

**Mediation and the Courts:**  
**Developments in 2008 and 2009**

**By**

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## ORDERING PARTIES TO MEDIATE/COSTS SANCTIONS

### Judicial Criticism of Halsey v Milton Keynes NHS Trust

- 1 In Halsey v Milton Keynes NHS Trust [2004] 1 WLR 3002, the Court of Appeal apparently resolved two issues about mediation. These were; first, whether the court could: order an unwilling party to mediate and, second, whether the court could: impose a costs sanction on the winning party at trial who had refused to mediate. On the first issue, the Court decided that parties should be encouraged to mediate but that it would be contrary to a party's Article 6 rights to order him to mediate against his will. On the second issue, the Court decided that a court could impose a costs sanction but only if the losing party proved that the winning party had acted unreasonably in refusing to mediate.
- 2 Halsey has been subjected to judicial criticism. On 29 March 2008, in a speech in India, Lord Phillips, then Lord Chief Justice and now the senior Law Lord, dealt with criticisms of the decision by Sir Gavin Lightman in a lecture on 28 June 2007. Sir Gavin had argued that the Court of Appeal was wrong on two points. First, that ordering an unwilling party to mediate was not contrary to his Article 6 rights because such an order did not prevent a party from litigating if the mediation failed. He also criticised the Court of Appeal for being unaware that, in many other jurisdictions, unwilling parties were ordered to mediate. Second, which the burden should be on the party who refused to mediate to prove that he was reasonable in so doing. He argued this for various reasons but, perhaps, most importantly, because the party who has decided not to proceed to mediation and knows the reasons for his decision should be required to explain and justify his decision.
- 3 On the Article 6 point, Lord Phillips stated that, if a party was denied the right to litigate if he refused to mediate, that would be likely to be a breach of the party's Article 6 rights. However, this did not mean that courts should not direct parties to mediate.
- 4 On the burden of proof point, Lord Phillips accepted that the Court of Appeal had

"significantly weakened" the costs sanction by deciding that the burden of proving unreasonable conduct was on the party who wanted the mediation. He added:

"I think that there is little doubt that this finding significantly reduced the pressure on English litigants to attempt mediation. After all, parties usually resort to litigation because they believe that they are going to win and, if you win, it can be quite difficult for the loser to show that you acted unreasonably on insisting on your full legal rights. At the time that Lord Justice Dyson gave his judgment in Halsey I agreed with it, but with hindsight I tend to agree with Gavin Lightman that it is a pity that he said what he did about burden of proof. There is much to be said for the robust attitude that a party who refuses to attempt mediation should have to justify his refusal."

5 Lord Phillips ended his speech with strong support for mediation. He said:

"The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is usually borne – at least in part – by the state. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the court."

6 The Master of the Rolls, Lord Clarke (as he now is), has also criticised Halsey in a speech to the Civil Mediation Council in May 2008.

7 On the Article 6 point, he argued that there may well be grounds for suggesting that Halsey was wrong. However, he also argued that that part of Halsey was not part of the court's decision because the issue before the Court was '*when should a court impose costs sanctions against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution (ADR)?*' Thus, despite Halsey, it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation and that the court has sufficient powers at present routinely to direct the parties to take part in a mediation process or attend a mediation hearing during the course of the pre-trial

### **Encouraging Mediations**

- 12 In **Bradford v James** [2008] EWCA Civ 837, [2008] BLR 538 Mummery LJ gave the following salutary warning:

“There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.”

