IN THE COURT OF APPEAL OF NEW ZEALAND

CA275/02

	BETWEEN	ROBERT SAMUEL MCCOSH Appellant
	AND	DAVID A R WILLIAMS Respondent

Hearing: 6 August 2003

Coram: Keith J
Blanchard J
Tipping J

Appearances: R A Houston QC and T R Ingram for Appellant
M A Gilbert for Respondent

Judgment: 12 August 2003

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Introduction

[1] This appeal concerns the liability of a mediator. The respondent, Mr DAR Williams QC, acted as mediator of a bitterly contested dispute between Mr R S McCosh, a Matamata farmer, and three daughters of his first marriage. Mr McCosh claims that Mr Williams was negligent in taking certain actions following the conclusion of an agreement resulting from the mediation.

Facts

[2] After a mediation process on 11 June 1998, a form of settlement agreement was drawn up by counsel representing the parties, with input from Mr Williams, and executed late on that day. No complaint is made about anything occurring up to that

point. The dispute had concerned the entitlements of the parties to certain dairy farming property. A term of the settlement document required Mr McCosh to transfer 21,530 New Zealand Dairy Group Ltd shares to the daughters. A few days later, on 16 June 1998, the solicitors acting for the daughters, Sharp Tudhope & Co of Tauranga, wrote to Mr Houston QC, who had represented Mr McCosh at the mediation, asserting that a mistake had been made concerning the number of shares. They said that the daughters ought to receive 59,430 shares, so as to take account of a bonus issue which had occurred in 1997. When this was denied by Mr McCosh, the daughters' solicitors requested Mr Williams to "arbitrate" on the issue.

[3] Mr Williams indicated in a letter sent to the advisers on both sides that he would undertake this task in accordance with the following clause in the Settlement Agreement:

> 13. In the event of any dispute between the parties in relation to the interpretation or implementation of this Agreement, that dispute shall be submitted to David Williams QC for summary determination and his decision will be final and not submit [sic] to judicial review of any kind.

He called for any written submissions the parties might wish to make. In a further letter responding to a submission from Mr Houston that there was "no mediation extant for you to rule upon", it being "a done deal", Mr Williams expressed his "preliminary view" that in terms of cl.13 a dispute had arisen concerning the interpretation or implementation of the agreement. He said he looked forward to receiving submissions from the parties.

[4] In response, Mr Houston wrote on 17 August with what he called his submissions. He said that "the writer agrees that the letter from Sharp Tudhope to me of 16 June 1999 raised a dispute concerning the interpretation or implementation of the Settlement Agreement". Mr Houston told us from the Bar that there must have been a clerical error as he had intended to say that he did *not* agree. All we can say in response to that statement is that any such error may not have been apparent to the recipient of the letter, particularly as balance of the communication did include an objection to jurisdiction, but on a rather different basis.

[5] In the balance of his letter of 17 August to Mr Williams, Mr Houston referred to a letter that he had written to Sharp Tudhope on 17 June in which he had said on behalf of Mr McCosh that there had been no mistake about the shares, and given reasons. Mr Houston's letter of 17 August put forward the view that as all the conveyancing, including transfer of 21,530 shares, had occurred, it was too late to raise the matter. The "attempt at relitigating" the number of shares was "out of time". But, should this submission to jurisdiction not find favour with the mediator, Mr Houston added a further submission on the substance of the dispute, without prejudice to his objection.

[6] Sharp Tudhope continued to take the position that there was an issue to be determined by Mr Williams. There was further correspondence. In a letter of 24 August to Mr Williams, Mr Houston returned to the question of jurisdiction. He said that no question or issue of interpretation or implementation of the Settlement Agreement arose, but without saying why, on a jurisdictional basis, that might be. He also made further submissions on the substance of the matter: as to whether there had been a mistake.

[7] After obtaining, through Mr Houston and Sharp Tudhope, certain letters and other materials from the dairy company, Mr Williams issued on 29 September 1998 an 18 page document styled "Summary Determination of David Williams QC", in which, for the reasons he gave, he declared that the agreement should be implemented by reading the reference to 21,530 shares as meaning 56,954 shares and stated that if Mr McCosh had not transferred the balance of 35,424 shares by 6 October, the daughters would be entitled to seek summary judgment for specific performance of the Settlement Agreement "as amplified and interpreted by this separate binding determination".

