

Neutral Citation Number: [2009] EWHC 1102 (TCC)

Case No: HT-07-118

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/05/2009

**Before :**

**THE HON.MR.JUSTICE RAMSEY**

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**Between :**

**Farm Assist Limited**

**(in liquidation)**

**- and -**

**The Secretary of State for the**

**Environment, Food and Rural Affairs (No.2)**

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**Robert-Jan Temmink and Saul Margo** (instructed by **Yates Barnes**) for the **Claimant**.

**Jonathan Acton Davis QC. and Rebecca Stubbs** (instructed by **Nabarro LLP**) for the **Defendant**.

**Ms Jane Andrewartha**, the Applicant in person.

Hearing date: 6<sup>th</sup> May 2009

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Judgment

**The Hon. Mr. Justice Ramsey :**

1.

This is an application by a mediator to set aside a witness summons under [CPR rule 34.3\(4\)](#). That summons seeks her attendance to give evidence in the unusual circumstances of this case.

2.

In these proceedings the Claimant, FAL, is seeking to set aside a settlement agreement entered into with the Defendant, DEFRA, on the grounds that the settlement was entered into under economic duress. The settlement agreement was entered into as a result of a mediation which took place on 25 June 2003 and in which the Mediator was Ms Jane Andrewartha, an experienced mediator and a partner in Clyde & Co. LLP.

3.

The question of the approach of the parties to evidence of what happened in the mediation, including evidence from the Mediator, was raised at case management conferences in July and October 2008. On 17 October 2008 directions were given leading up to a hearing in November 2008 of certain issues of privilege in relation to disclosure. In preparation for that hearing the parties exchanged written submissions. DEFRA stated at paragraph 47 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 DEFRA and FAL and their advisers.

4.

In submissions in response, FAL stated that it had never had any objection to calling the Mediator to give evidence in principle and 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. FAL stated that one approach, which found favour with DEFRA, was for the parties to write to the Mediator in an attempt to discover whether she had retained any notes or documents from the mediation and whether she had any factual recollection of the mediation.

5.

On 20 November 2008 when I heard submissions on privilege, the position taken by the parties led to directions which were substantially agreed as follows:

5. Subject to any further order of the Court, the parties are to write jointly to the Mediator, Ms Jane Andrewartha, by 5 December 2008 in an attempt to discover whether she has retained any notes or documents from the mediation which took place between the parties on 23 June 2008; and whether she has any factual (or other) recollection of the mediation and inviting her to disclose to the parties forthwith such notes or documentation she may have retained:

6. There be no limit on the liberty of the parties to take witness statements from the Mediator;

7. The parties are at liberty at trial to ask the Mediator questions about the entirety of what occurred at the mediation including matters which but for this Order may have otherwise been the subject of privilege and/or confidentiality;

8. The question of whether the Mediator be called as a witness by either party or by the Court be reserved.

6.

Conscious that these matters had been agreed by the parties but that the Mediator had not had an opportunity to make her views known, a direction was added at paragraph 9: "The Mediator do have liberty to apply."

7.

On 12 December 2008, on the handing down of my judgment on privilege following the hearing in November 2008, I made the further order at paragraph 5:

"For the avoidance of doubt, the parties are to liaise over any issue concerning the Mediator in accordance with paragraphs 5-9 of the Order, dated 20 November, but the Mediator is to have liberty to apply to the Court concerning any question she may have arising from her communications with the parties".

8.

On 9 December 2008 DEFRA's solicitors wrote a letter to the Mediator, jointly with FAL's solicitors, enclosing what was then the draft order from the hearing in November 2008. The Mediator responded on 10 December 2008 that her fees for the mediation had not been fully paid and saying that subject to payment she was obtaining the file from the archives. Payment was made and the Mediator wrote on 28 January 2009 to say:

"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 whilst 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.

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."

9.

In response DEFRA's solicitors said that nevertheless they would wish to meet the Mediator and take a witness statement. FAL's solicitors made it clear that in the light of the response from the Mediator they considered any further approach to her to be a waste of costs.

10.

The Mediator then wrote on 10 and 23 February 2009. She referred to the terms of the Mediation Agreement entered into between her and the parties dated 24 June 2003 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.

11.

On 2 March 2009 DEFRA then issued an application for directions concerning the manner in which the Mediator should give evidence. The application was heard on 20 March 2009. DEFRA indicated that they were minded to serve a witness summons on the Mediator and FAL submitted that it was for DEFRA to determine what course to take but that FAL did not intend to be involved in what it considered to be a waste of time.