### **Applying Halsey**

- 13 In **Nigel Whitam Ltd v Smith** [2008] EWHC 12 (TCC), 117 Con LR 177, HH Judge Coulson QC (now Mr Justice Coulson) was asked to reduce the successful party's costs on the basis of the novel proposition that, although there had been a mediation, it had taken too place too late in the dispute with the result that considerable costs had been wasted. The judge decided (at paragraph 36) that the principles in **Halsey** might, in an exceptional case, be applicable so that there might be an adverse costs order if there was a very late mediation and its chances of success were very poor and if it could be shown that the successful party unreasonably delayed in consenting to the mediation.
- 14 However, the judge decided that the contention failed on the facts because there was nothing to demonstrate that the defendants unreasonably delayed in consenting to the mediation. Also, he concluded that, even if there had been an earlier mediation, the claimant's uncompromising attitude meant that it would not have had a reasonable prospect of success.
- 15 Also, the judge made the following general remarks about premature mediations (at paragraph 32):

"It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which make any subsequent attempt of settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible".

- 16 In **S v Chapman** [2008] EWCA Civ 800, the Court also refused to make any costs order against the successful party for three reasons: first, that the claimants had failed properly to particularise their case so that the defendant did not know what case it had to meet; secondly, the claimants unreasonably failed to respond to the perfectly proper request for further information that was being sought by the defendant particularly as to the non-legal remedies that were desired; and, thirdly, that the claimants' case was very weak as shown by the fact that swathes of the particulars of claim were later struck out.
- 17 In **Vale of Glamorgan Council v Roberts** [2008] EWHC 2911 (Ch), Lewison J refused to impose a costs sanction on the successful Council where it had not mediated against a litigant in person but it had not been asked to do so. He held that **Halsey** did not apply: "It would, I think, be going too far to disallow costs incurred by a local or public authority because that authority did not initiate suggestions for a mediation" (paragraph 8).

### **Extending Halsey**

- 18 In **The Earl of Malmsebury v Strutt v Parker** [2008] EWHC 424 (QB), 118 Con LR68 (16 March 2008), Jack J has extended **Halsey**. This was a claim for

professional negligence against a solicitor, Wilsons, and an estate agent, Strutt and Parker ("SP"). The claim against Wilsons failed but the claim against SP succeeded. This was a judgment on the costs consequences of the judgments in favour of the claimants. In this paper, I am concerned only with that part of the costs judgment which dealt with the costs consequences of a mediation that did not take place and of one that did.

## **Background**

19 In order to understand the costs judgment, it is necessary to summarise some of the judge's findings on liability and quantum. The material matters were:

- a. The claim was brought by the trustees of the Malmesbury Estate and the life tenant, Lord Malmesbury, against SP alleging negligence in connection with leases entered into with Bournemouth International Airport of land used by the airport to provide the main car park for users of the airport.
- b. SP were held to have been negligent in respect of the 2002 and 2003 leases, but not in respect of the 2000 lease. They should have negotiated leases in 2002 and 2003 which contained 'turnover' rent provisions with a split of net car park income of 10 per cent to the Estate.
- c. Damages were to be assessed on a loss of capital value basis rather than on a loss of income basis.
- d. The outcome of the judgment on damages was that the damages in respect of the 2002 lease were £773,479, and in respect of the 2003 lease were £141,660, a total of £915,139 exclusive of interest. Those were assessed on the loss of capital value basis.
- e. It was held that on a loss of income basis the damages would have been £6,972,569.

20 The claimants had claimed £87.8 million. The principal reason why they recovered so much less were three findings by the judge: first, that the income split should have been 10 per cent and £87.8 million was based on 93.4%;

second, that the proper measure of damage was the loss of capital value rather than the loss of income; and, third, that the car parks would not in due course have been built over with either one or two levels of decking thus effectively doubling or tripling their capacity from the time it was done, and that no claim could be made for loss on this basis.

- 21 The claimants' costs were £1.84 million including costs incurred in respect of claims against Wilsons. SP's costs were £2.4 million including costs incurred in proceeding against Wilsons. The claimants and SP were each ordered to pay indemnity costs to Wilsons. SP paid Wilsons £1.1 million on account of their costs. The claimants expected to pay them about £40,000. These sums total £5.38 million. The judge noted: "That is a horrendous figure. It is wholly disproportionate to the sum actually recovered by the claimants".

