

## Mediation privilege?

Confidentiality is an essential element of mediation. It both encourages parties to engage in mediation in the first instance, and facilitates a free and frank negotiation during the mediation. As a result confidentiality increases the chances of mediation succeeding.

Some commentators, including many mediators, are now asserting that there is in fact a distinct category of mediation privilege in common law which provides confidentiality to communications surrounding mediation and to the events which take place at the mediation. At least, they argue, such a doctrine is starting to emerge.

It is worth noting that the European directive on mediation issued in March 2008 will require all member states to afford "confidentiality" to the mediation process by 2011, in order to foster mediation in cross border disputes. It is thought that the directive may lead to a legislative review of mediation, and a possible Mediation Act which introduces mediation privilege as a distinct category of privilege. This may mirror the more developed position which exists in the USA where many states embody mediation privilege in their evidential codes.

## Opening up without prejudice communications:

Without prejudice communications which are written or made for the purposes of settling the dispute cannot generally be admitted in evidence in the dispute and are essentially therefore subject to a species of privilege.

Robert Walker LJ in *Unilever v Proctor & Gamble* (2000) articulated the basis upon which a court will open up without prejudice communications. He observed that the without prejudice rule is founded partly in public policy and partly in the parties' agreement.

Public policy favours parties being able to explore settlement without trial. Therefore it is considered to be in the public interest that parties can explore settlement without fear that the limited concessions or admissions which they made to that end could be used against them.

Importantly, the Unilever case found that it was an established

exception to the without prejudice rule that the communication in question can be admitted as evidence of whether or not a concluded agreement was reached. Privilege was not waived because the issue in this case was the truth of statements in question, not whether the statements had been made.

The law was reviewed and the key principles were summarised as follows:

- Evidence can be heard if its exclusion would amount to a "cloak for perjury, blackmail or other unambiguous impropriety"
- A clear statement made during negotiations on which the other party is intended to rely may be admissible evidence as giving rise to estoppel.
- Evidence of negotiations can be admissible to demonstrate that an agreement reached should be set aside on grounds of misrepresentation.
- Evidence of negotiations can be given to explain delay (for example if a party is alleging delay to support striking out a claim).
- Communications as to the existence of a concluded compromise agreement are admissible.

The courts have also considered privilege (and its waiver) in the context of mediation in two recent decisions:-

## *Brown v Rice & Patel* : Was there a settlement?

This case concerned an action by Mrs Rice's trustee in bankruptcy who was trying to set aside the sale of Mrs Rice's house to a Mrs Patel for £250,000 on the basis that it was allegedly at an undervalue. The mediation agreement contained the standard confidentiality clause. At the end of a 13 hour mediation settlement had not been reached. The trustee purported the next morning to accept an offer made by Mrs Patel's husband after the mediation. Mrs Patel denied that such an offer had been made or was valid and capable of acceptance. The case went to trial and the preliminary issue was whether or not there had been a concluded settlement agreement at the mediation.

The parties agreed that without prejudice to whether or not it was admissible the judge could consider evidence of what happened in the late stages of the mediation. They also agreed that the



mediator could be called to give evidence (in the end he attended court but was not called).

## The judge found the following

- The evidence as to what had occurred at the mediation was admissible.
- It was not necessary to consider the arguments as to the “possible existence and desirability of a distinct privilege attaching to the entire mediation process”. The mediation process was simply an “assisted without prejudice negotiation”.
- In any event the question of admissibility fell “squarely” within the existing exception to the without prejudice rule which allows disclosure for the purpose of determining whether or not a settlement has been reached.

Clearly in this case it was of central importance to determine whether or not a valid offer had been made in order for the case to move forward. There was no obvious detriment to either party from the court’s consideration of what happened at the end of the mediation. It is also relevant that the parties had agreed that the court could consider the evidence regarding events at the mediation, which the judge called “sensible”. In terms of the practicalities it would also appear to have been the right result. It is hard to see how the matter would have been resolved satisfactorily, or at all, if the judge had been unable to admit evidence of what happened at the mediation with the parties at odds over whether or not there had been a settlement.

## *Cattley v Pollard*: What were the terms of the settlement agreed in mediation?

In this case, Mr Pollard, a solicitor had misappropriated funds from an estate. He and his then secretary, later his wife, had bought a house with the funds, which was put in the wife’s name. The beneficiaries of the estate sued Mr Pollard’s firm in negligence and Mrs Pollard was added as a defendant to that action. The litigation was defended by the firm’s professional indemnity insurers, and judgment was entered. They concluded a mediation process to which Mrs Pollard was not party even though she was a party to the action. There was a confidentiality clause in the mediation agreement. The beneficiaries then sued the wife for dishonest assistance and tracing, and she sought disclosure of the defendant firm’s solicitors’ file relating to the mediation. She aimed to establish that the claim failed, either because the claimants had elected to accept damages (and therefore could not reaffirm

the breach of trust and pursue an equitable remedy) or because there would be a double recovery. The disclosure of the file was ordered. The mediator was given permission to seek rescission of the order but in the event the order was upheld. The key points of the decision were

- a distinction was drawn between the fact of making a communication and the truth of the statements contained in it.
- the guiding rationale again was practical justice. The necessity for Mrs Pollard to be able to establish what happened in order to pursue was seemingly more important than the parties’ confidentiality

## Practical implications

On the basis of these decisions, it is difficult to conclude that there is (or ever was) a separate doctrine of mediation privilege, however in most cases a de facto mediation privilege exists by virtue of contract (mediation agreements) and the without prejudice rule, and by custom and practice.

While critics of these decisions express their fears that the mediation process should be sacrosanct, on the basis of public policy and the integrity of mediation agreements, it appears clear that when it comes to establishing facts (as opposed to evaluating the merits of a party’s position) the court will be willing to balance the interests of confidentiality with the interests of practical justice, and lift the veil of privilege whether the process is characterised as a mediation or a negotiation.

What will be interesting will be to see how far this balancing process is addressed (if at all) by the exceptions to any legislative embodiment of mediation privilege, and the extent to which the scope of the doctrine is then challenged by parties to the mediation or by third parties.

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