Claim No: HT-04-335

Neutral Citation Number: [2006] EWHC 2338 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT

Court 11, St Dunstan's House
Fetter Lane, London, EC4

Date: Tuesday, 19th September 2006

Before:

HIS HONOUR JUDGE PETER COULSON QC

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(1) ROBERT AIRD
(2) KAREN AIRD **Claimants**
- and -
PRIME MERIDIAN LIMITED **Defendants**

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MR. JEFFREY BACON (instructed by **Halliwells LLP**) appeared for the Claimants
MR. OLIVER TICCIATI (instructed by **Hill Dickinson**) appeared for the Defendants

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Judgment

His Honour Judge Peter Coulson QC:

Introduction

1. In recent years, mediation has proved an extremely effective method by which parties to commercial disputes can resolve their differences without going to the cost and disruption of a lengthy trial. Sometimes mediation can be a successful adjunct to on-going court proceedings. The preparation of a case for trial, and the judge's case management, can reach a stage when the parties have sufficient information about their respective positions to give mediation a good prospect of success. However, in such instances, care is needed to ensure that the two processes of litigation and mediation are kept separate; otherwise there may be disputes over the extent and effect of particular orders of the court. The present dispute illustrates this potential for conflict only too clearly.

2. By an order of the court made on 18th August 2005 His Honour Judge Thornton QC required that:

> "By 23.9.05 the parties' architectural experts (Peter Blockley for the Claimants and Frank Cleveland for the Defendants) do meet without prejudice and prepare a statement of the issues upon which they are agreed and those upon which they are not agreed with a brief statement of the reasons for the disagreement."

He also ordered that the action be stayed from 1st October 2005 to 31st November 2005 to allow the parties to mediate.

3. The experts complied with that order and, by 1st September 2005, they had agreed a statement of matters that were agreed and not agreed ("the statement"). In December 2005 there was an unsuccessful mediation and the proceedings re-commenced in the New Year. The Claimants sought to amend their pleadings in a way that was apparently inconsistent with the views expressed by their expert in the statement. The Defendants objected to those amendments. The Claimants claimed that, since the statement had been produced for the mediation, it was a 'without prejudice' document and thus privileged. Therefore, they maintained that no reference could be made to it. The Defendants now seek a declaration that the statement is not a 'without prejudice' document, and that it can be referred to in the ongoing litigation. In the alternative, the Defendants submit that, even if the statement is a 'without prejudice' document, the differences between the statement and the Claimants' new case are "so grotesque" that there has been an abuse of privilege and (at least for certain purposes) the 'without prejudice' tag should be removed.

4. In considering the first issue, namely whether the statement is privileged, I deal with the relevant principles of law in paragraphs 5 to 10 below. I then set out the facts in some detail in paragraphs 11 to 26 below, before providing my conclusions on the first issue in

paragraphs 27 to 31 below. I deal with the second issue, namely the Defendants' alternative argument, at paragraphs 32-35 below.

The Relevant Principles of Law

5. The dispute has raised two potentially competing public policies. On the one hand, the provision by the experts of a statement of the matters on which they agree and disagree is a vital component of effective case and trial management in the TCC, and it would generally be contrary to the overriding objective (CPR 1.1) if statements which had been signed by both experts were then to be kept secret from the court. On the other hand, it is a clear rule of public policy that, in order to encourage the parties to settle their differences in a frank and open manner, the documents generated by or for mediation are privileged.

6. The court's power to order experts to meet without prejudice and produce a statement identifying the matters agreed and not agreed is set out at CPR 35.12. This provides:

> "(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to:
>
> (a) identify and discuss the experts' issues in the proceedings; and
>
> (b) where possible, reach agreed opinion on those issues.
>
> (2) The court may specify the issues which the experts must discuss.
>
> (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing
>
> (a) those issues on which they agree; and
>
> (b) those issues on which they disagree and a summary of their reasons for disagreeing.
>
> (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
>
> (5) Where experts reach agreement on an issue during their discussions the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement."

