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Summons Set  
Aside: *Farm Assist Ltd v  
Secretary of State for the  
Environment Food and Rural  
Affairs (No.2)***

by

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## Mediator Fails to Have Witness Summons Set Aside: *Farm Assist Ltd v Secretary of State for the Environment Food and Rural Affairs (No.2)*\*

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### 1. INTRODUCTION

Some considerable time after a mediation had taken place, a mediator was served with a witness summons seeking her attendance at court to give evidence. She made an application to the court to set aside that witness summons under the Civil Procedure Rules 1998 r.34.3(4).<sup>1</sup> Ramsey J. examined the current state of the law in mediation in relation to without prejudice, privilege and confidentiality.

### 2. THE FACTS

Farm Assist Ltd (FAL) was seeking to set aside a settlement agreement with the Secretary of State for the Department for Environment Food and Rural Affairs (DEFRA) on the ground of economic duress. It was the result of a mediation of June 25, 2003. The mediator was Jane Andrewartha, an experienced mediator and a partner in Clyde & Co LLP.

The question as to how to deal with evidence in relation to what had gone on in the mediation had been raised in court at case management conferences in July and October, 2008, more than five years after the mediation itself. DEFRA said that it wished the mediator to give evidence and that she should be free to do so about the entire conduct of the mediation, including her private conversations with DEFRA and FAL and their advisers. FAL said that it had no objection to calling the mediator to give evidence in principle and that she should give evidence about private meetings with the parties. However, FAL said 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. That position taken by the parties led to directions:

- “5. . . [T]he parties are to write jointly to the Mediator. . . in an attempt to discover whether she has retained any notes or documents from the mediation. . . 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.
9. The Mediator do have liberty to apply.”<sup>2</sup>

\* *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment Food and Rural Affairs (No.2)* [2009] EWHC 1102 (TCC), per Ramsey J. (May 19, 2009).

<sup>1</sup> The Civil Procedure Rules 1998 r.34.3(4) reads: “The court may set aside or vary a witness summons issued under this rule.”

<sup>2</sup> This part of the Order was added because the judge was conscious that he was making orders at the hearing in the absence of the mediator.



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A joint solicitors' letter was sent to the mediator. She replied:

“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.”

DEFRA decided that they still wanted to take a witness statement from the mediator but FAL felt that in the light of the mediator's letter to do so would be a waste of costs. The mediator wrote again and referred to the terms of the mediation agreement entered into between her and the parties dated June 24, 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. Subsequently DEFRA served a witness summons seeking her attendance at the trial. Shortly afterwards, she applied to have the witness summons set aside or varied under CPR r.34.3(4) on the basis that her evidence was subject to express provisions of confidentiality and non-attendance pursuant to the signed mediation agreement and in any event the evidence was confidential and/or legally privileged and/or irrelevant.

The stage was now set for a hearing of that application involving consideration of the law in mediation in relation to without prejudice, privilege and confidentiality and the effect, if any, of the express provisions of the mediation agreement.



### 3. THE LAW AND THE DECISION

The judge looked at the concepts in the mediation agreement of confidentiality, privilege and “without prejudice” communications to consider how far they gave the mediator and the parties rights or imposed obligations which are relevant to calling the mediator as a witness.

#### Confidentiality and Without Prejudice

Clause 6 of the mediation agreement provided:

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

The mediation procedure (part of the mediation agreement) further provided in relation to 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,

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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.”

The mediation procedure para.1 also provided: “All communications relating to, and at, the Mediation will be without prejudice.”

The judge drew on *Toulson and Phipps on Confidentiality*<sup>3</sup> for the proposition that, if parties agree that something is to be confidential, that 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 but that the court will only compel such disclosure if it considers it necessary for the fair disposal of the case.<sup>4</sup> One of the exceptions to that principle is “without prejudice” communications in respect of which evidence could not generally be given. That without prejudice privilege belongs to the parties, not the mediator, and here the parties had waived it. So, does an implied agreement of confidentiality in mediations or the express agreement here as to confidentiality between the parties and the mediator affect the position? The judge turned to *Toulson and Phipps*, para.15-016 in relation to the implied duty of confidentiality in mediations and arbitrations:

“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.”