[8] The summary determination document had earlier addressed Mr Houston's objection to jurisdiction. Mr Williams said that the words "in relation to" which appeared in cl.13 of the Settlement Agreement were now given a broad meaning by the courts and had been held to include claims for rectification of a contract as well as claims involving mistake and misrepresentation. Mr Williams referred in particular to a statement by Kirby P in *IBM Australia Ltd v National Distribution*

Services Pty Ltd (1991) ATPR 41-094 at 52,509-10 concerning the construction of the phrase "arising out of or relating to the agreement" in an arbitration agreement.

[9] Mr Williams referred also to the fact that in his letter of 17 August Mr Houston had appeared to accept that the issue did constitute a dispute within cl.13, and that Mr Houston's concern appeared to be that the dispute was "no longer relevant upon settlement". But, he said, the daughters had reserved their position on the issue of the number of dairy company shares. Thus, to that extent, jurisdiction for summary determination remained and he found he had jurisdiction within cl.13.

[10] Mr Houston responded to the determination with "dismay". He said in a letter to Mr Williams on 29 October 1998 that he had advised his instructing solicitors and Mr McCosh and his wife (a co-owner of the disputed shares) that Mr Williams had acted without jurisdiction and had "forsaken his role as mediator and in his new and self appointed role of either Judge or Arbitrator purported to deliver a coercive judgment". Mr Houston said further that the summary determination was "riddled with error". Any summary judgment proceedings pursuant to it would be defended. He forecast that damages would be sought against Mr Williams.

[11] In September 1999 the daughters, through their solicitor, brought a proceeding against their father based on the summary determination and sought summary judgment. That was opposed by McCosh but before the matter came to a hearing counsel agreed, on 3 July 2001, that all matters were settled and all proceedings would be discontinued. Mr and Mrs McCosh retained the disputed shares. The daughters made a payment of $3,000 towards their father's costs.

[12] Mr McCosh then brought the present proceeding against Mr Williams. The heads of claim which went to trial before O'Regan J in the High Court at Auckland alleged negligence and breach of the Fair Trading Act 1986. Damages were sought for legal costs and expenses in relation to the daughters' summary judgment claim, travelling expenses and interest on the value of the shares for a period of one year when they were "frozen" but, it was said, would otherwise have been resumed by the dairy company. There was also a claim for general damages of $25,000 for "trauma,

worry, stress and the upset suffered of ongoing litigation with [the] daughters for a three year period", including aggravated damages.

The High Court judgment

[13] In his judgment delivered on 26 November 2002, O'Regan J recorded that the parties had agreed that it was not relevant to the determination of the matters in issue whether Mr Williams had been right or wrong in the decision he made in the summary determination. The focus was on whether he had had jurisdiction to embark on the exercise at all.

[14] The Judge accepted the argument made on behalf of Mr Williams that a clause in the Mediation Agreement, which had been signed by the parties before the mediation began, protected him from liability. It read:

> 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.

[15] The Judge rejected Mr Houston's contention that the signing of the Settlement Agreement meant that the Mediation Agreement was spent and that cl.9 could no longer assist the defendant. He further rejected the contention that the signing of the Settlement Agreement terminated the mediator's role and created a completely new role. It was clear to the Judge from the Settlement Agreement that the parties anticipated an on-going process towards documenting the terms of the settlement in detail, and also anticipated that the mediator would have an ongoing role (albeit as an adjudicator) in that process. The Judge also rejected an argument that there had been breaches of the mediation agreement by Mr Williams which could provide a basis for a finding that he had repudiated or broken a stipulation in the mediation agreement, thereby giving rise to a right of cancellation. The allegation of negligence was based on a contention that Mr Williams acted outside the jurisdiction conferred by cl.13. That might have entitled him, if the argument were successful, to a finding that the defendant had been negligent. But the Judge said that would not help take the situation outside the scope of cl.9 of the Mediation

Agreement because that clause released the defendant in respect of liability of any kind, whether involving negligence or not. Accordingly, even if the defendant had been negligent in acting without jurisdiction, that would not take his conduct outside cl.9 because the liability would still have arisen in connection with, or resulted from, or been related in any way to the mediation and cl.9 would apply. A further argument that the application of cl.9 was against public policy was also rejected, as was an argument for a narrow construction of cl.9.

