Peeping behind the curtain

Is the content of mediation privileged? Stephen Barker considers the implications of the recent case of Farm Assist

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'The judiciary recognises the importance of maintaining confidentiality and without-prejudice privilege in mediations, but has yet to take the step of protecting mediators themselves with a distinct form of privilege.'

On 19 May, Ramsey J handed down judgment in *Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009], dismissing an application by a mediator, Jane Andrewartha, to set aside a witness summons served on her by DEFRA. The case provides a summary of privilege and confidentiality in mediations. The judgment should prompt mediators to review their terms of engagement to check whether they are vulnerable to being called to give evidence when the parties to their dispute either continue to litigate or commence fresh proceedings.

Farm Assist is not the first case where the confidentiality attaching to mediations has been considered, nor is it the first time a mediator has been called to give evidence, but the judgment puts in the spotlight the issues surrounding settlement agreements made in a confidential and without-prejudice forum. The judgment does not analyse the law on economic duress, but the mere fact that the *Farm Assist* case was brought at all should cause practitioners to review their mediation settlements and consider whether they are open to attack by dissatisfied opponents.

The dismissal of the mediator's application has limited wider application, but it raises a number of questions for the mediators and practitioners:

- Can a mediation agreement ever be drafted to prevent a mediator from being required to give evidence on the conduct of a mediation?
- Does and should mediation attract a special and distinct form of privilege for the benefit of both the parties and the mediator?
- In what circumstances can a party challenge a mediation settlement on the grounds of economic duress?
- What practical steps can a mediation representative take to minimise the risk?
- What practical steps can a mediator take to reduce the risk of mediation settlements being challenged?

Summary of the case

Farm Assist Ltd (FAL) sought to set aside a settlement agreement entered into with DEFRA relating to litigation arising from the last outbreak of foot-and-mouth disease. The settlement was reached and an agreement concluded between the parties at a mediation in June 2003.

FAL alleged that it entered into the settlement agreement under economic duress and commenced proceedings to set the settlement agreement aside.

According to the judgment, FAL's claim criticised DEFRA's conduct at the mediation and the contents of its mediation statement, which they said demonstrated illegitimate pressure – a requirement for them to succeed in economic duress.

Both parties agreed to waive privilege in the mediation and agreed that the mediator should give evidence in the proceedings. They also agreed that the mediator's evidence should not be limited to matters discussed in plenary session, but should encompass the:

> ... entire conduct of the mediation including her private conversations with DEFRA and FAL and their advisers.

When the matter was before the Court in November 2008, Ramsey J made a direction allowing the parties to take evidence from the mediator

without limit, but gave the mediator liberty to apply.

In correspondence with the parties' solicitors the mediator explained that she had not retained personal notes and that, due to the number of cases she had dealt with in the intervening period, she had 'very little factual recollection of the mediation'. When pressed to assist, she relied on the terms of the mediation agreement. The confidentiality provisions contained the following boilerplate clause:

> 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.

DEFRA's solicitors clearly considered that the mediator's evidence was crucial to the fair disposal of the proceedings and served a witness summons. The mediator applied to have the summons set aside on the basis that:

- her evidence was subject to express provisions of confidentiality and non-attendance, pursuant to the mediation agreement; and
- her evidence was confidential, legally privileged and/or irrelevant.

Ramsey J dismissed the mediator's application, concluding that:

- her evidence was necessary for the fair disposal of the case;
- poor recollection is not a reason to set aside a witness summons;
- it would not be contrary to the mediation agreement because the boilerplate clause limited her appearance to being a witness in proceedings concerning the underlying dispute and not in the subsequent economic duress proceedings;
- the relevant class of privilege was without-prejudice privilege, which vested in the parties, not the mediator;
- the parties were entitled to waive any without-prejudice privilege in the mediation and had done so; and
- the mediator has a right to enforce the confidentiality provision in the mediation agreement, but the interests of justice lie strongly in favour of evidence being given of what was said and done.

Confidentiality and privilege in mediations

Ramsey J summarised confidentiality and privilege in mediation:

(1) Confidentiality: the proceedings are confidential both between the parties and 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 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.

Mediators have a right to enforce the confidentiality provisions in mediation agreements, but the interests of justice lie strongly in favour of the evidence being given.

Analysis

Can a mediation agreement ever prevent a mediator from having to give evidence?

It is well established that the unique role of a mediator as an impartial facilitator is made all the more effective by the double layer of confidentiality that attaches to the mediation. All the parties agree to keep everything said and done in the mediation private to encourage open debate, free from the constraints placed on such debate by any risk that what is said or done will be aired in public at a later date. This includes position statements, plenary presentations and debate between the parties (sometimes angry or theatrical). That is the first layer of confidentiality. The second is yet more important: everything said to a mediator in private sessions remains private between the parties and the mediator. If the confessional is to be made public, the parties will not be open and transparent about their strengths, weaknesses and circumstances, and the process will become inefficient and unsophisticated.

It is in the interest of the mediation process for confidentiality provisions to be enforceable. It is also in the interest of the mediators themselves. Mediators can be forgiven for wanting to limit their involvement to the preparation and participation in the mediation.

Mediators should check the drafting of their mediation agreements. There may be room to tighten up their confidentiality provisions and widen, to the entire mediation process, the agreement preventing them from being called to give evidence. Nevertheless, it is not clear whether a wider clause would have given the mediator any more protection. It should be noted that Ramsey J held that the confidentiality provisions were binding on the parties and the mediator:

> Whilst it is possible for the confidentiality to be waived, that has to be with the consent of all parties... 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.