7. It is important to note the following:

> (a) The meetings themselves are without prejudice. The privilege that therefore attaches to the meetings is a joint privilege and its waiver requires the consent of both parties. (see ***Rush & Tompkins v. Greater London Council*** [1989] AC 1280).

(b) The statement is, in the ordinary case, not privileged. Indeed its production is ordered by the court so that it can be relied on by everyone, including the parties and the court, in any trial of the substantive issues.

(c) The parties are not automatically bound by the matters agreed by their experts, although they can agree to be so bound. However, the lack of such agreement does not make the statement privileged: (see ***Robin Ellis Ltd. v. Malwright Ltd***. [1999] BLR 81.

(d) The conduct of the meetings and the content of the statement are solely for the experts themselves. Interference in this process by the parties or their lawyers may amount to a breach of the court order and lead to a refusal by the court to allow that expert's evidence to be admitted (***Robin Ellis***).

8. What has been called "without prejudice protection" [1] is based on two inter-related principles: open discussion and implied agreement. The public policy which encourages parties to speak frankly in attempting to settle their disputes has been reiterated on a number of occasions.

(a) In ***Rush & Tompkins*** Lord Griffiths said

> "The without prejudice rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate to a finish …. I would therefore hold that as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible, whether or not settlement was reached with that party."

(b) In ***Unilever v. Proctor & Gamble*** [2000] 1 WLR 2436 Robert Walker LJ said:

> "In those circumstances I consider that this court should in determining this appeal give effect to the principles stated in the modern cases, especially ***Cutts & Head*** [1984] 1 Ch 290**,** ***Rush & Tomkins*** and ***Muller v Linsley*** (30.11.94) 139 SJ LB 43. Whatever difficulties there are in a complete reconciliation of those cases they make clear that the 'without prejudice' rule is founded partly in public policy and partly in agreement with the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of the without prejudice communications except for a special reason would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.

[1] Lewison J in ***Hall v. Pertemps*** [2005] EWHC 3110 Ch, para. 9

9. The rule that documents generated by or for a mediation will be treated as being covered by without prejudice protection is no more than an extension of this public policy: see ***Halsey v. Milton Keynes*** [2004] 1 WLR 3002. In ***Smith's Group PLC v. Weiss*** (23.3.2002 unreported, Mr. R.C. Kaye QC sitting as a Judge of the Chancery Division), notes of interviews with witnesses conducted for the purposes of a mediation were inadvertently disclosed in a list of documents in the subsequent litigation. Privilege was claimed for them. The judge said that the relevant test was whether it was fair and just to allow a party to rely on mediation material. Because of both the terms of the mediation agreement in that case and the wider public policy, he concluded that the court should be slow to hold that the 'without prejudice' status of the mediation material had been lost except in what he described as "clear and unequivocal circumstances".

10. None of the cases helpfully cited to me by counsel dealt with the particular situation here, in which a statement signed by both experts, which would ordinarily be a document that was not protected by privilege once it had been agreed, was produced initially for use in mediation. It is therefore necessary for me to set out the facts surrounding the court order in some detail and then seek to apply the principles outlined above to those facts.

The Relevant Facts

11. At the first CMC on 28th January 2005, His Honour Judge Thornton QC ordered the provision by the claimants of a Scott Schedule and responses to that Schedule by the Defendant. Once those documents had been provided he directed that there should be a stay for mediation from 16th May 2005 to 15th July 2005. On 19th July 2005, at a further CMC, by paragraphs 1-5 of his subsequent order, he required both parties to produce further pleadings, particulars and responses.

12. Also on 19th July 2005 there was a discussion about the benefits to be gained from the parties' respective experts meeting to discuss the detail of the claim and the responses. Unusually, I have, in the form of a written ruling dated 3rd April 2006, Judge Thornton's recollection of that discussion.

> "7. … At the hearing both parties expressed a continuing desire to mediate.
>
> 8. I raised with the parties at the hearing the lack of any exchange of expert views between them in written form or by way of reports or at without prejudice meetings. I enquired of both parties whether they considered that mediation would have any reasonable prospect of success without this process of the exchange of information and the views of the respective principal experts first having taken place. Both parties agreed that a detailed without prejudice meeting or series of meetings should take place between the principal experts prior to any attempted mediation."