[16] As Mr McCosh's claim based on negligence failed because of cl.9, the Judge found it unnecessary to determine whether Mr Williams actually had jurisdiction in respect of the dispute referred to him by the daughters and whether his conclusion that he did have jurisdiction involved negligence.

[17] O'Regan J also rejected the claim under the Fair Trading Act. It had been particularised by saying that Mr McCosh had been induced into appointing Mr Williams under cl.13 on the basis that Mr Williams was an appropriately qualified person to perform the agreement in accordance with its terms, but that Mr Williams had then proceeded to conduct himself in a different way by asserting jurisdiction to deal with the dispute. Thereby Mr McCosh had been misled. It had been accepted by counsel that any statement made by Mr Williams about the role to be undertaken under cl.13 was not misleading at the time the Settlement Agreement was signed but it had become misleading when Mr Williams later asserted jurisdiction in relation to the dispute. The Judge said that this contention was "conceptually flawed." Any complaint which Mr McCosh might have about the actions of Mr Williams two or three months after the statement was made must focus on the actions taken, not on the earlier statements. Nothing said or written at the time of the preparation and execution of the Settlement Agreement amounted to misleading or deceptive conduct on the part of Mr Williams.

[18] The Judge also pointed out Mr McCosh's difficulty in establishing that the claimed losses were caused by the alleged negligence. In essence, it was being said that there would have been no dispute "but for" Mr Williams' summary determination. The Judge pointed out, however, that it was the daughters who had pursued the dispute. He could not accept, on the basis of the evidence concerning

their actions, that the dispute would simply have evaporated if Mr Williams had declined jurisdiction. The claim by Mr McCosh was dismissed.

Submissions

[19] The argument in this Court concentrated on whether Mr Williams had jurisdiction under cl.13 to determine the dispute and, if not, whether it had been negligent for him to conclude that he did have jurisdiction and to embark on the summary determination. We should emphasise that, as in the High Court, it was not being suggested that there was any negligence in the substance of that determination.

[20] It was Mr Houston's submission that an issue concerning the number of shares required to be transferred pursuant to the Settlement Agreement, involving a claim for rectification of the agreement, could not be said to be a matter of interpretation or implementation of the agreement. The agreement was clear in its own terms. It referred to the particular number of shares, not to "half the shares", a matter which could have required interpretation. Implementation was said to be concerned only with the mechanics of the settlement process, for example fixing a day on which settlement was to occur if there should be a dispute about such a matter. An agreement was not being implemented if it was being rectified. Therefore Mr Williams had exceeded his jurisdiction. He had been negligent in doing so, it was submitted, because he was going beyond the plain meaning of the words and because he had been warned by Mr Houston in correspondence that the view was taken that he had no jurisdiction to respond to the request made on behalf of the daughters.

[21] So far as the exclusion clause (cl.9) was concerned, the appellant's position was that it had no application to something arising not in the course of the mediation but under the Settlement Agreement. The mediation had come to an end when the Settlement Agreement was executed. Clause 9 applied only to the conduct of Mr Williams *qua* mediator. It did not apply when he acted or purported to act as an adjudicator or summary determinator.

[22] Mr Houston candidly accepted that there might be difficulties in relation to causation because of the novelty of the situation. But he submitted that it was an obvious result of the issuance of the summary determination that, if Mr McCosh did not comply, the daughters would proceed with a summary judgment application, thereby reviving all the bitterness of the original dispute, putting Mr McCosh to expense and causing him distress. The losses were said to have flowed directly from the alleged breach of duty of care.

[23] For Mr Williams, it was submitted by Mr Gilbert that cl.13 had to be read in the context of the settlement document. It immediately followed cl.12 which had stated the express intention of the parties that the document should record and constitute an immediately binding agreement, notwithstanding that at the same time they contemplated that the agreement would be engrossed in a more perfectly drafted document which they agreed to execute. In cl.12 it had also been agreed that, in the event of there arising any dispute between the parties regarding any suggested omission or uncertainty in the terms of the agreement or in the event of there arising any dispute between the parties in the course of the preparation of the more perfectly drafted documentation, such dispute was to be submitted to Mr Williams, "the summary determiner acting as an expert and not as an arbitrator", and the parties agreed to accept his determination as final and binding.