### **Failure to Mediate**

- 22 The first mediation issue was whether the claimants' costs should be reduced because they did not agree to mediate when all three parties were still involved in the litigation. SP alleged that the claimants had been unreasonable in setting preconditions to the mediation with the result that it did not take place.
- 23 Having examined in detail the without prejudice correspondence and what had taken place at a without prejudice meeting, Jack J decided not to make any deduction from the claimants' costs by reason of the fact that a mediation had not taken place. Although he concluded that the claimants had been unreasonable in insisting that they would recover at least £70m, he also concluded that SP was unreasonable in stating that they would pay nothing to the claimants. They had a weak case on liability as regards the 2002 lease, a stronger case on causation and a very strong case that any split would be well below 80 per cent. He noted that Wilsons' solicitors, whose clients had a very strong defence, were prepared to take a far more conciliatory attitude in order to get to the mediation room. He thought it most revealing that Wilsons' solicitor told the claimants' solicitor that, if SP would not accept that they might have to make a substantial payment, he would understand why the claimants would not mediate. In short, as the judge observed (at paragraphs 68 and 69):

"There was obduracy on both sides..... In these circumstances, where the failure to mediate was due to the attitudes taken on either side, it was not open to one party .....to claim that the failure should be taken into account in the order as to costs".

- 24 Although it was not referred to in the judgment, this part of the decision is consistent with the decision of Munby J In **Re East Sussex CC** [2005] EWHC 585 (Admin) 11.04.05 in which he refused to reduce the costs of the successful applicants for judicial review on the grounds that they had refused to mediate. One of his reasons was that the unsuccessful respondents had made unreasonable conditions for agreeing to mediation which the claimants were entitled to reject. He said: "A party who reasonably rejects an unreasonable or unrealistic proposal for mediation may still recover his costs".

### **Unreasonable Stance at Mediation**

- 25 The second mediation issue was whether the claimants' costs should be reduced because they had behaved unreasonably at the mediation which did take place after the judgment in the claimants' favour on liability.
- 26 The mediation followed a Part 36 offer by SP to settle for £1m save for costs – which would remain to be determined by the court. At the mediation, SP offered £1m inclusive of interest with each side to bear their own costs. The claimants made an offer of £9m plus 80 per cent of their costs. That was rejected and the mediation got no further. At this time, the lowest figure put forward by SP for the damages was £267,000, and the highest put forward by the claimants was about £5.3m. The judge observed (at paragraph 71):

"It is not difficult to judge that the correct figure would be between these two, that is, substantially lower than £5.3m. The claimants' offer therefore assumed a considerable success at the damages hearing together with a strong chance of success on an appeal".

- 27 On the basis of these observations, the judge decided (at paragraph 72):

"I consider that the claimants' position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded. It would be wrong to say more. As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail by his reason of unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in **Halsey**".

Jack J decided to penalise the claimants by giving them only 80% of their costs relating to damages.

### **Comment**

28 The Court of Appeal in **Halsey** went out of their way to preserve the confidentiality of the mediation. Thus, they said (at paragraph 14):

"We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."

It appears impossible to reconcile this unambiguous statement by the Court of Appeal with Jack J's reasoning. Jack J was doing precisely what the Court of Appeal said a court should not do i.e. "investigate why the mediation process did not result in agreement". Although it is clear that the parties were prepared to tell him what happened in the mediation, he should have refused to make any adverse costs order against the claimants as a result.

29 The potential for this decision to wreck mediations in the future cannot be overestimated. If a judge can pore over offer and counter offer in the way that Jack J did in this case and make adverse costs orders as a result, mediations will either become a thing of the past as parties will not be prepared to expose

themselves to such judicial scrutiny or the form of mediations will change radically for the worse as parties will take a stance based on what they think might happen at trial rather than in response to what takes place at the mediation. It is to be hoped that either the Court of Appeal will overturn this decision or that future judges will refuse to follow it.

