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# **Mediation Privilege and the EU Mediation Directive: An Opportunity?**

By

**DAVID CORNES**

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*Sweet & Maxwell*

**100 Avenue Road**

**Swiss Cottage**

**London**

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## Mediation Privilege and the EU Mediation Directive: An Opportunity?

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### 1. INTRODUCTION

Decisions of the courts in England and Wales in relation to mediation privilege have been based on the well-established without prejudice rule applicable to negotiations and the exceptions to that rule. A special mediation privilege has not been created by the courts.

Mediation is about much more than just “assisted without prejudice negotiations” but confidentiality and privilege are the very cornerstones of the success of mediation. Parties to a mediation need to be sure that what they say in a mediation (to each other and to the mediator) and documents produced for the mediation will not become public knowledge (unless by agreement of the parties) or become evidence in proceedings, whether litigation, arbitration or adjudication. Further, the cause of mediation may be damaged somewhat by the spawning of satellite litigation arising out of particular mediations.

On a parallel but unrelated track, the European Parliament formally approved on April 23, 2008, the common position of the Council of the European Union on a Mediation Directive. Directive 2008/52<sup>1</sup> was published in the *Official Journal* on May 24, 2008 and came into force 20 days later.<sup>2</sup> It is concerned only with cross-border mediation across the states of the European Union, not UK domestic mediation. The date for transposition<sup>3</sup> of the Directive by separate legislation in each Member State is May 21, 2011,<sup>4</sup> excepting Denmark which has opted out of the Directive. This means legislation by May 21, 2011 in the United Kingdom, save that the date for transposition of Art.10<sup>5</sup> is November 21, 2010. If mediators and the users of mediation want to influence the government on this legislation and assist constructively as to how it might best be achieved, there is just under three years left before implementation—time enough to give careful consideration to what is best.

The Directive states:

“The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.”<sup>6</sup>

So when Member States implement the Directive, they will have to decide whether they want to limit their implementing legislation to cross-border mediations or to apply its provisions to internal mediations. The Directive has provisions in relation to various aspects of mediation, which are set out below,<sup>7</sup> including some limited aspects of confidentiality and privilege by way of its Art.7.

The question arises whether the now inevitable legislation in the United Kingdom for cross-border mediation within the Member States of the European Union should also be

<sup>1</sup> Directive 2008/52 on aspects of mediation in civil and commercial matters [2008] OJ L136/3; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF> [Accessed August 4, 2008].

<sup>2</sup> Directive 2008/52 Art.13.

<sup>3</sup> i.e. implementation.

<sup>4</sup> Directive 2008/52 Art.12(1).

<sup>5</sup> Information on competent courts and authorities.

<sup>6</sup> Directive 2008/52 Recitals para.8.

<sup>7</sup> See below, “11. What does the EU Directive Require”.



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the opportunity for legislation in relation to privilege and confidentiality in domestic UK mediation. To consider that question involves looking first at the present state of mediation privilege in England and Wales, then at what the Directive requires and finally at what might be achievable in UK implementation of the Directive.

### 2. THE PRESENT STATE OF MEDIATION PRIVILEGE

The without prejudice rule renders without prejudice documents and negotiations inadmissible in evidence and those documents privileged from disclosure. In *Muller v Linsley & Mortimer*,<sup>8</sup> the rule was said to have two justifications: first, public policy to encourage parties to settle disputes by excluding from evidence admissions made during negotiations (as considered in *Rush & Tompkins Ltd v Greater London Council*<sup>9</sup>); secondly, by reason of implied agreement about what are commonly understood to be the consequences of negotiating without prejudice (as considered in *Cutts v Head*,<sup>10</sup> where an offer had been made on the basis that it was without prejudice but that it might be relied on in court as to the question of costs, but only after judgment had been given on everything except costs). In mediation, on the other hand, express terms both as to privilege and confidentiality are always contained in mediation written agreements.

