Mediation Privilege

Mediation privilege is once again under scrutiny following Mr Justice Ramsey's judgment in *Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural affairs (No. 2) 2009 EWHC 1102 (TCC).* Is confidentiality in mediation now hopelessly compromised?

Writing for *The Mediator Magazine*, Michel Kallipetis QC and William Wood QC offer views from either side of the argument.

"...a full mediation privilege should be recognised and upheld by the courts."

Michel Kallipetis QC, Independent Mediators

"We must have the confidence to sell mediation ...without pretending to offer some illusory level of secrecy that the law has never and will never permit us to deliver."

William Wood QC, Brick Court Chambers

Mediators Awake

The decision by Ramsey J in the TCC has once again emphasised the need for the mediation community to consider seriously the whole question of mediation privilege.

Michel Kallipetis QC considers the facts

Kallipetis: serious concern

In Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural affairs (No. 2) 2009 EWHC 1102 (TCC), the Court refused an application by a mediator to set aside a witness summons requiring her to attend court to give evidence as to what transpired in a mediation she conducted some six years ago.

The facts, briefly stated, are these: Farm Assist brought an action against DEFRA which was successfully mediated by Jane Andrewartha, one of the most experienced, able and popular commercial mediators in the UK. Both parties were represented in the mediation by a full legal team. Farm Assist went into liquidation and the liquidator sold the right of action to Ruttle Plant Hire. An action was brought by Ruttle to set aside the settlement agreement on the grounds that it was entered into under economic duress. After various procedural difficulties, which were set out in the first judgment[1], Ruttle abandoned its attempt to pursue the action and this second action was brought by the liquidator. Pausing for a moment, one is tempted to speculate why Farm Assist did not

1 See *Ruttle Plant Hire –v- The Secretary of State for the Environment and Rural Affairs* [2007] EWHC 2870 (TCC)

voice its concerns to its legal team at the mediation if it felt it was being pressurised to enter into the settlement agreement under economic duress, and, if it did, why it entered into the settlement agreement at all. However, as it was, DEFRA sought and obtained a witness summons requiring the mediator to give evidence. The Order expressly gave the mediator liberty to apply.

The Order required the parties to liaise over any issue concerning the mediator. A joint request to the mediator enclosing the Order evoked a response with which most busy mediators would sympathise:

> "You will appreciate that this mediation occurred many years ago and in the intervening period I have conducted up to 50 further mediations per year. I therefore have very little factual recollection of the mediation. Further, having retrieved my file from archive I find that whist it has a certain amount of administrative correspondence on it, together with a copy of the original Mediation Agreement and copies of the Position Statements (and is accompanied by a small lever arch file of papers), I have no personal notes on the file. This is unsurprising given that this was a mediation that settled on the day.
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> Accordingly I genuinely believe that, even were it appropriate for me to become involved in this matter again, there is little I can do to assist either side."

Notwithstanding the mediator's perfectly understandable response, her application to set aside the witness summons was refused. The Court concluded that the interests of justice required her to give evidence, basically for five reasons[2]:

(1) The allegations that the settlement agreement was entered into under economic duress concern what was said and done in the mediation and this necessarily involves evidence of what Farm Assist says was said and done by the Mediator. This evidence forms a central part of FAL's case and the Mediator's evidence in necessary for the Court properly to determine what was said and done.

(2) Although the Mediator has said clearly that she has no recollection of the mediation, this does not prevent her from giving evidence, frequently memories are jogged and recollections come to mind when documents are shown to witnesses and they are cross examined. Further provided that the summons is issued bona fide to obtain such evidence, as a general rule, it will not be set aside because the witness says they cannot recall matters: See R v Baines [1909] 1 KB 258 at 262 per Walton J.

(3) Calling the Mediator to give this evidence would not be contrary to the express terms of the mediation agreement which limited her appearance to being a witness in proceedings concerning the underlying dispute, because the Court in the instant case was dealing with a different dispute.

(4) The parties have waived any without prejudice privilege in the mediation which, being their privilege, they are entitled to do.

(5) Finally, whilst the Mediator has a right to rely on the confidentiality provision in the Mediation Agreement, this is a case where, as an exception, the interests of justice lie strongly in favour of evidence being given of what was said and done.

Ramsey J's judgment is an important addition to the growing case law on the exact legal status of mediation privilege. It is unlikely to be more than persuasive authority until the Court of Appeal have an opportunity to consider the matter, but the careful

2 Paragraph 53 of the judgment

analysis is worth studying, particularly as the learned judge is an experienced mediator himself. Ironically, after all the time and costs spent, the action was discontinued by Farm Assist before Ramsey J was due to hand down the judgment. Nonetheless, having considered the submissions (and, I suspect having written the judgment!), the learned judge decided to publish it. Although the mediation community may be divided as to some of his reasoning and conclusions, the judgment provides a very useful analysis of the problems which can arise and it highlights the issues which both the Court and parties have to bear in mind when entering into a mediation agreement.

