IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-001352
[2022] NZHC 385

UNDER	Part 18 of the High Court Rules
AND	The Trusts Act 2019
BETWEEN	ALISON MCRAE WRIGHT Plaintiff
AND	KEVIN DAVID PITFIELD, SCOTT ERIC WRIGHT and ALISON MCRAE WRIGHT as trustees of the Scott and Alison Wright Family Trust First Defendant
	SCOTT ERIC WRIGHT Second Respondent

Hearing:	3 March 2022
Appearances:	A M Corry, and A V Davison for Plaintiff D Chambers QC for Second Respondent
Judgment:	8 March 2022
Reissued:	23 May 2022

JUDGMENT OF VENNING J

This judgment was delivered by me on 8 March at 2.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

Solicitors:	Jackson Russell Lawyers, Auckland Wynn Williams, Auckland
Counsel:	Lady Deborah Chambers QC, Auckland

Introduction

[1] Scott Wright seeks an order submitting the issues between the parties to this litigation to a judicial settlement conference or, in the alternative, an order submitting the matter to mediation and ancillary orders.

[2] Alison Wright and Mr Wright were married in 1992. They separated in October 2018 after 26 years of marriage.

[3] Mr and Ms Wright settled the Scott and Alison Wright Family Trust in 1999. At present they are both trustees of that Trust, together with Kevin Pitfield (a professional trustee). The Trust is a typical family trust. Its assets have been derived from the efforts of the parties during their relationship. While Mr and Ms Wright are discretionary beneficiaries of the Trust, their four sons are discretionary and final beneficiaries.

[4] Mr and Ms Wright are unable to agree on the administration of the Trust and particularly issues concerning the sale of one of its major assets, a company, New Zealand Hearing Limited. Ms Wright has brought these proceedings and seeks an order removing Mr Wright as trustee. Mr Wright opposes that application. He has counterclaimed seeking the removal of Ms Wright as trustee. Mr Pitfield abides the decision of the Court.

[5] The substantive application is to go to trial on 20 June 2022, with four days allocated for the hearing.

Settlement conference

[6] As relevant, High Court Rule 7.79 provides:

> **7.79 Court may assist in negotiating for settlement**
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> (1) A Judge may, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations.
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> …

> (5) A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties.
>
> …

[7] The Court has accepted that the rule allows a Judge to direct a judicial settlement conference, even where one party resists that. I note, however, the rule expressly confirms that the Court may only direct the parties to attempt to settle their dispute by mediation or other alternative dispute resolution (ADR) with the consent of the parties.

[8] This is not the first time that Mr Wright has sought a settlement conference under r 7.79. In a minute issued on 1 June 2021 Associate Judge Gardiner noted:

> [14] Mr Wright asks that the Court require the parties to attend a judicial settlement conference. Lady Chambers QC indicated that Mr Wright has consistently asked the applicant to attend alternative dispute resolution to resolve the issues between them. They have agreed some issues through their lawyers, including that there should be a 50:50 division of their assets, but they have not agreed how the Trust assets should be divided. Lady Chambers QC submits that if the parties were directed by the Court to attend a judicial settlement conference, there would be a good prospect of resolving that issue, and that in turn would resolve the present proceedings.
>
> [15] Ms Harris submits that the division of assets sits outside the scope of the present proceedings. Moreover, the applicant does not want to participate in a judicial settlement conference, preferring to continue settlement discussions through lawyers.
>
> [16] Having reflected on these submissions, I decline to direct the parties to attend a judicial settlement conference. The appropriate division of the parties' assets is not an issue before the Court in this proceeding and it would be improper to require Ms Wright to participate in settlement discussions on issues outside the scope of the proceeding. It is also unlikely to be productive.

[9] Mr Wright did not seek to review that decision or to take that matter any further. In the absence of any such application to review it would not be appropriate for this Court to revisit that particular decision on a second application.

[10] Further, a settlement conference may have particular value where the judge can give the parties assistance with legal issues. But the legal issues in this case are relatively straightforward and will be well-understood by the parties given their

experienced counsel. The principal issues between the parties in this case are factual and practical rather than legal.

[11] Next, the conduct of a settlement conference and the techniques available to a judge at a settlement conference are quite different to the process of mediation and the tools available to a mediator. A judge at a settlement conference does not have the flexibility that a mediator has in the conduct of a mediation. If the present issues between the parties are to be resolved by way of assisted dispute resolution (ADR) I consider mediation to be the appropriate forum.

[12] For those reasons I decline the application insofar as it seeks an order directing the parties to attend a settlement conference.

