judicial spotlight.

Most recently, *Sheppard Industries Limited v Specialized Bicycle Components Incorporated [2011] NZCA 346* highlighted the need for clarity for all parties regarding when an agreement is reached at mediation. It also questioned the 'cloak of confidentiality' – one of the core tenets of the mediation process, and previously seen as absolute by many who use the process. Sheppard vs. Specialized has been widely reviewed but to briefly recap: The Court of Appeal overturned a High Court decision, which held that the evidence surrounding what occurred in the course of the mediation was inadmissible on common law grounds.

In reaching this decision, the Court of Appeal considered recent UK case law, which determined that the role of mediation, and its surrounding confidentiality, must be balanced against the enforcement of settlement agreements.

It held that parties could not contract out of the exceptions in s 57(3) of the Evidence Act 2006 and that the s 57(3) (b) exception to settlement negotiation privilege applied. Even if the mediation agreement purported to contract out of s 57(3), the possibility of waiver, variation or collateral contract could not be excluded.[2]

The case was destined for the Supreme Court but the parties settled out of court, leaving the Court of Appeal decision standing. The *Specialized* Court of Appeal decision is not an unbundling

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapter 13.4

[2] From nzscblog.com which has both a useful summary and links to previous commentary on this case.

of mediation principles. But it is a significant decision, and mediators and lawyers should be conscious of the fact that, no matter what the mediation agreement says, there can now be the possibility of court intervention and scrutiny of what happened at the mediation table.

Both in my role as Chair of LEADR NZ, and as a lawyer, mediator and specialist in dispute resolution; I view this court scrutiny as a sign of the maturing of the sector.

Not only is mediation an accepted part of the landscape, it is being used increasingly for sophisticated disputes and, further, it is being tested as a process in the course of those disputes. The courts have arguably always had the capacity to examine non-litigation processes but it is in more recent years that we have seen this scrutiny exercised.

For mediators, this maturing highlights the need to constantly reassess and review our approach to ensure parties get the best from what is a powerful and effective form of dispute resolution. Parties will be reluctant to engage wholeheartedly in a process if it becomes just another step in the legal wrangle regarding their dispute – particularly when the process is designed to provide an alternative to that route!

Mediation practitioners must ensure that parties fully understand the process that they're entering into. In particular, they must understand the circumstances that will determine when a binding agreement is reached at mediation. To do this, we must continuously review our standard mediation agreements – but we must also prepare and plan ahead for all eventualities.

From the opening of the mediation, mediators must ensure that parties and their advisers have a clear understanding of the processes that will be followed during the mediation. Mediators must also be conscious of reviewing everyone's understanding as the mediation progresses. All parties need clarity over what each of their roles is, the proper context of the mediation and, if agreement is reached, where that sits. The Court of Appeal decision means that mediators will not exclude the effect of s57 of the Evidence Act whatever they might choose to put in their mediation agreement. Careful consideration of wording around what constitutes an agreement and explanations of this to parties will, however, aid expectations in practice and therefore reduce the likelihood of conflicting understandings.

The concept of 'without prejudice' is the cornerstone of mediation. It not only allows for free and frank discussion; it allows parties to make concessions to each other in a safe environment. This is a key part of the robustness of mediation. The ability to explore options for compromise is important in the process of getting an overall agreement. When finalising the agreement, though, the mediator needs to work with the parties and their advisers to ensure everyone is clear on when the mediation is complete, and when an agreement can be considered a final – and therefore binding – one. This may well include considering more flexibility in the final stages of the mediation process.

For example, the mediator might adjourn the mediation to allow the lawyers to draft the written agreement. The mediator might then resume the mediation to refine the agreement, and get it signed. Or they might convene a telephone conference call in a week's time to discuss the draft agreement. This is all within the context of the mediation continuing until that agreement is finalised, and signed.

In the interests of certainty at the end of the process, the mediator must check that all parties have the same understanding about several key matters: the level of agreement reached (or not); the process that will be followed if the agreement is not yet in written form; and the process that will be followed if anything derails at this late but crucial stage.

The important point is that, as mediators, we have thought about it, planned it and communicated it clearly to the parties at the start of the day, and that everyone's roles are clearly defined.

By following these best practice principles, mediators can work to preserve the confidential nature of the discussions that occur in the mediation room, and retain the robustness of the process.

To keep our place at the ‘grown-ups table’, we need to focus on continuous improvement, ongoing training, and professional development for those working in the field. This includes focusing on robust and carefully thought through documentation and processes.

So long as we continue to do this, we can preserve the fluidity and flexibility of the mediation process, without compromising the principles that make ADR so attractive in the first case.

At LEADR, we have recently reviewed our standard mediation agreement as part of this continuous improvement. Practitioners can access this agreement from the ‘Resources and Tools’ section of our website www.leadr.co.nz. We offer this as a starting point for your own review.

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LEADR NZ is a not-for-profit membership organisation for mediation professionals, providing training, membership and accreditation as well as educating and advocating for the greater use of alternative dispute resolution.