Issues in relation to privilege in mediation now appear quite often before the courts. The courts are generally supportive of mediation in relation to privilege but the reality is that the approach is necessarily that of looking at without prejudice by reference to the rules of the common law established in relation to without prejudice negotiations *simpliciter*. In short, the courts tend to regard mediation as being without prejudice assisted negotiation. In reality, mediation is more than that. For example, there are conversations between the parties directly and through the mediator, as well as private conversations between each party and the mediator, that are not revealed to other parties. The courts have not yet decided that there is a special mediation privilege relating to commercial mediation. Indeed, the cases show that many of the established exceptions to the without prejudice rule have been utilised to enable the court to look at what would otherwise be privileged material, both as to documents and other evidence.

It is convenient to look at the most important exceptions to the without prejudice rule that were considered in *Unilever Plc v Proctor & Gamble Co*,<sup>11</sup> namely situations where the court can receive evidence of what took place notwithstanding the without prejudice tag that was applied at the time. The list of exceptions in *Unilever* is said not to be exhaustive but the eight exceptions there set out are considered here to see how some of them have been utilised in cases involving mediation:

### 3. EXCEPTION 1

This exception is to prove the existence of a concluded agreement (e.g. as in *Tomlin v Standard Telephone and Cables Ltd*<sup>12</sup>). In *Brown v Patel and ADR Group*,<sup>13</sup> the express terms of the mediation agreement had included the without prejudice nature of the mediation and that no agreement would be binding unless it was reduced to writing and signed by, or on behalf of, the parties. No settlement was reached on the day of the mediation but an offer was left on the table overnight and purportedly accepted in a telephone conversation the next day. That “settlement” was not recorded in writing and signed by the parties so on that basis alone the case could have been resolved. However, the judge had no apparent

<sup>8</sup> *Muller v Linsley & Mortimer* [1996] 1 P.N.L.R. 74, CA.

<sup>9</sup> *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280, HL.

<sup>10</sup> *Cutts v Head* [1984] Ch. 290, CA.

<sup>11</sup> *Unilever Plc v Proctor & Gamble Co* [2000] W.L.R. 2436.

<sup>12</sup> *Tomlin v Standard Telephone and Cables Ltd* [1969] 1 W.L.R. 1378.

<sup>13</sup> *Brown v Patel and ADR Group* [2007] EWHC 625 (Ch).

difficulty in deciding that the court was able to look at without prejudice material in order to decide whether or not there was a concluded agreement to settle, even though he accepted that he might later have to find that that material was inadmissible. The real concern about this case is that the judge seems not to have grasped that mediation, conducted in accordance with express terms in a mediation agreement, was much more than an “assisted negotiation” subject to common law exceptions to a common law without prejudice rule. Indeed, he said “Mediation takes the form of assisted without prejudice negotiation”, a view that had been previously expressed by May L.J. in *Aird v Prime Meridian Ltd*.<sup>14</sup> ADR Group had interpleaded in *Brown* and submitted that nothing said or done in preparation for, at, or in consequence of a mediation can ever be used outside the mediation; that was not accepted by the judge, who was unconvinced that there existed a special mediation privilege. He did not accept ADR Group’s further submission that the court should not readily open up without prejudice discussions in a mediation to the scrutiny of the court, notwithstanding what Dyson L.J. had said in *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy*<sup>15</sup>:

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

*Brown v Patel* is a worrying case as to privilege in mediation.

