



Mediation privilege

Dispute Management Group – February 2010

A briefing from our Dispute Management Group

There has been much debate in recent years over the privileged or confidential nature of mediation appointments and recent case decisions have affected the way that both the parties and the mediators themselves approach mediation.

Another turning point in this debate has been reached with the decision of Ramsey J in the case of [Farm Assist Ltd \(in liquidation\) v The Secretary of State for the Environment, Food and Rural Affairs \(No 2\) \[2009\]](#). In this matter, the Mediator applied, unsuccessfully, to set aside a witness summons served on her by the Claimant as part of its attempts to have the settlement agreement reached and the mediation set aside.

As is commonplace, the mediation agreement contained a clause stating that neither party would call the Mediator as a witness 'in relation to the dispute'. The Mediator sought to rely on this clause in her application. However, both parties wanted the Mediator to be called as a witness as part of the Claimant's attempts to set aside the settlement agreement on the basis that it had been procured by reason of economic duress.

Ramsey J concluded that the mediation agreement limited the Mediator's appearance as a witness in proceedings concerning the underlying dispute but not in the subsequent proceedings brought relating to the economic duress arguments. The wording of the clause was, it was held, not wide enough to cover the new proceedings.

In considering the application the Court reviewed earlier decisions relating to the concepts of confidentiality and privilege in mediation and summarised as follows:

Confidentiality

Mediation is confidential both between the parties and between the parties and the Mediator. On this basis, even if the parties agree that matters can be referred to outside the mediation, as was the case here, the Mediator can choose to enforce that confidentiality. The court will generally uphold this confidentiality, but in cases where it is necessary in the interests of justice for evidence to be given of confidential matters, the court will order or permit that evidence to be given or produced.

Without prejudice privilege

Mediation appointments are also covered by without prejudice privilege. This privilege exists between the parties only and not the parties and the Mediator. The parties can agree to waive that privilege, as they had done in this case.

Other privilege

If another type of privilege attaches to documents produced by a party and shown to the mediator, that party retains the privilege in those documents. It is not waived by disclosure to the Mediator.

It is important to note that the Court will only permit or order disclosure of otherwise confidential material if it is in the interests of justice to do so. However, Ramsey J did not consider it necessary in this case to extend the law and create a distinct 'mediation privilege', recognising that the concept would be an amalgam of confidentiality and without prejudice privilege.

The danger of the Court opening a line of case law which may permit a Mediator to be called to give evidence in proceedings is that it may discourage parties from adopting mediation in the first instance, or if they do, from being frank and open with the Mediator for fear that the Mediator may subsequently have to give evidence concerning those discussions.

The second fear is that it will discourage practitioners from becoming mediators or, for those already qualified, from accepting mediation instructions. In the [First Assist](#) case the Mediator argued that she had little to offer in evidence as she had destroyed all her papers on the matter and had dealt with numerous cases since the mediation had taken place. If mediators risk being called to give evidence on the conduct of mediation appointments it is likely that all will begin to destroy their papers, if they do not already do so.

In order to retain the benefit of mediation, it is a widely held view that the courts must do all that they can to uphold its special position in proceedings and to retain the confidentiality and privilege it needs to make the process work as a means of allowing the parties to openly explore settlement. If the courts fail to do so, mediation risks becoming little more than a compliance exercise, entered into merely to please the courts and avoid subsequent costs sanctions.



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