13. There is a dispute about whether, as part of this discussion, there was any reference to the experts producing a statement of what was agreed and not agreed. It seems clear that, if there was any discussion about such a statement, it was not extensive or detailed.

It was, however, a matter raised by Mr. Ticciati, counsel for the Defendants, after the hearing, when he was seeking to agree the terms of the order with his opposite number, Mr. Bacon. In an e-mail sent that same day, Mr. Ticciati provided a proposed draft order which included the provision of a statement signed by the experts.

14. On 26th July Mr. Bacon on behalf of the Claimants objected to the provision of a statement. In his responsive e-mail he said:

> "Paragraph 6 is okay save that we do not agree that it is appropriate to have an order that there is a joint statement of issues agreed, etc. That was not discussed. We do not have an issue with it in principle, but it could add significant costs. What was ordered was a meeting on site to discuss the Scott Schedule with a proposal that the experts report to their instructing solicitors. We are happy to talk nearer the time about whether they can usefully do more and even in terms of some sort of joint statement but not an Order at this stage."

15. Mr. Ticciati's reply was dated 27th July. He said:

> "I am happy with all your proposed amendments to the draft with the exception of the question whether the experts should produce a joint statement (CPR 25.12(3)). My understanding at the hearing and Andrew Hennesey's [his solicitor] was that the judge intended there to be such a statement but we have neither of us got a note that puts the matter beyond doubt.
>
> We think that a joint statement would be desirable for the following reasons:
>
> (a) Without one there will potentially be grave problems at any settlement discussions if we are not certain what the respective positions of the experts are after their meeting.
>
> (b) Since a joint statement is likely to be required in any event we think that it would be desirable that it be drawn up while the experts' discussions are still fresh in their memories.
>
> (c) A joint statement will be essential before the experts come to write their reports. Obviously we do not want them to waste time on matters which are not in issue between them, but unless there is a statement they will not be able to refer to their discussions."

He attached a second draft of his proposed order which retained the requirement for a statement in these terms:

> "By 23.9.05 the parties' architectural experts (Peter Blockley for the Claimants and Frank Cleveland for the Defendants) do meet without prejudice and prepare a statement of the issues upon which they are agreed and those upon which they are not agreed with a brief statement of the reasons for the disagreement."

16. Mr. Ticciati sensibly proposed that Judge Thornton rule on this dispute on paper. Mr. Bacon's instructing solicitor, Mr. Davidson, agreed with this. In his covering note to the judge's clerk Mr. Ticciati described the dispute in this way:

> "On 19.7.05 Mr. Bacon (Counsel for the Claimants) and I (Counsel for the Defendant) appeared before Judge Thornton QC on a restored CMC in the above case. We have almost reached agreement on the order that we would like the learned judge to make, but there is one matter that separates us, namely whether the experts should prepare a joint statement after they have met pursuant to CPR 35.12.3. The Claimants would prefer that they don't and the Defendants would prefer that they do."

17. The judge's clerk notified the parties on 18th August 2005 that Judge Thornton had ruled that "paragraph 6 as drafted should stand." Accordingly, the proposal drafted by Mr. Ticciati (paragraph 15 above) was included without amendment in the final version of the order (paragraph 2 above). Paragraph 7 of the order allowed a stay for mediation from 1st October 2005 till 31st November 2005, and other parts of the order dealt with the restoration of the CMC if the mediation was unsuccessful.