12.

By the end of the hearing on 20 March 2009 the position reached was that DEFRA were going to consider whether to serve a witness summons and that an order was made that any such summons was to be issued out of the TCC and any applications arising out of the summons were to be reserved to me.

13.

Subsequently DEFRA served a witness summons on the Mediator on 31 March 2009 seeking her attendance at the trial of the action which is due to commence on 22 June 2009. On 30 April 2009 the Mediator applied to have the witness summons set aside or varied under [CPR 34.3](#) on the basis that:

(1)

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.

(2)

In any event the evidence was confidential and/or legally privileged and/or irrelevant.

14.

I now turn to deal with the Mediator's application.

**The provisions of the Mediation Agreement**

15.

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 in this case contained seven clauses and appended, as a schedule, a Mediation Procedure.

16.

Clause 6 of the Mediation Agreement which deals with confidentiality provides:

"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."

17.

Paragraph 1 of the Mediation Procedure provides: "All communications relating to, and at, the Mediation will be without prejudice."

18.

Paragraph 7 provides 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."

19.

Paragraphs 11 to 13 provide, 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."

20.

It can be seen that the Mediation Agreement uses the concepts of confidentiality, privilege and “without prejudice” communications to describe the status of communications made or information provided in relation to the mediation. It is necessary to consider these concepts and how far they give the Mediator and the parties rights or impose obligations which are relevant to the question of whether the mediator should be called as a witness.

### **Confidentiality in mediations**

21.

The fact that parties agree that something is to be confidential does not, in itself, prevent a party from giving evidence of such matters in court or the court from ordering evidence of such matters to be disclosed. The general position on confidentiality is as set out in Confidentiality by Toulson and Phipps (2nd Edition 2006) in which they state at paragraph 17-001 that “Generally speaking, confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see... British Steel Corporation v Granada Television Ltd [1981] AC 1096.” One of the exceptions to that principle which the authors refer to is “without prejudice” communications and communications to mediators and conciliators. At paragraph 17-016 they say:

“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.”

22.

In this case, as I have said, there are express provisions as to confidentiality and privilege, as well as reference to matters being “without prejudice”. As the authors state above, communications or information provided in mediations would generally be within that “without prejudice” exception and in such circumstances evidence could not generally be given of those communications or documents disclosed after the mediation. However, as set out below, the general rule is that without prejudice privilege is the privilege of the parties to the dispute which can be waived by those parties. It is not a privilege of the Mediator. As the parties in this case have clearly waived without prejudice privilege, the without prejudice exception to confidentiality no longer applies but this raises the question as to whether there is any other aspect of confidentiality which applies to a mediation.

23.

In my judgment, there is a further obligation of confidentiality which arises expressly in this case by the agreement of confidentiality made not just between the parties but also between the parties and the Mediator. As the authors of Toulson and Phipps on Confidentiality say at 15-013 to 15-016, whilst there are many important differences between the role of an arbitrator and that of a mediator, the closest parallel of a dispute resolution technique where parties engage a third party to assist in resolving disputes is arbitration where the courts have, in English law at least, imposed an implied duty of confidentiality not just between the parties but also between the parties and the arbitrator: see Mustill & Boyd Commercial Arbitration (2nd Edition, 2001 Companion) at 112.

24.

The authors of Toulson and Phipps on Confidentiality say at paragraph 15-016 in relation to mediation:

“The same logic, whether in support of an implied contractual term or an equitable obligation, must apply as much, if not more strongly, in the case of mediation. For it would destroy the basis of mediation if, in the case of the mediation failing, either party could publicise matters which had passed between themselves or between either of them and the mediator for the purposes of mediation. An obligation of confidence would also be owed to both parties by the mediator.”

25.

The question is whether that confidentiality is absolute or whether the court has power to permit the evidence to be used or order it to be disclosed. In Toulson and Phipps on Confidentiality reference is made to 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, together with the existence of exceptions to that status.

26.

In dealing with the issues which arose in that case Sir Thomas Bingham MR referred at 240 to the practice which had developed in family conciliations and said this:

The practice of conciliation has grown and evolved in various ways over the last 10 years, in court and out of court, voluntary or directed, and extends over many parts of the country. Resolution of disputes over children by parents locked in acrimony and controversy has gradually but perceptibly taken over from efforts to preserve the state of the marriage of the parents. Conciliation of parental or matrimonial disputes does not form part of the legal process but as a matter of practice is becoming an important and valuable tool in the procedures of many family courts. This underlines the great importance of the preservation of a cloak over all attempts at settlement of disputes over children. Non-disclosure of the contents of conciliation meetings or correspondence is a thread discernible throughout all in-court and out-of-court conciliation arrangements and proposals.