#### 4. EXCEPTION 2

Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence (e.g. *Underwood v Cox*<sup>16</sup>). A potential addition to this category of exception is *Ruttle Plant Hire v The Secretary of State for the Environment and Rural Affairs*.<sup>17</sup> The dispute between Ruttle and DEFRA is one of several that have arisen between contractors and the government about payments for emergency work done to contain and eradicate the outbreak of foot and mouth disease in 2001. The two judgments are both on preliminary issues such as a strike out application and who is the correct claimant party following an assignment. One important issue that remains to be decided is the claim by Ruttle to have the settlement agreement, reached in mediation in June 2003, set aside on the grounds of economic duress.<sup>18</sup> So for the first time in England and Wales, economic duress is the vehicle to try to set aside a mediated settlement. It seems possible that issues will arise as to what, if any, evidence can be adduced in relation to what happened at the mediation that is argued to constitute economic duress. We shall have to wait for a further judgment in this case to see whether and how those evidentiary issues are dealt with by the parties and the court. The mere fact that this case is proceeding demonstrates that further consideration needs to be given to privilege in mediation. Indeed, this case has led one commentator to say with regret that we may be at the end of the idea of a “rule free zone” for mediation.<sup>19</sup>

<sup>14</sup> *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 at [5]: “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.”

<sup>15</sup> *Steel v Joy* [2004] 1 W.L.R. 3002.

<sup>16</sup> *Underwood v Cox* (1912) 4 D.L.R. 66, Ontario.

<sup>17</sup> *Ruttle Plant Hire v The Secretary of State for the Environment and Rural Affairs* [2007] EWHC 2870 (TCC); [2008] EWHC 238 (TCC).

<sup>18</sup> *Ruttle Plant Hire* [2007] EWHC 2870 (TCC) at [9]–[12].

<sup>19</sup> Tony Bingham, “Keeping Mum about Mediation” (2008) *Building* 8.

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### 5. EXCEPTION 3

Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel (*Hodgkinson & Corby v Wards Mobility Services*<sup>20</sup>). So far as I am aware, the only mediation decision that has considered this exception is *Brown v Patel and ADR Group*.<sup>21</sup> Counsel for Brown had submitted that cl.1.4 of the mediation agreement (no agreement would be binding unless it was reduced to writing and signed by, or on behalf of, the parties) was impliedly waived by virtue of Mrs Patel's offer having been left open for acceptance from the day of the mediation until midday on the following day. He submitted that to give effect to cl.1.4 would deprive that acceptance period of any meaning. The judge said:

"I reject that submission. The acceptance period is relevant to whether there was a settlement at all. If there was no acceptance within the period, the offer would lapse (subject to any possible arguments as to *de minimis* and whether time was of the essence) and there would be no settlement on which clause 1.4 could bite. If there was a valid acceptance within the period, there would then be a settlement on which clause 1.4 would bite. On either basis, there is nothing to justify the conclusion that the fact that Mrs Patel's offer was open for acceptance until midday on 17 February means that clause 1.4 was impliedly waived or that to give effect to clause 1.4 would make the existence of the acceptance period 'just verbiage', as counsel for [Brown] submitted."

### 6. EXCEPTION 4

Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety".<sup>22</sup> The court has warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.<sup>23</sup> *Venture Investment Placement Ltd v Hall*<sup>24</sup> looked at the circumstances, if any, in which something said during mediation, alleged to amount to threats, can be outside the cloak of without prejudice and confidentiality created by the mediation agreement. Was what took place here properly within the scope of the mediation or was it within the "unambiguous impropriety exception"? Such issues could not be decided by the judge at an interlocutory hearing, so an injunction was granted to restrain disclosure to third parties of the alleged threats, pending trial or further order. The judge commented that:

"Mediation proceedings do have to be guarded with great care. The whole point of mediation proceedings is that the parties can be frank and open with each other, and that what is revealed in the course of the mediation proceedings is not to be used for or against either party in the litigation, if mediation proceedings fail."

Subsequently, but arising out of that same case, satellite litigation was started: *Hall v Pertemps Group Ltd*.<sup>25</sup> In considering the without prejudice rule, it was said that the more relevant the events were to the underlying dispute to which the protection related, the more

<sup>20</sup> *Hodgkinson & Corby v Wards Mobility Services* [1997] F.S.R. 178, 191, not disapproved on appeal.

