Kluwer Mediation Blog

Singapore Case Note Part 2: What happens when a party to a mediated settlement agreement has a change of heart?

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In October, we reported on a recent case from the Singapore High Court: *Chan Gek Yong v Violet Netto*. In that post, we examined the High Court's attitude towards parties who have had a change of heart after agreeing to conclude a Mediated Settlement Agreement ('MSA') and wish to challenge its validity. Last month we focused on one of the plaintiff's (Mdm Chan) allegations, namely that the co-mediators put pressure on her to sign the MSA. As readers will recall, the High Court found there was no evidence to substantiate this claim. However this was not Mdm Chan's only argument!

In this post, we look at another two of the unrepresented plaintiff's claims in her quest to set aside the MSA and pursue her case through the litigation route. We draw on the observations of the High Court in Violet Netto to identify a number of takeaways for mediators.

What happened in *Violet Netto*?

The facts of *Violet Netto* have been outlined in last month's post. Readers will recall that Justice Tan considered the extent to which there was evidence to suggest that Mdm Chan signed the MSA whilst:
1. under duress from the co-mediators;
2. incapacitated; or
3. not fully comprehending its terms.

This post deals with the second and third points.

Mdm Chan alleged that she signed the MSA whilst feeling unwell and under the influence of medication taken before the mediation session, which made her drowsy (at [15]). In effect, she argued that she was labouring under some form of incapacity or intoxication, which sapped her of her ability to agree to the terms of the MSA. She further claimed that one of the co-mediators from the Singapore Mediation Centre was aware of her condition, as he "noticed that she was anxious" (at [41]).

Secondly, Mdm Chan claimed that she was incapable of understanding the terms of the settlement agreement as she is not a lawyer (at [69]), even though the terms of the MSA were explained to her by the mediators before she signed it. In effect, she pleaded the defence of *non est factum*. It is noteworthy that she did not claim that the terms agreed at the negotiation table were inaccurately

represented on the drafted settlement agreement which she and the defendants signed.

What did the Court decide?

The High Court dismissed Mdm Chan's challenges to the validity of the MSA.

First, Justice Tan opined that she failed to prove that she was "so mentally incapacitated that she could not understand the general nature of the mediation and the Settlement Agreement which she signed" (at [46]). His Honour took into account evidence from the mediation which indicated that she was capable of comporting herself during the negotiations, and found that she "was an active participant in the discussions that took place during the mediation session" (at [44]).

Secondly, Justice Tan ruled that her allegation against the co-mediator, who had apparently allowed the mediation to proceed even though he was aware of her condition and took notice of her anxiousness, was unfounded, observing (at [47]), "It is natural that parties feel anxious during court proceedings and mediation as each party will try to get the best deal for himself."

Finally, Justice Tan ruled that no one at the mediation except for Mdm Chan and her supporters knew of her infirmity, as she "admitted [in Court] that she did not inform the defendants and their lawyers that she was suffering from giddiness and drowsiness" (at [47]).

In respect to the defence of *non est factum*, Justice Tan reiterated that "it is trite law that a person of full age and understanding is normally bound by his signature on a document, whether he or she reads or understands the document or not[…] The defence of *non est factum* should only be allowed in exceptional situations to rectify injustice and unfairness" (at [62]). Mdm Chan's plea for the defence failed, for it would not matter whether she understood the MSA *once she had signed it*. It was the Court's opinion that the onus should have been on her to have taken the initiative and reasonable care to understand all terms enshrined within the draft MSA before she endorsed it with her signature and she had every opportunity to do so. Moreover, the terms of the draft MSA had been explained to her by the mediators before she endorsed it.

Takeaways for mediators

1. **Normalise the experience of working through conflict.** Mediation is hard work, and not just for mediators. Parties may be understandably anxious as they sit face to face with their adversary, loaded with the responsibility for making decisions that will lead to the resolution of the dispute in which they find themselves. Skilled mediators can normalise this situation by recognising what parties are going through and acknowledging their emotions and experiences as a 'normal' part of the iterative push and pull of mediation. This technique can help parties shift from a feeling of isolation to one of being connected (albeit tenuously) with others in similar situations, and invites feelings of anxiety to transform into hope.

2. Ensure that parties have the opportunity to bring **advisers and support people** to the mediation.

3. Be continually on the look-out for signs that parties might be **fatiguing** or otherwise **disengaging** from negotiations. As mediation processes may continue for many hours or even days, and may run into the evening, be on the lookout for signs of physical or mental fatigue, which may impact parties' decision-making ability as they inch closer to a breakthrough and a final agreement.

4. Where you become aware of any **party infirmity**, for instance, if a party discloses that they feel unwell, it is prudent to reschedule the mediation session if the party's condition cannot be otherwise adequately addressed e.g. where the party is able to access their medication and resume the mediation.

5. Where parties reach a settlement, there are differing views as to the extent to which mediators are responsible for explaining the meaning of its terms to the parties to ensure that they are all on the same page. Where both parties, or as in this case, one party is not legally represented, mediators need to consider the best way to deal with the MSA and be cognizant of the **potential risks** involved in advising parties on settlements as the Australian case (from the Supreme Court of Victoria) of Tapoohi v Lewenberg has shown. At the end of the day, the onus remains on the parties to study the terms of a contract for themselves before they sign off on it.

6. If it's not already part of your practice, consider integrating separate **pre-mediation meetings** with each of the parties into your practice. Many of the points discussed here can be addressed, or at least begin to be addressed, prior to the first mediation session.

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