### **Conclusion**

These practices and expressions of opinion cannot of course be regarded as authoritative statements of the law. But in this field as in others it is undesirable that the law should drift very far away from the best professional practice. The practice described above follows the law in recognising the general inviolability of the privilege protecting statements made in the course of conciliation. But it also recognises the special regard which the law has for the interests of children. In our judgment, 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.

We wish in closing to emphasise three points. (1) Even in the rare case which falls within the narrow exception we have defined, the trial judge will still have to exercise a discretion whether or not to admit the evidence. He will admit it only if, in his judgment, the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation. (2) This judgment is concerned only with privilege properly so called, that is, with a party's right to prevent statements or documents being adduced in evidence in court. It 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: cf. W. v. Egdeell [1990] Ch. 359 . (3) We have 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.

27.

In my judgment, whilst clearly dealing with a different position, 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.

28.

I consider that the position is similar in arbitration. As the authors of Mustill & Boyd on Commercial Arbitration (2nd Edition, 2001 Companion) state at 113, the courts have held that the existence of implied confidentiality in arbitration does not preclude the use of certain documents outside the arbitration in limited circumstances. Although the scope of the exceptions to the implied confidentiality is not fully defined, in my judgment the exceptions identified in Mustill & Boyd at 113 all relate to cases where there is either consent or where the use of the documents is necessary in the interests of justice.

29.

I consider that, in the context of mediation and in the absence of an express provision, a similar implied confidentiality would arise but that evidence may be given of those matters if the court considers that it is in the interests of justice to do so. In this case DEFRA and FAL have agreed with the Mediator to treat the mediation as confidential. That, in my judgment, is an obligation which is binding as between the parties and the Mediator but that the court can permit the use of or order disclosure of the otherwise confidential material if it is in the interests of justice to do so. Whilst it is possible for the confidentiality to be waived, that has to be with the consent of all parties. This means that, in my judgment, FAL and DEFRA cannot waive confidentiality in the mediation so as to deprive the Mediator of her right to have the confidentiality of the mediation preserved.

### **Privilege in mediations**

30.

Paragraph 12 of the Mediation Procedure also refers to documents and other information produced for, or arising in relation to, the Mediation being “privileged”. The effect of that privilege is also dealt with. The paragraph provides that the documents and information will “not be admissible as evidence or discoverable in any litigation or arbitration connected with the Dispute except any documents or information which would in any event have been admissible or discoverable in any such litigation or arbitration.”

31.

So far as the concept of privilege is concerned, there could be a number of grounds on which privilege might be asserted within the scope of existing, well established privileges. For instance a party might show the Mediator a letter of advice from solicitors or counsel’s opinion, which would be the subject of legal advice privilege. In doing so, in the confidential circumstances of the Mediation, that privilege would not be lost. The same would apply to documents covered by litigation privilege. As referred to above, so far as communications between the parties are concerned, then without prejudice privilege would apply.

32.

The question also arises as to whether there is any other privilege which applies to the Mediation, as opposed to the confidentiality which I have dealt with above.

33.

In Brown & Marriott ADR Principles and Practice (2nd Edition 1999) at paragraph 22-079 to 22-097 the authors discuss the possible existence of and desirability for a distinct privilege attaching to the mediation process.

34.

They say in relation to mediation privilege at paragraph 22-079:

“It remains to be resolved definitively by the English Courts (if not by the legislature) whether there is a privilege attaching to the whole mediation process, including all communications passing within that process, whether the mediation relates to family matters, civil or commercial disputes or any other kind of issue.”

35.

In relation to a mediator’s privilege they say at paragraph 22-088

“As the law presently stands, any privilege that might exist attaches to the parties and not the mediator. Consequently, the parties may agree to waive that privilege and allow the mediator to provide the Court with any information that arose in the mediation process. There is an issue, however, as to whether privilege should be attached to the mediator as well as the parties involved in the process.”

36.