18. It is right to record that, in his written ruling of 3rd April 2006, Judge Thornton had this to say about the order that he had made:

> "27. I would finally observe that the Defendant relied in part for its contentions on the suggested fact that the order requiring the two experts to make a joint statement was made under the provisions of CPR 35.12(3) which provides that the court may direct that following a discussion the experts must prepare a statement for the court. This showed, it was contended, that the joint statement had a dual purpose and was not privileged in the context of the court seeing the contents of the statement during the subsequent stages of the litigation.
>
> 28. However, the wording of the relevant direction set out above does not refer to CPR 35.12(3) but merely to the preparation of 'a statement' (not 'a joint statement'). The Defendant had sought wording which required a joint statement to be prepared under the provisions of CPR 35.12 but those additional provisions were omitted from the direction. This consideration is not of course conclusive either way since the relevant consideration is what was agreed by the two experts and what was their authority as to the status of the document they had signed and as to whether that document could have a double purpose which could result in the privilege being lifted if the other purpose was its use in the mediation."

19. I am bound to say that I do not fully understand the point being made in these two paragraphs. In so far as it suggests that the judge had made an order that was in different terms to that sought by the Defendants, I think it is wrong. The judge made the order in precisely the terms sought by the Defendants. Moreover, I find that the terms proposed by the Defendants and ordered by the judge were in a conventional form for an order made pursuant to CPR 35.12(3). Notwithstanding that, it is clear from these paragraphs that, to put it at its lowest, the judge considered that the order in respect of the statement

was not a conventional order, and was plainly being made very much with the mediation in mind.

20. The Claimant's solicitor, Mr. Davidson, has given evidence that he believed that the statement that was to be provided would be 'without prejudice' and for the purposes of the mediation only. That this was his belief at the time is, I think, supported by his letter to the Defendant's solicitors of 18th August, which said:

> "At the CMC on 19th July 2005 the parties' respective experts were tasked with producing a joint statement in advance of mediation. Mr. Cleveland returned to work on 15th August and only managed to pick up Mr. Blockley's e-mails after speaking with Mr. Blockley yesterday. As we mentioned immediately after the CMC on 19th July 2005 Mr. Blockley is unavailable from 3rd September to 6th October 2005.
>
> The experts are unable to meet until 25th August 2005 and are concerned as to whether a joint statement can now be finalised in a form suitable for mediation in advance of Mr. Blockley's departure."

21. Furthermore, Mr. Davidson's instructions to the Claimant's expert, Mr. Blockley, were also consistent with his belief that the statement was for the purposes of the mediation. Mr. Cleveland, the original expert relied on by the Defendants, was in difficulties due to pressure of work and of time constraints, and he informed Mr. Blockley on 17th August that his colleague, Mr. Frank Newbery, would probably be taking over from him. That letter went on to say:

> "In view of the number and complexity of the issues I am not optimistic that we will be able to explore the issues and produce an agreed joint statement in that time frame in a form which would be helpful to the parties or the court, although we will obviously do our best."

22. Mr. Blockley told Mr. Davidson the same day that he agreed. He said:

> "The joint statement … will almost certainly not be in a fit state for filing with the court."

Mr. Davidson responded immediately to point out that:

> "The proposal is not for a joint report to submit to the court but one which can be used in mediation. In those circumstances the report would not need to be in a form appropriate for the court at this stage, merely a working document to assist with mediation."

Mr. Blockley replied again to confirm to Mr. Davidson that he "was aware that the joint statement was for the purposes of mediation."

23. It appears that the statement itself, still marked "without prejudice" was agreed by the respective experts on 1st September. Mr. Newbery was advised by Mr. Cleveland "that it was normal for a final version of the statement to have this status removed because it had by then become the considered and agreed statement of both experts." There is no dispute that Mr. Blockley signed the statement along with Mr. Newbery and agreed to the removal of the without prejudice status. These events were described by Mr. Newbery in his statement and not contested by Mr. Blockley in the following terms:

> "12. … Mr. Blockley agreed to this during a telephone conversation. Later on 1st September 2005 I sent a copy of the signature page with 'without prejudice' duly removed. My covering fax sheet together with a covering letter with the posted copy of the joint statement clearly noted to Mr. Blockley the agreed removal of 'without prejudice' status … Mr. Blockley signed and returned the signature page to me by e-mail …
>
> 13. At no time since mutually agreeing our amendments did I understand that Mr. Blockley regarded the agreement as merely provisional or merely for the purposes of mediation … "

It is of course that last point which is at the heart of the dispute now between the parties.