<sup>21</sup> *Brown v Patel and ADR Group* [2007] EWHC 625 (Ch).

<sup>22</sup> Unambiguous impropriety is the expression used by Hoffmann L.J. in *Forster v Friedland*, unreported, November 10, 1992, CAT 1052.

<sup>23</sup> *Foster v Friedland*, unreported, November 10, 1992 and *Alizadeh v Nikbin*, *The Times*, March 19, 1993, CAT 205.

<sup>24</sup> *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227 (Ch).

<sup>25</sup> *Hall v Pertemps Group Ltd*, *The Times*, December 23, 2005; [2005] A.D.R. LR 11/01.

likely they were to be covered by the without prejudice protection. However, Lewison J. speculated that a court might investigate a situation where the alleged threats were so frightening to one party that it wanted to end its claim, notwithstanding its merits. This was not such a case. Indeed, in practice, solicitors to the parties will guard against this and any competent mediator will be alive to the possible consequences of serious threats in a mediation such that the courts should not be concerned about such a possibility. However, in this case, there was a peculiarity in that the threats were both alleged by one party and denied by the other in the pleadings. It was this that allowed the judge to find that there had been a mutual waiver of privilege. However, that kind of analysis did not apply to the circumstances of the withdrawal of a Pt 36 offer, which remained covered by the protection of the without prejudice cloak. So what happened in the mediation in relation to the threats could be taken into account in looking at costs, whilst it could not be taken into account in looking at the withdrawal of the Pt 36 offer. The moral seems to be that, in the ordinary case, it is clearly possible to waive the without prejudice protection by a pleading in satellite litigation which can then lead to unintended consequences.

## 7. EXCEPTION 5

Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. As Walker L.J. said in *Unilever*, Lindley L.J. had noted this exception in *Walker v Wilsher*,<sup>26</sup> but regarded it as limited to “the fact that such letters have been written and the dates at which they were written”. So far as I am aware, there are no mediation cases under this exception but the Directive contains a provision to suspend the running of the limitation period during a mediation.<sup>27</sup>

## 8. EXCEPTION 6

Disclosure of documents in subsequent proceedings may be ordered on the question of the reasonableness of mitigation (*Muller v Linsley and Mortimer*<sup>28</sup>). *Muller* is not a mediation case. Mr Muller was a director and shareholder in a software company. He was concerned that the board of the company would dismiss him and, in accordance with the articles of the company, require that he sold his shares at a fair value. Mr Muller was advised by Linsley and Mortimer, his solicitors, to put the shares into his wife’s name to avoid the effect of the articles. However, those solicitors failed to deliver a properly stamped share transfer to the company and the company refused to register the transfer. Mr Muller was dismissed and required by the company to sell his shares. After starting proceedings against the company, he negotiated a settlement. Mr and Mrs Muller then sought damages from their solicitors. They said that the settlement with the company was a reasonable attempt to mitigate their loss as against the solicitors. Those solicitors sought disclosure of without prejudice documents going to the settlement and its reasonableness. Disclosure was ordered by the court. Hoffman L.J. said that the public policy justification was directed solely to admissions in without prejudice correspondence, not to statements which were independently relevant of the truth of facts alleged to have been admitted. Swinton Thomas L.J. and Leggatt L.J. said that, by putting the reasonableness of the settlement in issue, Mr and Mrs Muller had waived privilege. So here was a case where without prejudice documents passing between two parties to a settlement were ordered to be disclosed to a third party in a different dispute, albeit factually related. *Muller* was considered this year in *Cumbria Waste Management Ltd, Lakeland Waste*

<sup>26</sup> *Walker v Wilsher* (1889) 23 Q.B.D. 335 at 338.

<sup>27</sup> See below under “11. What does the EU Directive Require?”

<sup>28</sup> *Muller v Linsley and Mortimer* [1996] 1 P.N.L.R. 74, CA.