However, while the courts will uphold effective confidentiality agreements, Ramsey J confirmed 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.

The creation of a distinct mediation privilege

Ramsey J took the opportunity to draw together the recent authorities on this growing area of jurisprudence. He was not required to extend the law to create a distinct mediation privilege. The cases to which he referred indicate that the judiciary recognises the importance of maintaining confidentiality and without-prejudice privilege in mediations, but has yet to take the step of protecting mediators themselves with a distinct form of privilege.

Aird v Prime Meridian [2006] concerned the status of reports used in mediation:

> The court will always encourage mediation in an appropriate case... 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.

However, the judgment does not distinguish this privilege from the established principles of without-prejudice privilege.

In Farm Assist, *Ramsey J recognised that 'mediation privilege' is an amalgam of confidentiality and without-prejudice privilege.*

Brown v Rice [2007] concerned acceptance of an offer that was made at mediation. The case was argued on the existing principles of without-prejudice negotiation.

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.

Cumbria Waste Management v Baines Wilson [2008] was a professional negligence case relating to drafting documentation that led to the mediated dispute. HHJ Kirkham made her support for protecting the status of mediation clear:

> 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.
>
> 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 judgment, 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.

In *Farm Assist*, Ramsey J recognised that 'mediation privilege' is an amalgam of confidentiality and without-prejudice privilege. In my view, the law needs to move further forward and create mediation privilege as a distinct and separate privilege. Unlike the parties in dispute a mediator enjoys a relationship of trust with all of the participants. Anything that puts that trust at risk puts the success of the mediation process at risk.

When can a mediation settlement be challenged on the grounds of economic duress?

As the law now stands, the parties and mediator in a 'successful' mediation run the risk of satellite litigation over the enforceability of the mediation settlement agreement. As a reminder, to succeed in a claim based on economic duress the claimant must show the two key elements identified by Lord Scarman in *Universe Tankships v International Transport Workers Federation* [1983]:

- 'Pressure amounting to compulsion of the will of the victim'; and
- 'illegitimacy of the pressure exerted'.

Causation in economic duress is a high hurdle to leap. The duress has to be the 'decisive or clinching reason' for the settlement – see *Huyton v Peter Cremer Gmbh* [1999].

In without-prejudice negotiations that 'illegitimate pressure' does not have to be unlawful, but can be illegitimate if it was 'in all the circumstances unconscionable' (*Vaughan v Royscot* [1999]).

Further guidance is given in *Dimskal Shipping v International Transport Workers' Federation* [1992], which sets out relevant factors for the court. When considering without-prejudice negotiation and mediation the judgment states that:

> ... illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.

How can a mediation representative minimise the risk?

A high proportion of mediations that settle on the day settle late in the evening. After hours of argument and soul searching, parties are often more realistic of their prospects of success and are mindful of the costs saving and risk avoidance that a settlement can bring. Exhaustion erodes the fighting spirit. However, neither party is forced to settle unless they choose to do so.

Nevertheless, a party who settles and wakes the next day feeling they have done badly may seek advice as to whether the deal can be undone.

A practitioner can minimise the prospects of challenge. Clients should also be reminded that settlements can be set aside for reasons other than duress. For example, the defendant who claims they cannot afford to pay more invites a claim for fraudulent misrepresentation if they later file accounts showing that they were not telling the truth.

Here are a few pointers:

- Ensure that the other party has independent legal advice. If necessary, consider whether to introduce an impecunious opponent to a *pro bono* organisation such as LawWorks (www.lawworks.org).
- Avoid threats (in position statements and orally) that the party with deep pockets will fight the claim until the other party runs out of money.
- Avoid threats to breach a contract, such as refusing to complete business-critical work without additional payment.
- Argue your legal case and explain why you will win.
- If it looks like an illegitimate threat, don't make it.

How can a mediator reduce the risk of mediation settlements being challenged?

The best advice for a mediator is not to feel pressured into making sure a deal is done at any cost. The Mediators' Institute of Ireland's ethical rules prevent mediators from advertising their success rate. It is tempting for mediators to crow about their high percentages of settlements and for parties to be influenced by that in their choice. However, mediators would be wise put their success statistics to the back of their minds and call a halt to any mediation where they consider one party to be putting improper pressure on the other, or where a party needs independent legal advice.

If a mediator is unsure where to draw the line, *Dimskal Shipping* can be used as an ethical guide. When a mediator feels that the parties have moved beyond 'the rough and tumble of the pressures of normal commercial bargaining' and that they are straying into the territory of 'illegitimate pressure', it is time to intervene. ■

As the law now stands, the parties and mediator in a 'successful' mediation run the risk of satellite litigation over the enforceability of the mediation settlement agreement.

Aird v Prime Meridian
[2006] EWCA Civ 1866
Brown v Rice
[2007] EWHC 625 (Ch)
Cumbria Waste Management v Baines Wilson
[2008] EWHC 786
Dimskal Shipping v International Transport Workers' Federation
[1992] 2 AC 152
Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)
[2009] EWHC 1102 (TCC)
Huyton v Peter Cremer Gmbh
[1999] 1 Lloyd's Rep 620
Universe Tankships v International Transport Workers Federation
[1983] AC 366
Vaughan v Royscot
[1999] 1 All ER (Comm) 863