Mediation

[13] While r 7.79 does not enable the Court to direct the parties attend mediation, s 145 of the Trusts Act 2016 provides jurisdiction for the Court to make such an order in relation to internal matters:

> **145 Power of court to order ADR process for internal matter**
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> (1) The court may, at the request of a trustee or a beneficiary or on its own motion,—
>
> (a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or
>
> (b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).
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> (2) In exercising the power, the court may make any of the following orders:
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> (a) an order requiring each party to the matter, or specified parties, to participate in the ADR process in person or by a representative:
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> (b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property:
>
> (c) an order appointing a particular person to act as a mediator, an arbitrator, or any other facilitator of the ADR process.
>
> (3) This section applies in relation to internal matters only.

[14] No particular process is provided for how the request for ADR may be made to the Court. If there are no extant proceedings before the Court then the application could be made under Part 18 of the High Court Rules 2016, although in appropriate cases applications for directions by trustees may be made in other forms, for instance, by using Part 19. Where there are extant proceedings in existence between the parties then the application can be brought by interlocutory application as it has in this case.

[15] Ms Corry suggested that given the ambit of the proposed referral, Mr Wright should have brought a separate originating application.

[16] I note that s 145(1) contemplates that the Court may, on its own motion, make orders under s 145. That confirms my view that where there are proceedings on foot an interlocutory application within those proceedings (as in this case) is an appropriate form of application.

[17] The section is new to the Trusts Act 2019. As noted by Wylie J in *S v N*:[1]

> [21] This is a novel provision. There was no predecessor provision in the Trustee Act 1956. It was introduced following the Law Commission's review of trust law. It has been suggested that the Act's explicit engagement with ADR is an exciting advance and that it may position New Zealand as a useful jurisdiction for the alternative resolution of trusts disputes.

[18] The section only applies to "internal matters". Internal matters are defined in s 142 to mean "a matter to which the parties are a trustee and 1 or more beneficiaries, or a trustee and 1 or more other trustees, of the trust". "Matter" is separately defined to mean "a legal proceeding brought by or against a trustee in relation to the trust; or a dispute in relation to the trust … between 2 or more trustees, that may give rise to a legal proceeding". It does not include a proceeding where there is a dispute about the validity of all or part of the trust.

[19] The present proceedings fit the definition of an internal matter. They involve legal proceedings between two trustees. Ms Corry submitted that Mr Wright appeared to be seeking to have wider relationship property matters referred to mediation. She submitted the wider relationship property issues involved personal issues between Mr

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1 *S v N* [2021] NZHC 2860 at [21] (footnotes omitted).

and Ms Wright, which did not meet the definition of an "internal matter" for the purposes of the Trusts Act. She noted that Ms Wright had issued separate relationship property proceedings in the Family Court at Queenstown. Ms Corry submitted the present proceeding was not a dispute about the division of trust assets, and that in principle, Ms Wright accepted the assets should be divided equally and resettled on two new and separate trusts.

[20] While I accept Ms Corry's point that the reference to mediation cannot extend to the relationship property issues between Mr and Ms Wright generally, I do not consider the issue in dispute to be as confined or "binary" as she suggested.

[21] While the ultimate relief sought in these proceedings is limited in scope, (to the removal of trustees), the underlying issues which are relevant to determination of that ultimate issue involve the control of the principal assets of the Trust and raise issues concerning Mr Wright's actions in relation to the proposed sale of a principal asset of the Trust. The pleadings in the amended statement of claim are detailed and extensive. They confirm the extent of the scope of the issues raised in the proceedings. I do not consider a restrictive approach should be taken. The issue of control and sale of the trust assets is presently in issue between the parties as trustees. A dispute between two trustees about the control and disposition of trust assets comfortably satisfies the definition of an internal matter.

[22] The phrase "ADR process" is defined in s 142 of the Act to mean an alternative dispute resolution process, which, relevantly for present purposes, includes mediation.

[23] There is no provision in the trust document that requires any matter to be subject to an ADR process. Section 145(1)(a) is not applicable. However, s 145(1)(b) provides a general discretion to the Court to submit a matter to an ADR process, except if the terms of the Trust indicate a contrary intention. The relevant trust deed in this case does not indicate a contrary intention.

[24] It follows that I accept there is jurisdiction for the Court to direct the parties in this case to mediation about the issues of control and potential sale of the assets of the trust. The issue is whether the Court should exercise its discretion to do so.

[25] In *S v N* Wylie J considered that matters which could bear on the exercise of discretion could include cost, confidentiality, speed, the seriousness and complexity of the matter, the suitability of the proposed mediator, the wishes of the parties, the wishes of the settlor if known, finality, and enforceability.[2] As the Judge observed those considerations are not an exhaustive list.