Having analysed the mediation agreement, which was in a form fairly standard at the time, the learned Judge made the following findings. First he approved of the passage at paragraph 17-001 in Confidentiality by Toulson and Phipps (2nd Edition) which states that "confidentiality is not a bar to disclosure of documents in the process of litigation, but the Courts will only compel such disclosure if it considers it necessary for the fair disposal of the case". Secondly he referred to the passage at paragraph 17-016 which states that "Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice' rule set out above."

The learned Judge concluded that the privilege was that of the parties and not the mediator and thus the parties were at liberty to waive their privilege regardless of the mediator's position.

However, Ramsey J did find that the mediator has a right to confidentiality which the parties themselves cannot unilaterally override. This right, he concluded, was not solely dependent upon the terms of the mediation agreement but also founded upon general principles which he derived again form Toulson and Phipps (paragraph 15-016) and the decision of Bingham MR in Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231. Further, based upon the observations of the Master of the Rolls as to the Court's need to exercise a discretion to hear evidence which would otherwise be protected by privilege where the statement "is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well-being of a child"[3] Ramsey J concluded that this "lends support for the existence of exceptions which permit use or disclosure of privileged communications or information outside the conciliation where, after balancing the various interests, it is in the interests of justice that the communications or information should be used or disclosed"[4].

While acknowledging that in Re D the court was clearly dealing with a different position, Ramsey J does appear to have ignored the three express reservations which the Master of the Rolls made, namely:

1. The decision was solely concerned with the welfare of children;

2. The decision was only concerned with privilege "properly so called... and has nothing to do with duties of confidence and does not seek to define the circumstances in which a duty of confidence may be superseded by other public interest considerations"

3. The Court of Appeal "deliberately stated the law in terms appropriate to cover this case and no other. We have not thought it desirable to attempt any more general statement. If and when cases arise not covered by this ruling, they will have to be decided in the light of their own special circumstances".

3 Re D supra at page 240
4 Farm Assist at paragraph 27

Ramsey J also referred at length to the decision of HH Judge Frances Kirkham (also another trained mediator) in Cumbria Waste Management v. Baines Wilson [2008] EWHC 786, which the mediation community hailed as a welcome recognition that mediation privilege was to be upheld by the Courts. Curiously he did not refer to her unequivocal decision that the mediator should not be required to give evidence of what transpired in a mediation. It is perhaps ironic that the other party to the mediation in that case was, as in Farm Assist, DEFRA, which was vigorously resisting the application to reveal what happened in that mediation! It demonstrates perhaps the old adage that a party only wishes to break the rules if it perceives an advantage for itself in so doing!

Having analysed all the relevant authorities Ramsey J came to the following conclusions:

(1) "Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

(2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

(3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

These are important statements of the law in respect of mediation. It is questionable whether the conclusion that there is no mediator privilege in the process is right. Many jurisdictions, which have developed a mediation jurisprudence over several decades, recognise and enforce mediation privilege both in the process itself and that of the mediator. Moreover, the decision to order the witness summons potentially runs counter to Article 7 of the EU Directive on Mediation (and does not fall within its express exceptions). Albeit that the Directive is limited to cross border disputes, had one of the parties been from another EU Member State, it would apply. It would be quite absurd if the Courts were to develop a mediation rule which would only apply to national disputes. Recent events have shown that we live in a world economy. Worldwide trade produces worldwide disputes, which most jurisdictions nowadays urge should be mediated. Our courts must recognise the need for our legal system to give such mediations the protection they need to encourage parties to use it rather than litigate. The debate needs to take place urgently and a full mediation privilege should be recognised and upheld by the courts. In our jurisdiction, privilege should be a matter of law for the courts and there should be no need for any statute. However, if one was needed, the Uniform Mediation Act provides an excellent starting place. In the meantime we mediators should look to our Mediation Agreements and avoid the difficulties and potential confusion which Ramsey J correctly highlighted when "confidential", "without prejudice" and "privilege" are used in the same document. If we all use "Mediation Privilege" as a matter of course, and no other phrase, it might be a start. It may not get by Ramsey J, but it might give the Court of Appeal a chance!

Michel Kallipetis QC FCIArb

Farm Assist: Mediators get another dose of disclosure?