- 30 In Lord Clarke's speech referred to above, he referred to Malmesbury with apparent approval (paragraph 19) but also commented:

"The bane of civil litigation is what I call satellite litigation that is disputes which are not about the underlying merits. I would certainly not like to see a new type of satellite litigation in which complaints about the parties' approach to mediation are investigated in detail and at great expense."

This indicates that, even if Jack J was correct in his application of Halsey, parties should be very slow to ask the court to undertake the same detailed investigation carried out in that case.

### **DISCLOSURE OF MEDIATION DOCUMENTS TO A THIRD PARTY**

- 31 In Cumbria Waste Management and Lakeland Waste Management v Baines Wilson [2008] EWHC (QB) 786 16 April 2008, HH Judge Kirkham had to decide if documents disclosed during a mediation and/or documents revealing what happened in the mediation should be disclosed to a third party without the consent of one of the parties to the mediation.

### **Background**

- 32 The defendant firm (BW) acted as solicitors to both claimants in connection with the drafting and negotiation of an agreement between them and the Department for Environment, Food and Rural Affairs ("DEFRA") for the provision of waste management services during the foot and mouth epidemic in 2001. The claimants and DEFRA were in dispute as to the sums to be paid for the claimants' services. The first claimant claimed £4.54m and the second claimant £1.72m in respect of unpaid invoices and both claimed interest and costs. That dispute was settled on payment by DEFRA of £3.9m to the first claimant and

£1.4m to the second claimant. The settlements followed a series of without prejudice communications between the parties' solicitors and two mediations.

33 The claimants' position was:

- a. They claimed from BW £3.65m and £0.76m, being the alleged balance between the settlement monies paid by DEFRA and the claimants' total claims against DEFRA.
- b. They alleged that the dispute with DEFRA occurred entirely as a result of BW's negligence in relation to the negotiating, drafting and advising upon the terms of the agreement between the claimants and DEFRA.
- c. They contended that DEFRA's case in the dispute with the claimants was based upon ambiguities and inconsistencies in the drafting of the contract for which BW was responsible.
- d. They contended that, if BW had performed its obligations and ensured that the contract was clear and unambiguous and that it reflected what had been agreed between the parties and/or the claimants' instructions, the position taken by DEFRA on the construction of the contract would not have been possible.
- e. They alleged that the settlement of the proceedings following the second mediation was in their best interests and reflected a reasonable and sensible compromise of the claims given, in particular, the ambiguity and lack of clarity in the contract.

34 BW's position was:

- a. It was for the claimants to prove that the settlement with DEFRA was reasonable and what was the true cause of the settlement.
- b. The true construction of the contract was clear and that there was no reasonable basis for the contention advanced by DEFRA in the dispute with the claimants.
- c. If the claimants settled with DEFRA on the basis that there was a risk that the unmeritorious construction advanced by DEFRA would be upheld by the court, that was an unreasonable basis for the claimants to settle.
- d. If the claimants settled with DEFRA on the basis of concerns (whether legal or commercial) other than the construction of the contract, then BW

could not be held responsible for any shortfall between the settlement monies and the amounts invoiced by the claimants.

### **Disclosure of Mediation Documents to Third Party by Party to Mediation**

35 Against that background, the judge had to decide whether BW was entitled to disclosure of documents arising out of or in connection with two mediations and which were not subject to legal professional privilege. DEFRA were not a party to the proceedings but were invited to make representations pursuant to CPR 31.19(6) (b). They resisted the making of an order for disclosure on the grounds that the mediation was privileged, confidential, the subject of a contract to which DEFRA was not a party and on the grounds of relevance. The claimants took a neutral stance.

36 Typically, the mediation agreements which the claimants and DEFRA entered into contained confidentiality clauses.

37 DEFRA's evidence was that they remained in dispute with other parties in relation to the 2001 foot and mouth epidemic or other disease outbreaks and that, if the documents were disclosed and if they become public during the trial, that might provide information as to DEFRA's approach to disputes and their resolution which might lead to prejudice to DEFRA in such cases.