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*Management Ltd v Baines Wilson (A Firm)*.<sup>29</sup> In two separate mediations, Cumbria and Lakeland had settled disputes with DEFRA. Those disputes related to agreements for the provision of waste management services during the foot and mouth epidemic in 2001. In later proceedings, they sought to recover more money from their solicitors, Baines Wilson, alleging negligence in connection with the drafting and negotiation of the agreements with DEFRA. Baines Wilson wanted the court to order disclosure of documents created in the two mediations which they said went to the reasonableness of the mediated settlements. Baines Wilson had not been a party to the mediations. DEFRA refused to consent to Baines Wilson seeing the documents. DEFRA, although not a party to the litigation with the solicitors, made submissions to the court. Baines Wilson relied on the principle in *Muller* to seek disclosure. However, Frances Kirkham J. (sitting as a High Court judge) was not persuaded that Baines Wilson was in the same position as the solicitors in *Muller*, so she did not order disclosure of the documents. She said:

“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<sup>30</sup> between the claimants and DEFRA that the without prejudice rule apply. . . . 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.”

And later:

“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.”

*Cumbria* is a robust decision strongly supporting the privilege and confidentiality of mediation from a judge who has a clear understanding of what mediation is all about. On the other hand, it might be said to represent a fine distinction with the approach of the superior court in *Muller*.

The judge hinted that there might also be a category of privilege attaching to the mediator:

“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.”

Whether or not there is a distinct “mediator privilege” is a matter that is an open question at present. Some say that the privilege belongs to the parties and they can waive it by agreement. Does that also mean the parties can waive privilege and require the mediator to give evidence? Most mediation agreements have a provision by which the parties agree not to call the mediator to give evidence but that contractual agreement is not binding on a court when it is considering calling a mediator to give evidence, say under a *subpoena*. It would be more than unfortunate if mediators could be compelled to give evidence because

<sup>29</sup> *Cumbria Waste Management Ltd, Lakeland Waste Management Ltd v Baines Wilson (A Firm)* [2008] EWHC 786 (QB).

<sup>30</sup> In each of the two mediation agreements.

they not only know what passed between the parties but also what passed between them and each party unbeknown to the other parties. This is an uncertainty that should preferably not be left unresolved. The Directive has a provision that touches on this question but does not resolve it.<sup>31</sup>

## 9. EXCEPTIONS 7 AND 8

The next two exceptions are:

1. An offer expressly made “without prejudice except as to costs” (*Cutts v Head*<sup>32</sup>). This is not going to arise in the context of commercial mediation.
2. In matrimonial cases, there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation (*D, Re*<sup>33</sup>). However, a separate and distinct category of privilege has been created here, albeit in the context of proceedings under the Children Act 1989 for the protection of children. It puts such conciliation beyond the scope of the without prejudice rule and, therefore, not subject to the exceptions to that rule. Sir Thomas Bingham M.R. thought it not:

“[F]ruitful 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, seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children*<sup>34</sup> regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage.”

Given that mediation is now regarded as an important part of public policy in relation to access to justice and by the courts, it is possible that the analysis in *D, Re* (i.e. special privilege developing by analogy with without prejudice privilege) could be deployed to help create a special mediation privilege. So far that has not happened and there appear to be no signs of it happening. Indeed, to the contrary, it appears to have been rejected as an approach in *Brown v Patel and ADR Group*<sup>35</sup> where Stuart Isaacs Q.C. sitting as a deputy judge, said:

“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.”

He did, however, say that in the context of his being able to proceed to decide the case under Exception 1 (i.e. hearing evidence of otherwise privileged matters to prove the existence of a concluded agreement), so *Brown* is not decisive on the point.

## 10. OTHER CASES INVOLVING PRIVILEGE

There are other cases where the privilege has been firmly upheld in relation to mediation. For example, in *Reed Executive Plc v Reed Business Information Ltd*,<sup>36</sup> there was an issue as to whether there had been an unreasonable refusal to mediate that merited a cost sanction

<sup>31</sup> See below under “11. What does the EU Directive Require?”