In Re D (Minors) Sir Thomas Bingham MR reviewed the law at 238 and said:

“A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party (whether official or unofficial, professional or lay) receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties’ agreement: see McTaggart v. McTaggart [1949] P. 94 ; Mole v. Mole [1951] P. 21 ; Pool v. Pool [1951] P. 470 ; Henley v. Henley [1955] P. 202 ; Theodoropoulos v. Theodoropoulos [1964] P. 311 ; Pais v. Pais [1971] P. 119 ; D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171 , 191E, 226F, 236G.

It is not, in our view, fruitful to debate the relationship of this privilege with the more familiar head of “without prejudice” privilege. That its underlying rationale is similar, and that it developed by way of analogy with “without prejudice” privilege, seem clear. But both Lord Hailsham of St. Marylebone and Lord Simon of Glaisdale in D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171 , 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage. We respectfully agree, and we can see no reason why rules which have developed in relation to “without prejudice” privilege should necessarily apply to the other. Thus we do not question the familiar rule that a party cannot prevent admission of a communication into evidence by marking it “without prejudice” if it does not in truth contain any offer of or approach towards negotiation. But we do not accept that evidence can be given of statements made by one party at a meeting admittedly held for purposes of conciliation because, in the judgment of the other party or the conciliator, that party has shown no genuine willingness to compromise. Wherever an attempt to conciliate has failed, both parties are likely to attribute the failure to the intransigence of the other. To admit such an exception would reduce the privilege to a misleading shadow. Again, even



if *Kitcat v. Sharp*, 48 L.T. 64 is authority for the proposition that a "without prejudice" marking does not protect evidence of a threat as to what will happen if an offer is not accepted, it does not in our view follow that evidence can be given of threats, even credible threats, made by parties in the course of attempted conciliation. Where deep human emotions are engaged, as they often are in disputes concerning children, such threats are commonplace. To override the privilege in such an event would be to emasculate the privilege and so undermine the whole process of conciliation. To permit evidence to be given of a party's statements of fact inconsistent with his or her open position would, in our judgment, have the same result: unless parties can speak freely and uninhibitedly, without worries about weakening their position in contested litigation if that becomes necessary, the conciliation will be doomed to fail."

37.

That and the decision of the House of Lords in *D. v. National Society for the Prevention of Cruelty to Children* lend some support for the existence of a privilege. In *Brown v. Rice* [2007] EWHC 625 (Ch) Stuart Isaacs QC, sitting as a Deputy High Court Judge, had to consider whether following an offer made in a mediation the dispute had been settled. At paragraph 20 of the judgment he said:

"The possible existence and desirability of a distinct privilege attaching to the entire mediation process is also usefully discussed in *Brown & Marriott ADR Principles and Practice* (2<sup>nd</sup> edition, 1999) at paras 22-079 to 22-097. Counsel for both ADR Group and Mrs Patel accepted, however, that this case could be decided under the existing without prejudice rule. In particular, this was because it was common ground between the parties that the court could not properly require Mr Walker to give evidence and, consistently with clause 7.4 of the agreement to mediate, neither party was intending to issue a witness summons against him. I agree that this case can be decided under the existing without prejudice rule. It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises for decision now."

38.

In *Aird v Prime Meridian* [2006] EWCA Civ 1866, there was an issue as to the status of an experts' joint statement ordered by the court and used in mediation. At paragraph 5 of his judgment, with which Smith LJ agreed, May LJ said:

"The court will always encourage mediation in an appropriate case. It is well-known and uncontroversial in this case that mediation takes the form of assisted "without prejudice" negotiation and that, with some exceptions not relevant to this appeal, what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful. In the present case the parties reinforced this by including a provision in their mediation agreement that they would "keep confidential all information, whether oral or written or otherwise produced for or at the mediation". This cannot of course be taken absolutely literally, since it obviously would not apply to documents obviously produced for other purposes which were needed for and produced at the mediation; for example, their building contract or the antecedent pleadings in the proceedings. There was also a note in the agreement to the effect that evidence otherwise admissible would not become inadmissible simply because it was used in mediation. But the general intent of the provision is clear and it accords with the generally understood "without prejudice" nature of mediation."

39.

In addition, in Cumbria Waste Management v. Baines Wilson [2008] EWHC 786, Her Honour Judge Kirkham had to consider whether documents relating to a mediation could be disclosed by one of those parties in later proceedings against solicitors for negligence in drafting and negotiation and agreement with the other party, which gave rise to the disputes dealt with in the mediation. The other party in that case was, as here, DEFRA. Judge Kirkham considered both questions of privilege and confidentiality.

40.

