NZ High Court orders former spouses to ADR

By Sam Dorne

Courts worldwide have long seen the benefits of alternative dispute resolution (ADR) such as mediation. However, the courts have either been constrained or unwilling to force parties to participate in the ADR process.

The High Court in New Zealand has bucked the trend and ordered parties to mediate in the first case of its kind, in *Wright v Pitfield*, setting the scene for a potential future expanded use of ADR in disputes.[1]

Background

ADR is normally a consensual process. Anyone can take someone else to court but ADR has historically required parties to be willing to engage in the process from the outset. Despite studies proving the effectiveness of ADR, some parties are reluctant to engage in the process, leaving the courts as the only option whether they like it or not.

Under section 145 of the Trusts Act 2019, the High Court of New Zealand can order parties to attend mediation against their will.

The High Court exercised this power for the first time in *Wright v Pitfield*. *Wright* involved a run of the mill trust dispute between former spouses.

The former wife took her former husband to court seeking to remove him as a trustee of their family trust. The former husband counterclaimed seeking to remove his former wife but requested that mediation be attempted to resolve the dispute. His former wife declined the invitation.

Due to his former wife refusing mediation the husband made an application to the Court for an order under section 145 of the Trusts Act 2019 to force the matter to mediation first, and requiring his former wife to participate in that mediation.

The order

The High Court granted the order. Justice Geoffrey Venning found that this was *the type of case Parliament had in mind when providing jurisdiction for the Court to require parties to attend mediation*.[2]

Justice Venning remarked that requiring the wife to attend mediation would not deny her access to the Court but could avoid the costs of a hearing and resolve all issues between the parties. He held:[3]

> …the issue before the Court concerns breach of duties as a trustee and the dysfunctional relationship between the three trustees. She says the removal of the trustee is a narrow issue, not one that lends itself to mediation. However, I consider the dispute between the parties raised on the pleadings is broader than just the issue of the ultimate relief sought. If the issues of control of the assets and sale of the principal asset can be resolved, the issue of whether one or both trustees should be removed will fall away. That supports the reference to mediation.

The evolving application of ADR

Justice Venning noted the considerable changes in the courts' approach to mediation over the past 20 years, both in New Zealand and internationally. He argued that *Beadle v M & L A Moore Ltd must be seen as a case from its time. It was decided over 20 years ago. The Court's approach to mediation has changed considerably since then*.[4] In *Beadle*, the Court of Appeal held that a mere failure to resort to ADR was not sufficient to lead to an award of adverse costs absent any particularly compelling circumstance.

In considering judgments from England and Wales, Justice Venning was similarly dismissive in their relevance to the facts of this case and the modern approach to encouraging settlement by ADR.

1 *Wright v Pitfield* [2022] NZHC 385.
2 At [41].
3 At [27].
4 At [35].

In discussing the tension between mediation as a voluntary process and ordering a party to mediation against their will, Justice Venning commented:[5]

> *Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity? 'You can take a horse to water, but you cannot make it drink'. To which those in favour of compulsory mediation reply, 'yes, but if you take a horse to water it usually does drink.' Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition.*

His analysis was wholly justified as the former spouses subsequently attended a successful mediation resolving all trust and relationship property issues, thereby helping to avoid years of further litigation.

Conclusion

Section 145 of the Trusts Act 2019 is evidence that the courts should be actively encouraging unwilling parties to participate in ADR in the trust context and, where appropriate, ordering an unwilling party to the ADR table. It will be interesting to see if compulsory court ordered ADR will make its way into other civil disputes in New Zealand. The ability of ADR to release some of the strain from the under-pressure court system is reason enough to encourage its continued use, let alone the well-known benefits to the parties of cost-effective, early resolution to the case.

About the author

Sam works remotely as a Knowledge Manager in NZDRC's Knowledge Management Team.

He recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

5 At [35], citing Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales "Alternative Dispute Resolution: an English Viewpoint" (India, 29 March 2008).