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Case note

Alleging mistake after mediation

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MERIGAN-JAMES v JAMES

[2006] VSC 34
9 February 2006

The Victorian Supreme Court proceedings in *Merigan-James v James* arose out of the former de facto relationship of the plaintiff and defendant. While they had agreed on the division of much of their joint property the couple had been unable to agree on the division of a house in Echuca, a business, and some personal chattels and shares. The parties, with their respective legal representatives, attended an 'informal mediation session' on 9 March 2004.

At mediation both parties agreed to terms of settlement according to which the plaintiff would receive 37.5 per cent and the defendant 62.5 per cent of the net proceeds of the property, which was to be auctioned. In addition the business was to be transferred to the plaintiff. Both parties agreed to do all things necessary to give effect to the terms of the mediated settlement, and agreed to have the County Court proceeding struck out, subject to a right of reinstatement. This agreement was captured in handwritten terms of settlement.

The defendant failed to perform the terms of the settlement agreed at mediation. There was no dispute that the mediated settlement was signed, that it contained the terms alleged by the plaintiff, and that the defendant had breached his obligations under the mediated settlement. The plaintiff remained ready, willing and able to perform her part of the terms. The proceedings were ordered to be reinstated.

The issue for the Court to decide arose from the defendant's claim that there had been a *mutual or common mistake* as to the value of the Echuca property, thus invalidating the mediated settlement.

In the time during which the parties had attempted to resolve the issues between them before mediation, three appraisals on the property had been obtained. At the start of the mediation meeting the plaintiff handed to the defendant and his adviser a market appraisal of the property which showed a current value of $360,000–380,000, based on the assumption that the property was subdivided. This appraisal was used by the plaintiff as indicative of the value of the property for negotiating purposes. The defendant subsequently claimed that there had been common mistake in this valuation of the property, and as such the mediated agreement was invalid.

The defendant was highly upset by the outcome of the mediation, a fact acknowledged by Hollingworth J at [49]:

> That letter reflects my understanding of the real attitude taken by the defendant. He felt that his previous solicitor had pressured him into settling. He was unhappy with the deal that had been struck and wanted a chance to renegotiate it …

The defendant proceeded directly to his solicitor's office after the mediation and in the week after 17 March 2004 another written valuation of $280,000 was obtained by the defendant. It was alleged that this valuation lent support to the common mistake allegation.

However on the facts of the case Hollingworth J found (similar to Denning LJ in *Cooper v Cooper (Preece) (*1973) CAT 425) that there was no evidence that either party had entered into the mediated settlement under a mistake, let alone that there was a common mistake of fact. At the most it could be said that there was a mistake of opinion, since both parties knew all the material facts about the house, and a mistake of opinion was not a ground for upsetting the mediated settlement.

The result was that the Court held the common misapprehension as to the value of the property was not, by itself, a ground for setting aside the mediated

settlement, and it ordered specific performance for the plaintiff.

In terms of contract law doctrine this decision involves a conventional application of settled principles to established facts. However it illustrates what can occur if mediation and the subsequent 'settlement' do not reflect the will or wishes of both parties.

In this instance, the defendant felt that he was forced into a settlement that was, in his view, neither fair nor well negotiated. The defendant had merely entered into the negotiations at mediation on the advice of his solicitor to reduce legal costs, and had failed to read relevant documents. From the defendant's point of view the mediation process provided an outcome which enjoyed no special immunity from attack on established grounds of contract law, although on the facts of the case the attack was not successful.

From the plaintiff's point of view the lack of self-execution of the mediated settlement necessitated court proceedings, which was what all parties were trying to avoid in the first place.

Thus while mediation is often a useful tool in the division of assets in matrimonial disputes, this case illustrates the difficulties of mediation when at least one of the parties is either reluctant about mediation or does not 'come to the table' with a spirit of negotiation.

This is also another in the litany of cases in which the parties gave evidence of what transpired in the mediation. The Court found the plaintiff to be a credible witness as to what occurred. Conversely the judge found the defendant to be an unimpressive witness on whom he could place little reliance. This was critical to the outcome because it enabled the Court to find that the parties proceeded on the 'pragmatic commercial basis' of taking a figure somewhere between the highest and lowest real estate appraisal ranges, and that the plaintiff did not believe that in fact the property was worth between $360,000 and $380,000. As the plaintiff was not operating on any assumption in entering into the mediated settlement there was no basis for upholding the mutual mistake contention. The Court found that effectively the defendant was unhappy with the deal struck at the mediation and now, with a new solicitor, wanted to renegotiate its terms.

The evidence led about the mediation also highlights the distressing circumstances in which many mediations of this type take place. The plaintiff had buried her mother the previous day, a source of stress to both parties. The defendant was angry about being at the mediation, regarding the property in question as belonging solely to him. The plaintiff became upset during the joint meeting and the mediator resorted to shuttle for the rest of the meeting. A number of dollar figures were shuttled back and forth by the mediator, with little progress, and the parties then shifted to percentage figures, with a view to allowing the auction to determine the value question.

The judge commented on the tone and demeanour of the defendant and his antagonism towards the plaintiff, factors which can be more accentuated in the informality of a mediation room than in the majesty of a court. Decision-making in these circumstances is a delicate matter, in particular for the defendant who had a long term illness and was at mediation in part to avoid the stress which would exacerbate the illness.

Finally the case illustrates the importance of mediators being cautious in relation to reassurances to the parties about privacy and confidentiality. As has been the case in the law reports of many other Australian courts, the business of these two parties became very public. While the case does not indicate the basis on which confidentiality and the without prejudice privilege were not upheld it reinforces the reality of these principles having only limited potential application in relation to mediation proceedings. ✣

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