[24] In this context, Mr Gilbert said, the reference in cl.13 to the interpretation or implementation "of this Agreement" was properly to be read not as referring to the Settlement Agreement document but to the underlying settlement. What Mr Williams had done involved interpretation or implementation of the agreement reached between the parties. And, even if Mr Williams had been wrong in the approach he took, it was not negligent of him to think that he had jurisdiction.

[25] It was further submitted by Mr Gilbert that, in any event, Mr Williams was protected by cl.9 of the Mediation Agreement. What he had done in resolving or purporting to resolve the dispute was related to the mediation. Although cl.9 was expressed in terms of a release etc of "the Mediator", that was simply a term referring to Mr Williams, not to his role. Furthermore, cl.11 of the Mediation Agreement had provided for the execution of a formal settlement agreement if

agreement were reached between the parties. It had stated that the parties undertook to give effect to and implement that settlement agreement in accordance with its terms. Because the Mediation Agreement had contemplated the Settlement Agreement which came into being and required the parties to give effect to and implement it, the actions taken by Mr Williams under cl.13 could be said to be related to the mediation.

[26] As to the claim under the Fair Trading Act, Mr Gilbert said that there had been no evidence supporting the allegation of deceptive and misleading conduct and it had been acknowledged by counsel for the appellant that Mr Williams had not misled Mr McCosh about the role which was contemplated by the Settlement Agreement at the time that agreement was signed. The Judge had been right to reject as conceptually flawed the argument that Mr Williams' conduct became misleading two or three months later when he embarked on the process which led to the summary determination.

[27] Mr Gilbert also submitted that the claim would also fail on the basis that any fault on the part of Mr Williams had not caused the claimed losses. This was not a claim in contract. The daughters would have sued their father anyway because they were, as the evidence showed, very upset about what had occurred in relation to the dairy company shares. Mr Williams had not caused that problem for Mr McCosh.

Jurisdiction

[28] We have reached the view that the argument Mr Houston made to us concerning the limits on the jurisdiction conferred on Mr Williams under cl.13 must be upheld. We consider that Mr Williams did exceed his jurisdiction. He cannot properly be said to have been engaged in interpreting the document. It was quite clear that 21,530 shares were, pursuant to an express provision of the document, to be transferred. Nor was he determining a question of how the agreement should be implemented, in the sense of transferring property in terms of the agreement, discontinuing proceedings and so on. Rather, Mr Williams undertook the task of making a determination about whether the document required correction (of a more than clerical kind, which might well fall within "interpretation") by substituting for

the figure of 21,530 a figure which added in some bonus shares. That was an exercise of rectification of contract and cannot properly be said to have been merely a matter of interpretation or implementation.

[29] In coming to this conclusion we reject Mr Gilbert's argument that "this Agreement" in cl.13 means in context the underlying agreement. Although the document, prepared in haste, was not entirely internally consistent in its use of language, it seems reasonably plain that "Agreement" (with an initial capital) was intended to refer to the document itself, and that it was only a dispute concerning the interpretation or implementation of the document which was the subject of cl.13. In other words, only if there were a dispute about the meaning of the words in the document or the obligation of the parties concerning the mechanics of putting it into effect, could Mr Williams be asked to make a summary determination.

[30] It might possibly have been different if he had been acting under cl.12 to adjudicate upon a dispute "regarding any suggested omission or uncertainty" in the terms of the agreement. But he was resolving the dispute only under cl.13.

[31] We take the point made by Mr Williams himself in his "Summary Determination" that the words "in relation to" are of broad import, but the relationship still must be to an interpretation or implementation *of the document* and the issue which arose was not of that nature.

[32] We are therefore of the view that Mr Williams acted without jurisdiction.

[33] But although Mr Williams fell in this respect into error, we do not consider that what he did departed from the standard of care to be expected of a reasonably careful mediator, even a Senior Counsel as well versed in alternative dispute resolution as Mr Williams, and that he can be said to have acted negligently, i.e. in breach of a duty of care owed to Mr McCosh, in embarking on the determination. We ourselves have not found the question of jurisdiction straightforward. It involved looking closely at the words of cl.13 in the context of a document which, as we have said, was not of perfect consistency in its choice of words. Although

Mr Williams had some input into the construction of the document, so did Mr Houston and counsel for the daughters.