38 The judge upheld DEFRA's objections. She referred to the passage from Halsey quoted above. She decided that what occurred at the mediation was privileged and that, whether on the basis of the without prejudice rule or as an exception to the general rule that confidentiality is not a bar to disclosure, the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.

### **Disclosure of Mediation Documents to Third Party by Mediator**

39 She also noted that BN had sought disclosure of documents held by the mediator. She stated (at paragraph 31): "In my judgement, the court should be very slow to order such disclosure. Mediators should be able to conduct mediations confident that, in normal circumstances, their papers could not be

seen by the parties or others”.

## **MEDIATOR AS A WITNESS AT TRIAL**

40 In **Farm Assist (In Liquidation) v The Secretary of the State for Environment, Food and Rural Affairs (No 2)** [2009] EWHC 1102 (TCC) 19 May 2009, Ramsey J had to decide if a mediator should be called as a witness at a trial at which one of the parties to a mediation sought to set aside the agreement reached at the mediation.

### **Background**

41 In a trial due to commence on 22 June 2009, the Claimant (“FAL”) seeks to set aside a settlement agreement entered into with the Defendant (“DEFRA”) at a mediation on 25 June 2003 on the grounds that it was entered into under economic duress. DEFRA denies the allegation.

42 In the course of interlocutory hearings, DEFRA made clear that it wished the mediator to give evidence and that she should be free to give evidence about the entire conduct of the mediation including her private conversations with both parties and their advisers. FAL did not object to calling the mediator to give evidence in principle and agreed that she should give evidence about private meetings with the parties, although it stated that the need to call the mediator had not yet been demonstrated.

43 Following a suggestion by FAL, in late 2008 (over 5 years after the mediation) Ramsey J directed that the parties should write jointly to the mediator in an attempt to discover whether she had retained any notes or documents from the mediation and whether she has any factual (or other) recollection of the mediation and invite her to disclose to the parties forthwith such notes or documentation she may have retained. The parties were also able to take witness statements from the mediator and were at liberty at trial to ask her questions about the entirety of what occurred at the mediation including matters which, but for the directions, may have otherwise been the subject of privilege

and/or confidentiality. However, Ramsey J reserved the question of whether the mediator could be called as a witness by either party or by the Court.

44 The mediator informed the parties that, as the mediation occurred many years ago and in the intervening period she had conducted up to 50 further mediations per year, she had very little factual recollection of the mediation. Also, her file contained only administrative correspondence, the Mediation Agreement and copies of the Position Statements plus a small lever arch file of papers. She had no personal notes which were "unsurprising given that this was a mediation that settled on the day". She concluded by stating: "Accordingly I genuinely believe that, even where it appropriate for me to become involved in this matter again, there is little I can do to assist either side."

45 Despite this response, DEFRA wanted to take a witness statement from the mediator. FAL contended that this was a waste of costs in view of the mediator's earlier letter. In further correspondence, the mediator referred to the terms of the Mediation Agreement entered into between her and the parties which provided that both parties had agreed not to call her as a witness and stated that she did not believe that she could help and would not devote further time unless required by the court to do so.

46 DEFRA then issued a witness summons on the mediator seeking her attendance at the trial and she applied to have it set aside or varied under CPR 34.3 on the basis that:

- a. Her evidence was subject to express provisions of confidentiality and non-attendance pursuant to the Mediation Agreement signed by all parties dated 24 March 2003.
- b. In any event, the evidence was confidential and/or legally privileged and/or irrelevant.

### **The Mediation Agreement**

47 As the judge observed, "The Mediation Agreement contained a number of terms which have now become commonplace in mediation agreements and deal with

such matters as the status of communications in the mediation". The Mediation Agreement contained seven clauses and appended, as a schedule, a Mediation Procedure.