In relation to privilege she referred to the decision of the Court of Appeal in Muller v. Lindsay & Mortimer [1994] 1 PNLR 74 and said at [24] to [27]:

“24. I am not persuaded that disclosure of documents within the mediations falls within the exception to the without prejudice rule enunciated in Muller. The circumstances in Muller are different from those which obtain here. In that case, it was the plaintiffs who sought to deny disclosure of without prejudice material. Here, the question is whether a third party's without prejudice material should be disclosed. The Court of Appeal in Muller gave no consideration to the position of a third party. In this case the privilege belongs not only to the claimants but also to DEFRA. There are public policy reasons why DEFRA should be entitled to assert that privilege: DEFRA are entitled to protect from disclosure material which may embarrass them in other disputes. Further, in this case there was express (not just implied) agreement between the claimants and DEFRA that the without prejudice rule apply.

25. The rationale of Hoffmann LJ in Muller was that the issue was unconnected with the truth or falsity of anything stated in the negotiation and as therefore falling outside the principle of public policy protecting without prejudice communications. It would appear that that will not apply in this case, because, here, the truth or falsity of what was argued in the mediation will or may (subject to relevance) be an issue in the litigation.

26. The long line of authorities, and the CPR, encourage parties to attempt to settle disputes through without prejudice communications and mediation. There is clear public policy to encourage mediation in place of litigation. The court should be slow to find exceptions to the without prejudice rule.

27. In my judgment, the defendant cannot bring itself within the Muller exception to the without prejudice rule. For that reason alone, the defendant's application must fail. I nevertheless deal with the question of confidentiality.”

41.

In relation to confidentiality she referred to passages from Confidentiality by Toulson and Phipps (2nd Edition, 2006) and, in particular, paragraph 17-016 referred to above. Judge Kirkham then continued at [29] to [31]:

“29. There is an overlap between DEFRA's objection to disclosure based on the ground of confidentiality and its resistance based on the protection it seeks pursuant to the 'without prejudice' rule, as many of the applicable principles are common to both. Had I not concluded that the defendant's application failed for the reasons given above -that is, as not falling within one of the exceptions to the without prejudice rule - I should have concluded that DEFRA would be entitled to rely on an exception to the general rule that confidentiality is not a bar to disclosure. DEFRA was a party to the confidentiality agreement and wishes its provisions to be honoured. In any event, I am persuaded that, for the reasons identified in 17-016 above, documents within a mediation should be protected from disclosure.

30. In my judgment, 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.

31. I note that the disclosure sought by the defendant is of such wide scope that it would include documents held by the mediator. 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.”

42.

The passages from those judgments emphasise the overlap between concepts of confidentiality and privilege, in particular without prejudice privilege which applies to mediation. In my judgment, they provide strong support for the proposition that the general confidentiality or privilege in mediations derives from the without prejudice nature of the mediation proceedings, and applies that concept by analogy.

43.

There is a tendency for the use of the words “confidential”, “privileged” and “without prejudice” to be used in conjunction so as to emphasise the important general rule that what takes place in a mediation is not to be disclosed to third parties outside the mediation. As stated above, the Mediator in this case has an express enforceable right to keep matters confidential under the terms of the Mediation Agreement. In my judgment the court would, in any event, impose an implied duty of confidentiality which would be enforceable by the Mediator. On analysis, the privilege referred to by the authors of *ADR Principles and Practice* or in *Re D (Minors)* may be no more than that duty of confidentiality and the reference to privilege merely a question of semantics. However, in mediation where existing concepts of legal advice privilege, litigation privilege and without prejudice privilege can be applied, I consider that those principles provide sufficient guidance but there is also the need for a further “privilege” which arises other than the Mediator’s right to confidentiality in relation to the mediation proceedings.

### **Summary of confidentiality and privilege in mediations**

44.

Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principle in relation to mediation is generally as follows:

(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.

### **The effect of the Mediation Agreement on this mediation**

45.

The terms of the Mediation Agreement reflect the existence of both confidentiality and privilege, in the way in which I have set out above. In particular, the provisions as to confidentiality in clause 6 of the Mediation Agreement and paragraphs 7 and 11 of the Mediation Procedure reflect the tri-partite nature of that confidentiality and the existence of an exception where the court makes an order.

46.

Similarly privilege is dealt with at paragraphs 1 and 12 of the Mediation Procedure which reflect the principle that evidence from the mediation is generally inadmissible and non-disclosable, in litigation or arbitration.

47.