[26] As noted, Ms Wright opposes the application. Ms Corry submitted there is nothing in the present application that was different to the request made for the settlement conference. However, as noted, I consider the request for a mediation to raise different issues to the request for a settlement conference.

[27] Ms Corry repeated her submission that 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.

[28] Ms Corry submitted that Mr Wright is apparently negotiating a sale of the primary asset of the Trust, New Zealand Hearing Limited, (or its shares), and has not made the details available to her or the independent trustee. She submitted the intention of the application for reference to ADR appears to be designed to pressure Ms Wright to negotiate a division of the trust property prior to the sale by Mr Wright of a primary and valuable trust asset while he remains in command of the information relevant to it.

[29] Ms Wright is represented by experienced and able counsel. An experienced mediator will be able to ensure that the mediation proceeds on an appropriate basis and that Ms Wright has sufficient information to ensure that she will not be disadvantaged by the process. Further, I note that the professional trustee does not

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2 *S v N*, above n 1.

oppose reference to mediation on the basis of a lack of information. He has adopted a neutral position.

[30] Ms Corry noted that Wylie J had referred to the wishes of the parties as a consideration. She made it clear that Ms Wright does not want to go to mediation. She referred to the comments of the Law Commission in its issues paper where it stated:[3]

> It would be difficult to apply ADR to trust disputes where a trustee is unwilling to settle or to be involved in the dispute resolution process. In these situations ADR does not provide a viable alternative to court action.

However, the short answer to those comments is that Parliament has expressly provided in s 145 that the Court can require a trustee to attend ADR.

[31] While Ms Wright does not wish to attend mediation the wording of s 145 is clear. It enables the Court to require a party to participate in the AVR process.[4] That contemplates the Court can make an order in the absence of consent. If there was consent, there would be no need for the order requiring the party to attend. The direction under s 145 is to attend mediation, (in good faith once the order is made), rather than a requirement to resolve the matters in issue at the mediation. There is no suggestion of Ms Wright being overborne or being forced to a resolution simply by requiring her to attend a mediation.

[32] In *S v N* Wylie J declined the application and refused to require Ms S to attend mediation, noting that mediation was inherently a consensual process. In doing so he referred to *Beadle v M & L A Moore Ltd* and *Halsey & Milton Keynes General NHS Trust v Steele*.[5]

[33] However, I consider the case of *S v N* to be quite different to the present one. It is an example of the exercise of a discretion on the particular facts of that case. In *S v N* Wylie J declined the application for three reasons.[6] First, importantly, earlier consent orders in that case had led to the appointment of independent trustees who

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3 Issues Paper at 5.9.
4 Trusts Act 2019, s 145(2)(a).
5 *Beadle v M & L A Moore Ltd* [1998] 3 NZLR 271 (CA) at 274; and *Halsey & Milton Keynes General NHS Trust v Steele* [2004] EWCA 576.
6 *S v N*, above n 1.

were to realise the trust assets and distribute them into two new trusts. The next feature was that Ms S had a final protection order in her favour preventing N from contacting her. The Judge considered that forcing her to attend a mediation insisted on by her abuser was not an attractive proposition.

[34] Finally, the Judge considered that N had "gamed the system". He had breached Court orders and had sought to delay and frustrate the independent trustees. Given that lack of good will Wylie J considered that it was difficult to see that mediation would achieve anything.

[35] None of those factors are present in this case. Further, the cases cited by the Judge can be distinguished. I accept Ms Chambers' submission that *Beadle v M & L A Moore Ltd* must be seen as a case from its time.[7] It was decided over 20 years ago. The Court's approach to mediation has changed considerably since then. A pithy encapsulation of the response to concerns about compelling parties to attend a voluntary process can be found in the speech by Lord Phillips, the Lord Chief Justice of England and Wales in 2008:[8]

> 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.

[36] Further, the case of *Halsey & Milton Keynes General NHS Trust v Steele*[9] can be confined to its facts. That case involved the difficult issue of whether the Court should impose a costs sanction on a successful party on the grounds they had refused to take part in ADR. The Court's comments that, to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the Court and that, if the parties (or at least one of them) remains intransigently opposed to ADR, then it would be wrong for the Court to compel them

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7 *Beadle v M & L A Moore Ltd*, above n 4.

8 Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales "Alternative Dispute Resolution: an English Viewpoint" (India, 29 March 2008).

9 *Halsey & Milton Keynes General NHS Trust v Steele*, above n 4.

to embrace it must be seen in that context. It was also important that the relevant rules did not expressly provide for the Court to require the parties to attend mediation.

[37] As noted, in the present case, Parliament has expressly provided jurisdiction for the Court to require a party to attend ADR.