48 Clause 6 of the Mediation Agreement which dealt with confidentiality provided:

*"Each Party in signing this Agreement is deemed to be agreeing to the confidentiality provisions of the Mediation Procedure on behalf of itself and all of its directors, officers, servants, agents and/or Representatives and all other persons present on behalf of that Party at the Mediation."*

49 Paragraph 1 of the Mediation Procedure provided:

*"All communications relating to, and at, the Mediation will be without prejudice."*

50 Paragraph 7 provided for the exchange of information and provided that:

*"In addition, each Party may send to the Mediator and/or bring to the Mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other Party, clearly stating in writing that such documentation is confidential to the Mediator."*

51 Paragraphs 11 to 13 provided, as follows, under the heading of "Confidentiality":

*"11. Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose:*

- a) *the fact that the Mediation is to take place or has taken place; and*
- b) *all information (whether given orally, in writing or otherwise), produced for, or arising in relation to the Mediation including the settlement agreement (if any) arising out of it, except insofar as is necessary to implement and enforce any such settlement agreement or to comply with any Order of the Court in any subsequent action.*

*12. All documents, which include anything upon which evidence is recorded (including tapes and computer discs), or other information produced for, or arising in relation to, the Mediation will be privileged and not be admissible as evidence or discoverable in any litigation or arbitration*

*connected with the Dispute except any documents or other information which would in any event have been admissible or discoverable in any such litigation or arbitration.*

*13. None of the parties to the Mediation Agreement will call the Mediator as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the Dispute and the Mediator will not voluntarily act in any such capacity without the written agreement of all the Parties."*

### **Confidentiality and Without Prejudice**

52 Ramsey J summarised the position in respect of confidentiality, without prejudice privilege and other privilege. He stated (at paragraph 44):

- a. 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.
- b. 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.
- c. 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".

53 In deciding that a mediator can be called as a witness despite the confidentiality of the mediation, the judge relied on **Re D (Minors) (Conciliation: Disclosure of Information)** [1993] Fam 231 where the privileged status of statements made in proceedings under the Children Act 1989 was considered. Sir Thomas Bingham MR decided that, where there had been a conciliation relating to children, the law is that evidence may not be given in proceedings under the Children Act 1989 of

statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a 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.

- 54 In view of that narrow reasoning and the very different nature of conciliation proceedings involving children and meditations of commercial disputes, it is surprising that Ramsey J decided [at paragraph 27] that, "whilst clearly dealing with a different position", Sir Thomas Bingham's judgment "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".

#### **Agreement That Parties Would Not Call the Mediator As A Witness**

- 55 As noted above, the parties had expressly agreed by clause 13 of the Mediation Procedure not to call the mediator as a witness in respect of any litigation in relation to the dispute between the parties. The judge dealt with this agreement in two ways: first, he decided that the words 'the dispute' referred on its proper construction to the underlying dispute between the parties and not to a dispute as to whether the settlement agreement had been entered into as a result of economic duress (paragraph 48); second, even if the wording of paragraph 13 of the Mediation Procedure did apply to this case, he did not consider that it would in itself lead to the witness summons being set aside but it would be a factor for the court to take into account in deciding whether, in the interests of justice, a mediator should be called as a witness.

#### **Setting Aside The Witness Summons**

- 56 The judge refused to set aside the witness summons for the following reasons:
- a. The issue in the case was whether the settlement agreement arising from the mediation should be set aside for economic duress. The allegations concerned what was said and done in the mediation and this necessarily involved evidence of what FAL says was said and done by the mediator. This evidence formed a central part of FAL's case and the mediator's

evidence was necessary for the Court properly to determine what was said and done.

- b. Whilst the Mediator had said clearly that she had no recollection of the mediation, this did not prevent her from giving evidence. Frequently, memories are jogged and recollections come to mind when documents are shown to witnesses and they have the opportunity to focus, in context, on events some years earlier. Also, provided that the summons was issued bona fide to obtain such evidence, as a general rule, it will not be set aside because the witness says he or she cannot recall matters.
- c. 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.
- d. The parties had waived any without prejudice privilege in the mediation which, being their privilege, they were entitled to do.
- e. Whilst the mediator has a right to rely on the confidentiality provision in the Mediation Agreement, this was a case where, as an exception, the interests of justice lay strongly in favour of evidence being given of what was said and done.