24. It is clear to me from the evidence that Mr. Newbery, like Mr. Cleveland before him, was operating on the basis that, although the imminent and initial use of the statement would be for the mediation between the parties, the statement might also be used for the purposes of CPR 35.12. That is why he talked about filing it with the court. On that point, on 2nd September 2005, it seems that Mr. Blockley was also in agreement that the document was to be filed with the court. His letter to Mr Davidson of that date refers to it being ready for filing with the court.

25. There was a mediation in December 2005. At the mediation itself the parties signed a mediation agreement. It was in conventional form. The relevant parts of the agreement were as follows:

> "3. The parties agree that every person involved in the mediation will keep confidential:
>
> (a) the fact that the mediation is to take place or has taken place other than to inform a court dealing with any litigation relating to the dispute of that fact, and
>
> (b) all information, whether oral or written or otherwise, produced for or at the mediation including the terms of any settlement agreement arising from it;
>
> provided that nothing in this clause prevents the parties including the mediator discussing the mediation with the parties' professional advisers and/or insurers or any party to the mediator making disclosure to any relevant authority or person …

> 4. The parties agree that:
>
> (a) all offers, promises, conduct and statements made in the course of the mediation proceedings are inadmissible in evidence in any litigation or arbitration …
>
> Note: Evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable simply as a result of its use in the mediation."

26. The mediation was unsuccessful. As noted above, when the proceedings re-commenced after the stay the Claimants sought to make amendments to their claim. These amendments were, so it is said, contrary to the matters which had been agreed in the statement signed on 1st September 2005. That led inevitably to the disagreement which I now have to resolve.

Is the Statement Privileged?

27. I am of the view that, in the ordinary case, a statement of the kind that, in this case, was signed on 1st September would not be privileged. Such a statement is ordinarily required by order of the court and for the assistance of the court in the exercise of its case management and trial management functions. The mere fact that it is used in a subsequent mediation would not make it privileged or inadmissible in the ongoing court proceedings, a point expressly set out in the "Note" that forms part of the mediation agreement in this case (paragraph 25 above). If parties to court proceedings wish to ensure that documents that would ordinarily not have 'without prejudice protection' should be given such protection then they need to spell that out clearly to each other and to the court.

28. However, I am bound to find that, on the particular facts of this case, this was not a usual situation. I find on the facts that:

> (a) The orders in respect of the experts' meetings and the statement only came about as a result of the imminent mediation. To put it another way, without the mediation, the order of 18th August 2005 in respect of the experts' meetings and the statement would not have been made at all. At the very least, the period for the preparation of the joint statement would have been much longer than a month or so from the making of the order, particularly given that experts' reports had not yet been exchanged. The whole purpose of the short period in which the statement had to be agreed was so that it could facilitate the mediation.
>
> (b) The judge did not think that he was making a conventional order pursuant to CPR 35.12(3), although it may fairly be said that, on the wording, that is what he did do. He clearly believed that the order was made for the purposes of the mediation, to assist the parties and to give the mediation the greatest possible chance of success.

(c) The Claimant's solicitor and the Claimant's expert both believed that the purpose of the statement was for use in the mediation: see paragraphs 20-22 above.

(d) To put it at its highest, the Defendant's expert believed that the statement had a dual purpose: it was to be used initially in the forthcoming mediation and, if the mediation failed, it might possibly be used in any subsequent court proceedings.

I find therefore that, as at 1st September, the primary function of the statement was to assist in the mediation.

29. There is a wider point that I must make regarding fairness. It is clear from his evidence (paragraphs 3 and 4 of his statement) that Mr Blockley did not carry out the sort of extensive background work that he would ordinarily do before signing a joint statement pursuant to CPR 35.12(3). It is clear that, because of the limited time and the financial constraints under which he was operating before the mediation, he could only carry out a much more limited exercise than would have otherwise been the case. That of course links back to Mr. Bacon's concerns about the statement in the first place. His e-mail of 26th July 2005 (paragraph 14 above) had expressly warned of the Claimants' concerns about the cost of producing such a statement. It would, I think, be plainly unfair to the Claimants to conclude that the statement was an open document and could be referred to by all parties in the litigation in circumstances where, had he realised that that would happen, Mr. Blockley would have not signed up to the statement in the first place.