Bill Wood QC gives a personal reaction

Many people seem to have been worried by Farm Assist. But the decision to uphold a witness summons against a Mediator should not surprise us. Like it or not we are looking here at the well-reasoned and articulate application of a set of largely familiar principles.

We have always known that the protection enjoyed by mediation had its limits. All forms of confidentiality and privilege are limited in some way. This was a duress case. The duress case may have looked a little unconvincing but the issue had been raised and it had to be investigated. It would be surprising and, I submit, wrong if parties to our mediations had greater difficulty obtaining redress in the face of duress or fraud than the parties to ordinary negotiations.

Whether dealing with disclosure of documents or witness summonses the courts have to conduct a balancing exercise. The practical inconvenience to us of attending court is a minor consideration; nurses and teachers have to obey witness summonses and arguably the social consequences of their being diverted to court are rather more serious. That leaves us with the difficult argument that mediation is "special" and deserves treatment by the rules of evidence more favourable than that afforded to

Wood: don't panic

ordinary negotiations.

If a party is said to have made a fraudulent representation or exerted duress in the presence of a mediator (a fortiori where he has done so though the mediator) should the mediator not be available and even keen to give his or her evidence? That evidence may simply be indispensable in establishing the truth of these very serious allegations.

The following aspects of the Farm Assist case represent well-established law:

(a) Contractual confidentiality can yield to the interests of justice. All litigators know that objections to disclosure based on confidentiality rarely succeed.

(b) Without prejudice privilege yields to an allegation such as duress. Duress is one of the recognised exceptions to the protection offered by without prejudice privilege. In fact in this case both parties had waived privilege so that it was unnecessary to rely on the existence of this exception even though it was a duress case.

The following, I accept, may have initially have occasioned some surprise:

(a) The language of the clause prohibiting the parties from calling the mediator as a witness was construed as being inapplicable where the dispute concerned the enforceability of the settlement agreement reached rather than the original dispute. Many mediators are now looking at the wording of their agreements to ensure that they extend to preventing them from being called in subsequent disputes, particularly disputes about the validity of the settlement agreement .

(b) But their efforts may be of little use. Even if the parties to the dispute had been under a binding contractual constraint not to call the mediator Ramsey J. makes it clear that he would have been able to override that clause and uphold a witness summons if it was in the interests of justice to do so.

Where does the law go next?

(a) The provisions of the EU Directive as to Confidentiality are relevant here. They may be brought into law either for cross-border disputes only (this is the compulsory minimum) or across the board (this is still a possibility). This will change the law, at least as it affects mediator compellability. But even had it been applicable and in force the Directive would not have affected the result of Farm Assist; It is clear from the terms of Article 7 that the restriction on calling a mediator to give evidence only applies "unless the parties agree otherwise".

(b) The reform which may be needed in this area is the recognition by the Courts of the need for special protection for the confessional exchanges between mediators and individual parties, the truly private core of mediation activity. This is now the cutting edge of the mediation confidentiality issue. Encouragingly the most recent and most articulate proponent of the case for developing this kind of principle is a High Court Judge. See Briggs, "Mediation Privilege?" New Law Journal, April 2009 . Had Ms. Andrewartha been called to give evidence the questions could have been controlled to ensure that these areas were not invaded. That it seems is an approach which Mr. Justice Briggs at least would support.

(c) Without prejudice privilege is an area of very live debate. The tide is certainly not relentlessly in favour of disclosure. The post-Hoffmann House of Lords already

seems to be rowing back from the potentially wide-ranging implications of the Muller v. Linsley decision: see Ofulue v. Bossert [2009] 2 WLR 749 . (For further discussion of the implications of Muller see generally Wood: "When girls go wild", TheMediatorMagazine December 2008).

Where do mediators go next?

Mediators are now serious players in a wide range of significant and complex disputes. In an ideal world perhaps we would conclude our mediations, receive the grateful thanks of the parties and move on untroubled to the next job. But it seems to me inevitable that there will be a small minority of cases where the parties resume hostilities after the mediation on the same or some related issue. They will on occasion try to re-visit the events of the mediation. Perhaps it is even a sign of the maturity of the profession and the pervasiveness of mediation that applications of this kind are being made and issues like this are arising.

We must have the confidence to sell mediation and to sell ourselves without pretending to offer some illusory level of secrecy that the law has never and will never permit us to deliver. We also need to have confidence in the Judges. Of course they will want to try their cases on the best evidence from the most reliable sources. But they will listen to the mediation community. They will develop these difficult principles case by case as they have always done.

A "full mediation privilege" ? A "Uniform Mediation Act" for England and Wales? As the great US mediator Ken Feinberg warned us in a recent transatlantic discussion: "Be careful what you wish for."

William Wood QC