There is one particular provision at paragraph 13 of the Mediation Procedure, which bears directly on the questions of whether the Mediator can be called as a witness. It is in two parts. The first part, so far as it deals with the Mediator being a witness, provides that none of the parties to the Mediation Agreement will call the Mediator as a witness in any litigation or arbitration "in relation to the Dispute". The second part states that the Mediator will not voluntarily act as a witness without the written agreement of all the Parties.

48.

Does that provision mean that DEFRA should not be entitled to call the Mediator as a witness in these proceedings so that the court should set aside the witness summons? In my judgment, it does not. First, I consider that the parties' agreement not to call the Mediator as a witness "in relation to the Dispute" is limited to litigation or arbitration in relation to the underlying dispute as defined in the preamble. There the Dispute is defined as the dispute which "relates to work performed by [FAL] on behalf of [DEFRA] during the foot and mouth epidemic in 2001". The dispute with which I am concerned is not that dispute but the dispute whether the settlement agreement was entered into under duress. In this context, I consider that the phrase "in relation to the Dispute" has been chosen to be narrow and some limited support may be derived from contrasting it with the use of the phrase "connected with the Dispute" used in paragraph 12 of the Mediation Procedure.

49.

However, even if the wording of paragraph 13 of the Mediation Procedure did apply to this case; I do not consider that it would in itself lead to the witness summons being set aside. Rather, 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.

### **Should the witness summons be set aside?**

50.

In approaching the question of whether the witness summons against the Mediator should be set aside, there are a number of factors which I bear in mind.

51.

First, in this case the parties have waived the without prejudice privilege and the Mediator has provided the parties with the limited documentation which she still possesses in relation to the mediation. Secondly, FAL has pleaded and relies on what occurred in the mediation both in their pleadings and in the witness statements which they have served. In paragraph 54(e)(v) of the Amended Particulars of Claim FAL relies, in support of its case on breach of the Collateral Contract, illegitimate pressure and/or bad faith, on “DEFRA’s conduct at the mediation and the contents of its mediation statement, whereby: 1. It refused or failed to take a structured, reasoned, bilateral, reasonable or bona fide approach to the valuation of FAL’s account;...”. FAL also relies on the matters pleaded at paragraph 54 (f) where it states “Without prejudice to the generality of the averments made in paragraph 54(e)v above, FAL relies on the following further and/or particular examples of illegitimate pressure and/or bad faith in relation to DEFRA’s conduct of the mediation and/or the contents of its mediation statement;...”. In the witness statements served by FAL for the June hearing they rely on what the Mediator said in private sessions (see the witness statements of Adam Harris at paragraph 53 and of David Hepworth at paragraphs 141,143,144,146) or in conversations with the Mediator and others (Adam Harris at paragraph 56 and David Hepworth at paragraph 117) or what happened in the mediation (Bruce Todd at paragraphs 63 to 66).

52.

Thirdly, as I have held the Mediation Agreement contains a term which precludes the parties from calling the Mediator as a witness which does not apply to the particular dispute with which I am concerned. Fourthly, I also have to take account of the fact that the Mediator has stated that she has no recollection of the mediation and, of course, since 2003 she has been involved in very many mediations as well as dealing with other matters as a partner in a City law firm. Fifthly, as I have set out above the Mediator has an enforceable right to confidentiality under the express terms of the Mediation Agreement unless it is in the interests of justice that she should be called as a witness.

53.

In those circumstances, balancing the various considerations, I have come to the conclusion that it is in the interests of justice that she should give evidence as to what was said and done in the mediation, for the following reasons:

(1)

The issue in this case is whether the settlement agreement arising from the mediation should be set aside for economic duress. The allegations concern what was said and done in the mediation and this necessarily involves evidence of what FAL says was said and done by the Mediator. This evidence forms a central part of FAL’s case and the Mediator’s evidence is necessary for the Court properly to determine what was said and done.

(2)

Whilst the Mediator has said clearly that she has no recollection of the mediation, I accept that 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 have the opportunity to focus, in context, on events some years earlier. In addition provided that the summons is issued bona fide to obtain such evidence, I accept that, 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)

As I have held, calling the Mediator to give this evidence would not be contrary to the express terms of the mediation agreement which, in this case, limited her appearance to being a witness in proceedings concerning the underlying 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, I consider that 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.

### **Conclusion**

54.

In these circumstances I consider that, for the reasons given above, this is a case where the Mediator should give evidence in response to the witness summons and I therefore dismiss the application to set aside that witness summons.