The judge also drew some support for the possibility of exceptions to the without prejudice principle in *D (Minors), Re*,<sup>5</sup> a decision concerned entirely with the practice in relation to the privileged nature of conciliation in family cases involving children. The two exceptions in that case were first, if the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation; and secondly:

“[I]f and when cases arise not covered by this ruling, they will have to be decided in the light of their own special circumstances.”

Turning to the express term as to confidentiality in this case, the judge said that DEFRA and FAL agreed with the mediator to treat the mediation as confidential and that obligation binds 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 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.

<sup>3</sup> *Toulson and Phipps on Confidentiality*, 2nd edn (London: Sweet & Maxwell, 2006).

<sup>4</sup> *Toulson and Phipps on Confidentiality*, 2006, para.17-001 and *British Steel Corp v Granada Television Ltd* [1981] A.C. 1096; [1980] 3 W.L.R. 774 HL.

<sup>5</sup> *D (Minors) (Conciliation: Disclosure of Information), Re* [1993] Fam. 231; [1993] 2 W.L.R. 721 CA (Civ Div).

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### Privilege

The judge looked at whether there is any other privilege, as opposed to confidentiality, which applies to mediation. He referred again to *D (Minors), Re*:

“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. . . . 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] AC 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.”

He accepted that that decision lent some support for the existence of a privilege. He went on to refer to passages in *Brown v Rice and Patel*,<sup>6</sup> *Aird v Prime Meridian*,<sup>7</sup> *Cumbria Waste Management v Baines Wilson*<sup>8</sup> and *Muller v Lindsay & Mortimer*,<sup>9</sup> concluding that those judgments emphasised the overlap between concepts of confidentiality and privilege, in particular the without prejudice privilege which applies to mediation. He said they provided 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 to that concept by analogy.

The mediator in this case had an express enforceable right to keep matters confidential under the terms of the mediation agreement. However, the judge said, absent an express obligation, the court would in any event impose an implied duty of confidentiality which would be enforceable by the mediator.

### Summary of confidentiality and privilege in mediations

The judge’s conclusions were:

- *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.
- *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.
- *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.

<sup>6</sup> *Brown v Rice and Patel* [2007] EWHC 625 (Ch); ; [2007] B.P.I.R. 305.

<sup>7</sup> *Aird v Prime Meridian* [2006] EWCA Civ 1866; [2007] C.P. Rep. 18.

<sup>8</sup> *Cumbria Waste Management v Baines Wilson* [2008] EWHC 786 (QB); [2008] B.L.R. 330.

<sup>9</sup> *Muller v Lindsay & Mortimer* [1994] 1 P.N.L.R. 74.

### **The effect of the mediation agreement**

The judge then turned to the express provision in the mediation agreement that the mediator should not be called to give evidence. The first part provided that none of the parties will call the mediator as a witness in any litigation or arbitration “in relation to the Dispute”. The second part stated that the mediator will not voluntarily act as a witness without the written agreement of all the parties.

First, he decided that the words conditioning the calling of the mediator to give evidence “in relation to the Dispute” meant the underlying dispute as referred to in the mediation and not the dispute in these proceedings (i.e. FAL seeking to set aside the settlement agreement entered into at the mediation). So the provision did not here operate to seek to prevent the calling of the mediator.

Secondly, even if the wording did apply to this case, he considered that it would not 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.

### **THE DECISION NOT TO SET ASIDE THE WITNESS SUMMONS**

In coming to his decision, the judge had in mind:

- The parties had waived the without prejudice privilege. The mediator had provided the parties with the limited documentation which she still possessed in relation to the mediation.
- FAL had pleaded and relied on what occurred in the mediation both in their pleadings and in the witness statements which they had served.
- The mediation agreement contained a term which precluded the parties from calling the mediator as a witness but that term did not apply to the dispute before the court.
- He also took account of the fact that the mediator had stated she had no recollection of the mediation and since 2003 had been involved in many mediations as well as dealing with other matters as a partner in a City law firm.
- The mediator had an enforceable right to confidentiality under the express terms of the mediation agreement unless it was in the interests of justice that she should be called as a witness.

His final conclusion was that the mediator should be called to give evidence and that the witness summons should not be set aside. In so deciding, he listed the following points:

- The allegation of economic duress concerned what was said and done in the mediation; that necessarily involved evidence of what FAL says was said and done by the mediator; the mediator’s evidence is necessary for the court properly to determine what was said and done.
- As to the mediator saying she had no recollection of the mediation, the judge said that 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. As a general rule, a witness summons will not be set aside because the witness says they cannot recall matters.<sup>10</sup>

<sup>10</sup> *R. v Baines* [1909] 1 K.B. 258 at 262, per Walton J.