<sup>32</sup> *Cutts v Head* [1984] Ch. 290, CA.

<sup>33</sup> *D, Re* [1993] 2 All E.R. 693 at 697.

<sup>34</sup> *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All E.R. 589 at 602, 610; [1978] A.C. 171 at 226, 236.

<sup>35</sup> *Brown v Patel and ADR Group* [2007] EWHC 625 (Ch) at [19]–[20].

<sup>36</sup> *Reed Executive Plc v Reed Business Information Ltd* [2004] 1 W.L.R. 3026.

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(by reference to the decision in *Halsey v Milton Keynes General NHS Trust*<sup>37</sup> to that effect). The Court of Appeal refused to look at without prejudice correspondence for that purpose. In doing so, it decided that *Halsey* had not altered the rule from 1889 in *Walker v Wilsher*<sup>38</sup> that letters or conversations written or declared to be “without prejudice” cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs.

However, in *Earl of Malmesbury v Strutt & Parker*,<sup>39</sup> following an agreed waiver of privilege by both parties,<sup>40</sup> the court looked at without prejudice material in order to decide whether or not there should be a cost sanction where it was said one party had behaved unreasonably in a mediation. It was decided that one party acting unreasonably would be in the same position as a party refusing to mediate and, therefore, at risk of a cost sanction under *Halsey* principles. However, courts will be unlikely to hear evidence as to a party acting unreasonably because it will be privileged, unless, as here, privilege is waived by both parties.

In *Leicester Circuits Ltd v Coats Industries Plc*,<sup>41</sup> no point was taken that the court was not allowed to look at what happened before one party decided to pull out of the mediation just before it was due to take place. In like manner, the court received in evidence without prejudice material, without objection from the parties, in *SITA v Watson Wyatt and Maxwell Batley*.<sup>42</sup> An injunction was granted by Lloyd J. in *Instance v Denny Bros Printing Ltd*<sup>43</sup> to restrain the use of documents from an English mediation for the intended purpose of supporting proceedings in the United States.

In summary, we can see the courts generally supporting mediation but we can also see some inconsistent approaches in relation to privilege, no sign of a special mediation privilege emerging and reliance by the courts on precedent set in cases about without prejudice negotiation *simpliciter*, rather than cases considering mediation from first principles.

### 11. WHAT DOES THE EU DIRECTIVE REQUIRE?

The new Directive<sup>44</sup> contains five key provisions for cross-border mediation:

1. Encouraging the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms.
2. Every judge in the Community, at any stage of the procedure, is given the right to invite the parties to use mediation if he or she considers it appropriate in that case. That is already embodied in the Civil Procedure Rules for England and Wales: CPR r.1.4(1) obliges the court to further the overriding objective of enabling the court to deal with cases justly by actively managing cases. Rule 1.4(2)(e) defines “active case management” as including:

“[E]ncouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”

<sup>37</sup> *Halsey v Milton Keynes General NHS Trust* [2004] 1 W.L.R. 3002.

<sup>38</sup> *Walker v Wilsher* (1889) 23 Q.B.D. 335.

<sup>39</sup> *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB); transcript available at <http://www.cedr.co.uk/> [Accessed August 5, 2008] under “EDR Law”.

<sup>40</sup> *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) at [24].

<sup>41</sup> *Leicester Circuits Ltd v Coats Industries Plc* [2003] EWCA Civ 333.

<sup>42</sup> *SITA v Watson Wyatt and Maxwell Batley* [2002] EWHC 2401 (Ch).

<sup>43</sup> *Instance v Denny Bros Printing Ltd*, *The Times*, February 28, 2000; transcript available at <http://www.cedr.co.uk/> [Accessed August 5, 2008] under “EDR Law”.