### **No Loss of Legal Advice Privilege When Party Seeks to Set Aside a Settlement Agreement**

57 In **Farm Assist (In Liquidation) v The Secretary of the State for Environment, Food and Rural Affairs (No 1)** [2009] P.N.L.R. 16, (the facts of which are set out above) DEFRA applied for disclosure of FAL's legal advice given to it both before and after the settlement. DEFRA argued that any relevant privilege had been impliedly waived by the bringing of the subsequent proceedings and sought disclosure of the legal advice on the basis that it was relevant to an issue in the present proceedings, namely the claimants' state of mind when settling the claim.

58 Ramsey J held that implied waiver of legal advice privilege only arose in English law where a client sued his former solicitors, thus putting the otherwise confidential relationship in the public domain: **Paragon Finance Plc v Freshfields** [1999] 1 W.L.R. 1183. The mere fact that a party's state of mind (in

this case, the effect on FAL of the alleged economic duress) was in issue in other proceedings did not give rise to an implied waiver of privilege in relation to any legal advice which might have influenced him. He stated (at paragraph 53):

“Whilst a person's state of mind and also that person's actions may well have been influenced by legal advice, there is no general implied waiver of privileged material merely because a state of mind or certain actions are in issue. This means that, in the absence of disclosure of the privileged legal advice, the other party is precluded from being able to put that legal advice to a person to show that the advice influenced the state of mind or actions of that person. In many cases it could be said that privileged legal advice might be relevant to establishing an issue and that, in this way, the privileged material could be said to be put in issue. That is not the approach taken in English law. Rather, the underlying policy considerations for creating privilege to protect communications between a client and solicitor are treated as paramount even if some potential unfairness might occur”.

Therefore, FAL was entitled to claim legal advice privilege.

### **Are Costs of the Mediation Costs of the Proceedings?**

- 59 Are the costs of the mediation costs in the case? This question was considered by Coulson J in **Lobster Group Ltd v Heidelberg Graphic Equipment Ltd** [2008] EWHC 413 (TCC) on an application by defendants for security of their costs which included the costs of a failed pre-action mediation. The judge ruled that they were not entitled to do so.
- 60 First, he decided that, as a matter of general principle, the costs of a separate pre-action mediation were not “costs of and incidental to the proceedings” under s.51 of the Supreme Court Act 1981. They are costs incurred in pursuing a valid method of alternative dispute resolution which had no connection to the litigation and which took place 2.5 years before the proceedings even started. He distinguished **Chantrey Vellacott v The Convergence Group** [2007] EWHC 1774 (Ch), a decision of Rimer J (as he then was) and **Nat West Bank v Feeney** [2006] EWHC 90066 (Costs), a decision of Master Campbell, upheld by Eady J, as they were concerned with mediations after the proceedings had commenced,

when it is much easier to see why they fell under s.51 and/or why, pursuant to Costs Practice Direction 4.6(8), the costs were found to be analogous to "work done in connection with a view to settlement".

61 Second, he decided that the parties had expressly agreed to bear their own costs of the mediation and it would be a breach of that agreement if, 3 years later, the defendants sought to recover from the claimant their costs of the mediation.

62 In the speech referred to above, Lord Clarke suggested (at paragraph 21) that there should be a general principle that the costs of a mediation will ordinarily be treated as costs in the case so that the person with the strong case will then be protected against the costs of a failed mediation if the action subsequently succeeds. As far as I am aware, this suggestion has not (yet) been followed as, in the vast majority of mediations, the costs are shared by the parties although, if the mediation results in a settlement, the paying party frequently pays the payee's costs of the mediation.

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