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- Calling the mediator to give 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.
- The parties had waived any without prejudice privilege in the mediation, which, being their privilege, they were entitled to do.
- Whilst the mediator has a right to rely on the confidentiality provision in the mediation agreement, he considered 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.

#### 4. COMMENTS

It is surprising at first sight to find a mediator compelled by a court to give evidence about the mediation, albeit it is understood that, shortly after this decision, a settlement was reached and the mediator did not in fact have to give evidence. Probably for that reason, some commentators have seen this decision as worrying in the context of the need for confidentiality and privilege as essential ingredients in the continuing success of mediation. Other commentators see it as an application of proper existing principles of law that do not constitute a threat to mediation. Which is it? Perhaps it is a little of each but, on balance, it almost certainly does not do damage to mediation unless it sets a trend.

It is an exceptional case—the judge said so, although some would say he could have said so with more emphasis on the need for the courts not to set a trend for prying into what went on in mediations. Generally in their decisions, the courts are being sensitive to the needs of mediation confidentiality and privilege. It is possible that we will not see a rush of similar cases because the allegations in this case were about economic duress during a negotiation at a mediation, which is a rare actionable event. However, the circumstances in negotiation whereby one party uses its greater financial muscle against the other are not infrequent. What can happen is that one party uses the other party's lack of funds and, therefore, its ability to pursue the claim to its conclusion, against them in the negotiations and at the same time does not take on board the other party's contentions about the issues. That kind of scenario does occur in mediation. So there are probably circumstances where a *Farm Assist* approach might arise out of a mediation where a party has a grievance about the settlement they feel they were forced into accepting. Most mediated settlements, unlike the one in *Farm Assist*, do not lead to further litigation about the settlement because they are for the most part consensually arrived at and consensually implemented. It must not be forgotten that in this case both parties agreed to waive privilege and the judgment reflects that reality. Finally, such evidence will only be needed where it is necessary for the fair disposal of the action.

On the other hand, can this case be used to enable the exception of “necessary for the fair disposal of the action” to be used in more cases, making the exception not so exceptional? That seems unlikely and only time will tell. It is of note, however, that by July 2009, less than two months after this decision, another well-known mediator, Nicholas Pryor, was called to the High Court in the recent libel action between Richard Desmond and Tom Bower that had arisen many years after a mediation. He objected to being required to give evidence on the basis that the public interest in protecting the confidentiality of mediators and the mediation process outweighed, or should outweigh, the private interests of justice in a particular case, and that this aspect had not been considered in the *Farm Assist* decision. He was advised subsequently that the parties were not going to proceed to seek his evidence. That episode, of itself, raises a question mark over the exceptional nature of the *Farm Assist* decision.

The judge in *Farm Assist* did not put any flesh on the bones of the phrase “the interests of justice” save in respect of the position as between the parties as a matter of private law. He did not deal in any great detail with the public policy issues in relation to the confidentiality of mediation itself, as opposed to the interests of the particular parties in this dispute. Most

disappointing perhaps is the recognition by the judge that there is some basis for arguing for a separate “mediation privilege” but no real examination of that possibility and certainly no decision on it. Those matters remain of concern to the mediation community.

One particularly worrying aspect of this decision is that no protection was afforded even to private conversations between the mediator and one party alone in private: what might be called “mediation secrets”. However, on examination of the judgment, see above under s.2, “The Facts”, that was agreed by the parties and the judge simply dealt with what the parties had agreed in the context of an application by the mediator to set aside the witness summons. In short, there was no finding that a court could compel, absent such an agreement between the parties, a mediator to give evidence about such private meetings. It is perhaps surprising that this aspect appears not to have been considered by either party as a potential problem area or, indeed considered by the judge as being likely to lead to problems later when the evidence of the mediator was to be given. If the case had continued, would the judge have allowed questions as to what went on in that sensitive area of “mediation secrets” (including potentially, for example, advice given by lawyers to their clients in the presence of the mediator) or would he have drawn a different line from that apparently agreed by the parties? This is an important aspect of mediation and needs further consideration either by a court or by the provision of some rules about mediator evidence in the Civil Procedure Rules or by statute.