<sup>44</sup> Directive 2008/52.

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Rule 26.4(1) entitles a party, when filing the completed allocation questionnaire, to request that the proceedings be stayed<sup>45</sup> while the parties try to settle the case by ADR.

3. There will have to be a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary. The choice of mechanism is left to each Member State. This can be partially achieved in England and Wales by the use of a Tomlin Order where there are proceedings on foot at the time of the settlement but the requirement in the Directive is much wider than that.
4. The Directive provides, with some exceptions, that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties. This is discussed in more detail below.
5. Finally, the Directive requires a new rule on limitation and prescription periods which will ensure that, when parties engage in mediation, any such period will be suspended or interrupted in order that they will not be prevented from going to court as a result of the time spent on mediation. Whilst desirable, this may be difficult to implement and will require, at the very least, a definition of the start and end of a mediation for the purposes of limitation of action.

It is the fourth of those key provisions that is concerned with mediation privilege and merits further consideration here. In the Recitals to the Directive, we find:

“(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.”

And in the Articles of the Directive:

“Article 7 Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
  - (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
  - (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.”

In Recital (23) and Art.7, the reference to “confidentiality” is almost certainly intended to be what is called “privilege” in common law countries. Article 7 is much shorter and less broad in its scope than the previous draft of the Directive.<sup>46</sup> In essence, it provides that neither mediators nor mediation service providers can be compelled to give evidence, subject to three exceptions. The first exception is where the parties otherwise agree; the second is

<sup>45</sup> i.e. suspended temporarily.

<sup>46</sup> See draft Directive 2004/0251 (COD).

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where overriding questions of public policy arise; the third is disclosure of a settlement for the purposes of enforcement and that is uncontroversial.

Taking the first two of those exceptions in turn, Art.7 clearly intends that the parties can agree to call the mediator to give evidence but it is not entirely clear as to what that evidence may relate to. For example, if the parties agree, is the mediator required to give evidence about what happened in a private session with one party? How is this new provision to be viewed against the common standard contractual provision in mediation agreements that the parties will not call the mediator to give evidence? Is the provision in the Directive intended to take precedence over what has been otherwise agreed by contract? As to the second exception, namely, “overriding considerations of public policy”, it is not entirely clear what that means. It would certainly properly cover a situation where there was a danger to life or a cover-up of health-threatening environmental pollution, but where is the line to be drawn? For example, does it include, as overriding questions of public policy, all of the exceptions to privilege set out in *Unilever*? It cannot be all of them because, for example, the exception in *Cutts v Head*<sup>47</sup> is said to be based on express or implied agreement (rather than overriding public policy).

The Directive creates no privilege or confidentiality for the parties to the mediation nor for the mediator or mediation service provider. In short, it is regulation of mediation privilege with an extremely light touch. Indeed, that light touch is exactly what was intended by the European Parliament so as not to cause any difficulties to the development of mediation in Europe at a time when some countries are less advanced in their mediation activity than others. However, both the devil and the difficulty will be in the detail of the drafting of the privilege provisions in UK legislation. On the other hand, Art.7(2) expressly states that stricter measures can be implemented in Member States. Further, para.8 of the Recitals to the Directive says that the provisions can also be applied to domestic mediation in Member States. So should the United Kingdom use this opportunity to legislate beyond the light touch required by the Directive?

### 12. WHAT SHOULD THE GOVERNMENT DO ABOUT PRIVILEGE?

That is really two questions about privilege. First, how should the Directive be implemented in relation to cross-border mediations? Secondly, should the opportunity be taken to legislate for domestic mediation at the same time? I believe that, on balance, it is better to have privilege in mediation regulated by legislation, with all the difficulties of drafting that entails, rather than leaving it to the common law to develop it case by case using tools rooted in rules relating to without prejudice negotiations *simpliciter* and not always appropriate to the task of creating a clear and consistent approach to mediation. UK mediators have an excellent reputation; consequently the United Kingdom is widely seen in the world as being a good place to mediate. We need to back that with up to date, clear and appropriate laws of privilege that are applicable to both cross-border and domestic mediation.