30. I do accept that there was a degree of muddle and confusion on the part of Mr. Blockley, the Claimant's expert, when he agreed to the removal of the 'without prejudice' tag and made the reference in his letter of 2nd September to filing the document with the court. But in my judgment that cannot alter the fact that his instructions and his understanding of those instructions were that the document was required for the mediation. Such instructions flowed directly from the circumstances which I have set out above in which the order was made by His Honour Judge Thornton, QC.

31. I have very much in mind the point made by the judge in ***Smith's Industries***, namely that the 'without prejudice' tag usually applicable to documents provided for mediation should only be waived in clear and unequivocal circumstances. For the reasons that I have indicated this is not a clear and unequivocal case. Whilst I agree and accept Mr. Ticciati's submission that the order on its face is clear and not qualified by reference to the mediation, it is equally clear to me, having investigated all the surrounding circumstances, that the judge and the Claimants' advisors intended that it be so qualified and that both the Claimants' solicitors and the Claimants' expert understood and acted upon it as if it was so qualified. In those circumstances I have concluded that the statement is privileged and cannot be referred to in the court proceedings unless both sides agree.

Abuse of Privilege

32. Mr. Ticciati's alternative argument was that, because of the scale of the departure from the statement in the Claimants' new pleadings, there would be "unambiguous impropriety"[2] in allowing the without prejudice label to remain on the statement, thereby depriving the Defendant of the opportunity to cross-examine Mr. Blockley on the reasons for the difference between the statement and the new claims. In the Defendants' helpful written grounds for this part of their application the complaint was that many of the new claims "are inconsistent with the joint statement and the Claimants have not sought permission to rely on another expert in lieu of Mr. Blockley." Mr. Bacon submitted that the point raised by the Defendants, even if correct (which he did not accept) did not trigger the exemption to the 'without prejudice' rule in any event.

33. The exception to the rule governing without prejudice communications has at its heart an abuse of a privileged occasion. Moreover, it is an exemption which will rarely be found to be applicable. Thus, for instance:

(a) In ***Forster v. Friedland*** [1992] CAT 1052 Hoffmann LJ (as he then was) said that the value of the without prejudice rule would be seriously impaired if its protection could be removed for anything less than unambiguous impropriety.

(b) In ***Fazil-Alizadeh v. Nikbin*** [1993] CAT 205 Simon Browne LJ said:

> "There are powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule in only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected it will all too readily become eroded."

(c) In ***Unilever*** Robert Walker LJ referred on a number of occasions in his judgment to the abuse of privilege and the need for something "oppressive, dishonest or dishonourable" in the defendant's conduct at the without prejudice meeting in order for the without prejudice protection to fall away."

34. In my judgment of particular relevance to the present case was the observation by Rix LJ in ***Savings & Investment Bank***. He said at paragraph 57:

> "It is not the mere inconsistency between an admission in a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege: see the first holding in ***Fazil-Alizadeh***. It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth even where the truth is contrary to one's case. That after all is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement, and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

[22] See the words of Rix LJ in ***Savings and Investment Bank v. Finkin*** [2004] 1 WLR 684, para. 56

35. Accordingly, it seems to me that Mr. Bacon is right to say that the Defendants' alternative argument, as to inconsistency between the statement and the new claims, even if made out in full on the facts, could not amount to an abuse of the privileged occasion and falls a long way short of the sort of circumstances in which the exception of unambiguous impropriety has been triggered in the reported cases. It seems to me that Rix LJ's observation set out in the preceding paragraph is fatal to the Defendants' argument on this point.

Conclusions

36. My conclusions therefore can be set out as follows:

(a) Ordinarily, a court order for the provision of a statement signed by both experts as to what they agree and disagree will mean that, once the statement has been agreed, the without prejudice protection will be removed and the statement can be referred to by all parties in the subsequent litigation. That is so even if the statement is used for the purposes of mediation.