This was the subject of two recent articles by Briggs J., “Mediation Privilege?”<sup>11</sup> in which he concluded that the problem could be solved by a court deciding that “mediation secrets” were just that, secret, and, therefore, a no-go area for evidence. That would preserve the ability of the court to deal with other issues in relation to without prejudice privilege under the established law, while protecting from scrutiny the vitally important area of “mediation secrets”. In short, it cannot be in the interests of justice to permit or require evidence of mediation secrets to be given to a court and the court should not over-ride party/mediator agreed confidentiality in that area. To do so would cause serious damage to mediation.

Mediators will now amend their terms of appointment to require the parties not to call them to give evidence not only in relation to the underlying dispute but also in relation to any disputes arising out of or in connection with the mediation itself. They will do so knowing that even such a provision will not be conclusive in the eyes of at least this judge, but rather a factor to be taken into account in a court’s decision as to whether to require a mediator to give evidence. That aspect of this decision is one where a different court on a different day might take a different view, particularly in relation to “mediation secrets”.

Article 7<sup>12</sup> of the EU Directive on certain aspects of mediation (even if enacted, which it is not, to apply to domestic mediation) would not have affected the result of this case because it only prevents mediators from being compelled to give evidence “unless the parties agree otherwise”. Here the parties had waived privilege and agreed to the mediator giving evidence.

For those who argue for a UK mediation statute dealing with privilege and the exceptions to it (such as the Uniform Mediation Act (UMA) in the United States) this case will provide a little more ammunition. However, everyone accepts that there would have to be exceptions to privilege, such as those in the UMA: a signed settlement agreement; a public mediation; threats of bodily injury or crime of violence; planning crime or attempting to commit crime or concealing a crime; professional misconduct of the mediator, professional misconduct of a mediation party, non-party participant, or representative of a party based on conduct occurring during a mediation and, finally, protection of children. Should the exceptions in any draft UK statute extend to the facts of *Farm Assist*, i.e. a settlement alleged to have been obtained by economic duress? That, and many other similar difficult questions, would need

<sup>11</sup> Briggs J., “Mediation Privilege?” (April 2009) *New Law Journal*.

<sup>12</sup> Directive 2008/52 [2008] OJ L136/3.





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to be addressed in drafting. Are we better off continuing with judges evolving the law rather than going for a statute or is such a piecemeal approach, case by case, not desirable?<sup>13</sup>

It may be controversial in some quarters to say that there are cases where considerations of public policy may properly require mediators to give evidence. We have to draw the line somewhere. The difficulty is where to draw it. If we continue with the courts drawing the line, it may be drawn in different, even inconsistent, places by different judges, unless and until the Court of Appeal grapples with these difficult issues, which may never happen; if we have a statute, it will be a fixed line that may do injustice in some cases and lead to litigation about its meaning in others.

Mediators facing being called to give evidence will be likely to argue the public policy aspects of mediation: while it is entirely likely that a mediator's evidence could be useful, not least as the evidence of a neutral unbiased or non-partisan party, the courts ought to seek to prevent the admission of evidence from mediators on grounds of public policy similar to the basis on which other privileges are imposed. For example, without prejudice material could be hugely useful if available to the court in order to do justice as between the parties. An example of that is the *Earl of Malmesbury*<sup>14</sup> decision, where the court got sight of material crucial to the issue of costs which otherwise it would not have seen, albeit by reason of waiver of without prejudice privilege by the parties. However, overall the system works better if some information, however useful it might well be to the process of justice, is kept privileged and confidential. The loss in some instances is outweighed by the gains overall. That argument applies powerfully too with mediation. There may be obvious gains in a particular case, but a big loss overall for the justice system if the integrity and effectiveness of mediation, which is accepted as a hugely valuable adjunct to the system, is thereby compromised.<sup>15</sup>



<sup>13</sup> For an interesting debate between Michel Kallipetis Q.C. and Bill Wood Q.C. see "Mediation Privilege" in the online Mediator Magazine at <http://www.themediator magazine.co.uk/images/stories/file/farmassist.pdf> [Accessed September 11, 2009].

<sup>14</sup> *Carleton (Earl of Malmesbury) v Strutt & Parker* [2008] EWHC 424 (QB); 118 Con. L.R. 68, per Jack J.

<sup>15</sup> I would like to acknowledge the valuable contributions made by Nicholas Pryor to these Comments.