In the United States the Uniform Mediation Act (UMA)<sup>48</sup> is available as a draft for implementation in any State. One of its aims is to try to deal with inconsistency in cross-state mediations as to the law of privilege in each State by bringing uniformity. It has been implemented in a number of states but certainly not all. A “Prefatory Note” says:

“In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met rather than

<sup>47</sup> See “9. Exceptions 7 and 8” above.

<sup>48</sup> Drafted by the National Conference of Commissioners of Uniform State Laws and approved by it and recommended for enactment in all the states, August 10–17, 2001 and amended August 1–7, 2003. Copies available from the NCC, 211 E. Ontario Street, Suite 1300, Chicago, Illinois 60611: <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm> [Accessed August 5, 2008].

frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings... Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties' knowing consent will be preserved."

The UMA tries to achieve that aim by creating a privilege against disclosure of any "mediation communication"<sup>49</sup> by parties, the mediator, and non-parties such as experts who attend the mediation. The privilege applies to judicial, administrative and legislative proceedings and arbitration, unless waived by all parties to the mediation and, in the case of mediator privilege, by the mediator as well. Exceptions are few, set out in the UMA s.6: 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, or party, or non-party participant, or representative of a party based on conduct occurring during a mediation; and protection of children.<sup>50</sup> It also has provisions requiring mediators to disclose conflicts of interest and giving a party the right to bring a lawyer to the mediation. The UMA is both praised and criticised in the United States and it is not a draft that could simply be adopted in the United Kingdom. However, it should be seen as a philosophy (and a very substantial piece of research as well) that we may find helpful in looking at what we might do in the United Kingdom.

In 2003, the UMA was amended to incorporate by reference the Model Law on International Commercial Conciliation,<sup>51</sup> promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in 2002. The amendment to the UMA provides that, unless there is agreement to the contrary, the UNCITRAL Model Law applies to any mediation that is an "international commercial mediation". The UNCITRAL Model Law also has confidentiality and privilege provisions. The UMA provides that "nothing in Article 10 of the Model Law (the privilege section) derogates from ss.4, 5, and 6" of the UMA. Any perceived conflicts between the two as to privilege are therefore resolved in favour of the UMA rules. In looking at UK mediation legislation, we should also have in mind this UNCITRAL Model Law, at least in relation to cross-border mediation.

We need to create a statutory special privilege for mediation that not only brings fairness and consistency but admits of the reality that mediation is more than assisted negotiation and which advances the position of the United Kingdom as a respected centre for international and domestic mediation. We must also do our best to avoid unintended consequences; legislation should be born out of the Directive that is clear, precise, understandable and fair to the users of mediation in particular and also to mediators, as well as providing for clarity and certainty in the area of privilege and the exceptional situations in which the court can hear evidence that would otherwise be privileged. It also needs to deal with the questions and issues raised in this article and part 11 in particular. Mediation, as a vital part of dispute resolution in the United Kingdom, deserves and needs all that care and attention to the cornerstone of privilege on which it is built.

<sup>49</sup> UMA s.2(2): "[A] statement whether oral or in a record verbal or non-verbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or re-convening, a mediation or retaining a mediator."

<sup>50</sup> The majority of States that have enacted the UMA have done so without much modification to the provision as to privilege but there are State to State variations in the drafting of the exceptions, e.g. in Iowa, New Jersey, Ohio, Vermont and Washington, e.g. [http://www.mwi.org/uma/UMA\\_Summary.By\\_State.v1.doc](http://www.mwi.org/uma/UMA_Summary.By_State.v1.doc) [Accessed August 5, 2008].

<sup>51</sup> See <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf> [Accessed August 5, 2008].