[34] It is true that Mr Houston gave Mr Williams advance warning that he considered that Mr Williams was exceeding his jurisdiction. But, significantly we think, he put that objection on a different and it, would seem, erroneous ground, namely that it was too late to raise a question concerning the shares because a conveyancing settlement had already occurred in which the specified number of shares had been passed over to the daughters. Mr Williams was of the opinion, which seems to have been justified, that the two daughters had reserved the right to contest the number of shares which ought to come to them.

[35] The objection actually raised by Mr Houston at the time may in fact simply have distracted Mr Williams from the real doubt about his jurisdiction which was not taken up by Mr Houston until after the determination had been made. If another experienced counsel himself did not seem to appreciate the limitations of the words "interpretation or implementation" until looking at the matter more closely, that reinforces our view that what Mr Williams did was mistaken but did not fall short of the standard of care to be expected of a person in his position.

Fair Trading Act

[36] It is quite hopeless for the appellant to say that merely because a professional person accepts an appointment under a document providing for them to take a particular role in the event of a dispute, and it may therefore be inherent in that acceptance that they intend to do so in terms of the appointment, that they are then to be taken to have made at that time a deceptive and misleading statement if it transpires that later they exceed the terms of their appointment. It would be different if the person concerned had at the time of accepting the appointment a concealed intention to so exceed its terms. The inherent or implied statement of present intention might then be found to have been misleading or deceptive. But there is and could be no such allegation in the present case. This ground of appeal also fails.

The exclusion clause

[37] Because we have held that Mr Williams was not negligent in taking upon himself jurisdiction to decide the dispute over the shares, he does not need to have recourse to the exclusion clause. It is appropriate, however, that we should record that we do not share O'Regan J's view that cl.9 protected the respondent from liability for negligence in connection with the summary determination. We agree with Mr Houston's submission that the protection of cl.9 was only in relation to acts and omissions of Mr Williams when acting as a mediator. The actions complained of cannot be said to have been related to the mediation. They were, instead, acts taken by him after the mediation had concluded by the execution of the Settlement Agreement and were purportedly done in pursuance of the Settlement Agreement. Mr Gilbert drew attention to cl.11 of the Mediation Agreement in which there was an undertaking by the parties to give effect to and implement any formal Settlement Agreement, but if cl.9 had really been intended to relate to actions which Mr Williams might take pursuant to the Settlement Agreement, surely cl.9 would have said so directly. Clause 9 is an exclusion clause appearing in a separate document and one put forward by the mediator himself. Clear and unambiguous language would be required for it to be effective beyond the scope of the mediation process. On the natural meaning of the words used in cl.9, that clause does not extend to a process of adjudication concerning the Settlement Agreement.

The duty of care/causation

[38] If Mr McCosh had been able to establish that Mr Williams' conduct fell short of the appropriate standard he would still have had to show that in the circumstances Mr Williams owed him a duty of care to protect him from the particular losses said to have arisen from the erroneous assumption of jurisdiction. There would also have been an issue concerning whether any proven breach of duty had actually been causative of the claimed losses. Those appear to be matters of some difficulty. In particular, it is clear that Mr McCosh himself did not rely on the summary determination. He at once, through Mr Houston, rejected it as having any validity. He would therefore have had to have shown that the duty of care extended to

refraining from an action in breach of jurisdiction which might cause the other party, the daughters, to embark on further litigation, thereby causing him expense and distress. In other words, he would have to show that the duty of care owed by Mr Williams encompassed not issuing a determination, in excess of jurisdiction, which might be acted on as valid by the other party.

[39] We express no view on that question, nor on whether Mr Williams' action could be said actually to have caused the claimed losses by encouraging the independent action of the daughters in bringing a further proceeding and applying for summary judgment. There is, at the very least, a respectable argument on the facts of the case that if Mr Williams had declined to act under cl.13 the daughters would still have pursued the bonus shares by way of litigation.

Result

[40] In the result, the appeal fails and is dismissed. The appellant must pay the respondent's costs on the appeal in the sum of $6,000 together with his reasonable disbursements, including travel and accommodation costs of counsel, to be fixed if necessary by the Registrar.

Solicitors:
Bell & Graham, Matamata for Appellant