[38] Next, I note that in addition to the comments of Lord Phillips noted above, the decision of *Halsey* was itself the subject of strong criticism by Sir Gavin Lightman writing extra judicially in a Times article.[10]

[39] Following *Halsey*, the rules were changed to provide for early neutral evaluation. Subsequent cases have either distinguished *Halsey* or have not followed it. For example, in *Lomax v Lomax*, Lord Justice Moylan in delivering the Court of Appeal's reasoning in that case noted:[11]

> [27] This means that I do not need to enter into the question raised in *Wright v Michael Wright Supplies Ltd & Anor* as to what *Halsey* determined and the extent to which it remains good law. I would only comment that the court's engagement with mediation has progressed significantly since *Halsey* was decided. …

[40] I note that other jurisdictions are supportive of the ADR process. For instance, in New South Wales, mandatory mediation is common and has been so since the Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW) amending the Supreme Court Act 1970 (NSW).

[41] In my judgment, this is the type of case Parliament had in mind when providing jurisdiction for the Court to require parties to attend mediation. It involves a dispute between two trustees about the control of the Trust and its principal assets. With appropriate assistance, the issues between them should be capable of sensible resolution.

[42] To require Ms Wright to attend mediation is not to deny her access to the Court. There is a fixture date for her proceeding. The substantive hearing in this Court is

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10 Sir Gavin Lightman "Breaking down the barriers" *The Times* (online ed, London, 31 July 2007).
11 *Lomax v Lomax* [2019] EWCA 1467 at [27] (footnote omitted).

scheduled for 20 June 2022. That fixture remains in place. There will be time for the parties to engage in a mediation in advance of that date.

[43] There will be additional costs incurred in the mediation, but against that, there is the chance of avoiding the costs of the hearing itself, if not the preparation for it. Further, removal of one, or both of the trustees will not necessarily see all of the issues between the parties concerning control of the trust property resolved whereas a mediation may achieve that.

[44] It is also relevant that if the matter is resolved at ADR that would maintain commercial confidentiality. A public dispute in this Court between the parties will not enhance the prospects of sale of the principal asset or the value at which that principal asset, namely New Zealand Hearing Ltd, or its shares can be sold.

Mediator

[45] In the event the Court determined that it should require the parties to attend mediation, Ms Corry submitted the mediator should be the Hon Raynor Asher QC. However she did not advance any reason why the Hon Rhys Harrison QC would be unsuitable. Ms Chambers confirmed he has had no involvement with the case or knowledge of it.

[46] The proposed mediator, the Hon Rhys Harrison QC, is an effective and experienced well-respected mediator. Like the Hon Raynor Asher QC he is a former High Court and Court of Appeal Judge, and experienced litigator. In the absence of a principled opposition to his appointment, I consider the Hon Rhys Harrison QC to be an appropriate appointment. In the event he was unavailable I accept that the Hon Raynor Asher QC would be an appropriate alternative.

Result

[47] For the above reasons I consider the interests of justice support the application. There will be an order accordingly requiring the parties to this matter to participate in a mediation process in person (although they may be accompanied by their legal

representatives). The Hon Rhys Harrison QC is to be the mediator. The costs of the mediation are to be paid out of the trust property.

Costs

[48] The costs of this application are fixed on a 2B basis but are reserved, either to be dealt with at the mediation or following the substantive hearing in this case.

Timetable directions

[49] There is another application before the Court. Mr Wright seeks leave to file an amended statement of defence to the amended statement of claim filed at the close of pleadings date. That is not opposed but the parties have differing views as to the appropriate timetable.

[50] The following orders/directions are made:

(a) Leave is granted to Mr Wright to file and serve an amended statement of defence. That amended statement of defence is to be filed and served by **21 March 2022**.

(b) Ms Wright is to file and serve any evidence (by affidavit) relating to the new issues arising from the amended statement of claim by **28 March 2022**.

(c) Mr Wright is to file and serve any affidavit evidence in relation to the new issues arising from the amended statement of claim and Ms Wright's evidence by **22 April 2022**.

(d) Ms Wright is to file and serve any affidavit evidence strictly in reply to Mr Wright's further evidence by **13 May 2022**.

(e) Ms Wright is to file and serve the common bundle by **20 May 2022**.

(f) Ms Wright is to file and serve her synopsis of submissions, chronology and case book by **27 May 2022**.

(g) Mr Wright is to file and serve his synopsis of submissions, chronology and case book by **13 June 2022**.

(h) Ms Wright is to file and serve a chronology of all agreed dates by **15 June 2022**.

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Venning J

Addendum

[51] Following the delivery of the judgment, the parties attended mediation on 29 April 2022, with the Hon Rhys Harrison QC. The parties settled all issues between them at the mediation.

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Venning J