(b) On the facts of the present dispute this was not an ordinary case. The judge only made the order for the assistance of the parties in the mediation and the Claimants' solicitor and the Claimants' expert acted on that basis. As a result, in this case, the prima facie position is that the document was privileged. To put the same point another way, this is not a clear and unequivocal case where privilege has been waived.

(c) In view of the limited time and financial constraints on the Claimants' expert last summer, in the weeks prior to the agreement of the joint statement, it seems to me that it would be unfair to rule that the statement was now not privileged. I conclude on the evidence that, if the Claimants' expert had known that the joint statement was to be used in the litigation if the mediation was unsuccessful, then he would not have signed it.

(d) The Defendants' alternative argument fails. The mere fact of inconsistency between the statement and the new pleadings, no matter how wide, cannot in my judgment amount to an abuse of the privileged occasion or unambiguous impropriety. Even if that is wrong, then, on the material that I have been provided with, it seems to me to be clear that an unambiguous impropriety has simply not been made out on the facts.

37. For those reasons therefore the Defendants' application fails.

(Following submissions)

38. The Claimants have been successful on both limbs of the Defendant's application and so, prima facie, the Claimants are entitled to their costs. As to the second issue, Mr. Ticciati properly accepts that that is an area of the dispute which the Defendants lost and that effectively therefore the Defendants can have no argument but that they should pay the Claimants' costs. As to the first issue, I accept that, in general terms, the Claimants have been successful and are entitled certainly to the bulk of their costs. As I put it to Mr. Bacon, my residual concern is that the point that I have had to decide could and perhaps should have been made clearer at the time. I am very loathe to bring to bear some sort of 20/20 hindsight, but I do think on balance that the Claimants' position could have been explained rather more clearly in the correspondence, so that the limitations of the statement were entirely clear to both sides at the time that it was being worked on. I therefore think that the fairest way to deal with that is for me to decide that the Claimants are entitled to their costs, but that their entitlement should be the subject of what is a relatively modest percentage deduction to reflect that residual concern. The percentage that I have got in mind is 20%.

39. Therefore, as a matter of principle, I conclude in the exercise of my discretion that the Claimants are entitled to 80% of their costs. What are those costs? The Claimants are claiming, in the round, £12,000 by way of their costs. Allowing for the reduction for 20%, one gets to a figure of just below £10,000.

40. Points were made by Mr. Ticciati on the nature of the bill. It seems to me that no point can arise on the hours worked. In my judgment, those are reasonable hours for the work that had to be done. A point was taken about the hourly rates, and in particular the fact that the hourly rates paid to the Claimants' solicitors appear to be double those paid to the Defendants' solicitors. I do accept Mr. Bacon's defence of that, namely that the rates that are charged are themselves reasonable and not uncommon for firms conducting this sort of litigation, and the fact that the Defendants' solicitors' rates are modest should not detract from the fact that the Claimants' solicitors' rates are still reasonable. I do, however, think that the partner who was earning £320 an hour should have been used rather more sparingly in the work done on the documents, and that therefore a small saving could and should have been made.

41. But that only leads to a small reduction. In the round, I summarily assess the costs in the sum of £9,500. That is the amount that the Defendants will pay to the Claimants in relation to the costs of the hearing of 13th September, which we have concluded this morning. I make it clear, as I made plain to counsel, that the costs of the aborted hearing on 19th July, which was not in front of me, are more properly dealt with by Judge Thornton, so I reserve those costs to him.

(Following submissions)

42. As to the application for permission to appeal, I decline it. Certainly there is no 'other compelling reason', because I accept Mr. Bacon's point that this dispute was not ultimately decided on the basis of a point of principle. It was decided on the facts. Is there any realistic prospect of success on the facts? I conclude, having set out the facts in what was probably laborious detail in my Judgment, that anybody coming to those facts

and considering them in detail would be bound to arrive at the same conclusion that I did. Therefore in those circumstances I do not think there is a realistic prospect of success on any appeal. I must therefore decline the application for permission to appeal.

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