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### Confidentiality of mediation communications

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Unilever Plc v Procter & Gamble Co [2000] 1 W.L.R. 2436 (CA (Civ Div))

Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] EWHC 786 (QB); [2008] B.L.R. 330 (QBD (Merc) (Birmingham))

Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 1102 (TCC); [2009] B.L.R. 399 (QBD (TCC))

Brown v Rice [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305 (Ch D)

Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership) [2008] EWHC 424 (QB); 118 Con. L.R. 68 (QBD)

### *\*C.J.Q. 192* Introduction

One of the most important decisions that a litigant must now consider is whether to settle without trial. Pre-action protocols emphasise that disputants should file a court claim only as a last resort.<sup>1</sup> If they institute legal proceedings, the court is under the duty of active case management to encourage the use of an alternative dispute resolution (ADR) procedure where appropriate.<sup>2</sup> Consequently, a successful party runs the risk of being ordered to pay the opponent's costs if it has unreasonably refused to agree to settlement negotiations.<sup>3</sup>

Of all the various processes to resolve a dispute voluntarily, the Government, judiciary and Lord Woolf's Reports on Access to Justice gave prominence to mediation. Mediation confidentiality occupies a place of considerable importance in the reformed civil justice system. It enhances the prospects of settlement, founded on the empirical assumption that a secure and private negotiating sphere facilitates a frank exchange of views between the parties.<sup>4</sup> It also prevents the parties from taking a tactical advantage of the evidence passed in mediation by adducing it in subsequent proceedings.

Generally a mediator will say in the opening statement that communications made in the process are without prejudice. The mediator and all the mediation participants will sign an agreement with express obligations of non-disclosure.<sup>5</sup> However, the legal protection for mediation confidentiality is far from absolute. This article seeks to analyse the limited protection afforded by the without prejudice rule, mediation agreement and legal professional privilege where it applies. It then *\*C.J.Q. 193* appraises the role of statutory intervention in light of the US Uniform Mediation Act<sup>6</sup> and the EU Mediation Directive.<sup>7</sup> It concludes by arguing that there is a strong case for mediation privilege in the English civil justice system.

### The without prejudice rule

The without prejudice rule has been fundamental to the administration of civil justice. This rule

renders inter-party communications made in aid of settlement both inadmissible in evidence and immune from disclosure.<sup>8</sup> The court may, however, deviate from this rule in exceptional circumstances. Preserving confidentiality in settlement negotiations is all the more important after the Civil Procedure Rules (CPR) came into force, where the court must facilitate just and peaceful resolution of disputes in accordance with the overriding objective. In the absence of a secure and private negotiating sphere, the parties would be reluctant to unveil their genuine needs and generate compromise options for fear that what they say could be used to their disadvantage in subsequent proceedings.

The primary justification for this rule is the public policy of encouraging the parties to resolve their differences rather than litigate them to a finish. In *Cutts v Head*,<sup>9</sup> Oliver L.J. said,

“ parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should ... be encouraged freely and frankly to put their cards on the table”

Hoffmann L.J. (as he then was) pointed out the contractual basis of the rule in *Muller v Linsley & Mortimer*<sup>10</sup> :

“ *Cutts v Head* shows that the rule has two justifications. Firstly, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others, only one or the other.”

**\*C.J.Q. 194** These two reasons are interrelated. Policy considerations promote settlement discussions. Once the parties have agreed to negotiate on a without prejudice basis, elementary justice requires the law to uphold the consensus that their communications should be inadmissible and privileged.<sup>11</sup> More significant still, the combined effect of these reasons offers good guidance in resolving a difficult issue of principle.

There has been some disagreement as to the extent of the without prejudice protection. In *Muller*,<sup>12</sup> Hoffmann L.J. stated that the without prejudice rule only prevented the use of settlement negotiations to prove the truth of the facts admitted. He applied this line of reasoning in *Bradford & Bingley Plc v Rashid*,<sup>13</sup> distinguishing acknowledgments under s.29(5) of the Limitation Act 1980 from inadmissible admissions. Taking a different view in *Unilever Plc v Procter & Gamble Co*,<sup>14</sup> Robert Walker L.J. (as he then was) emphatically rejected this categorical approach. He warned against the practical difficulties involved in separating admissions from the rest of the without prejudice communications. Such limited protection, he explained, would be contrary to the underlying objective of encouraging the parties to speak freely about all issues in the litigation when seeking compromise and to admit certain facts for the purpose of establishing a basis of compromise. In the recent decision of *Ofulue v Bossert*,<sup>15</sup> the House of Lords was asked to address this debate head on.

Lord Neuberger of Abbotsbury, with whom Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe concurred, approved of Robert Walker L.J.'s analysis as being consistent with an earlier decision in *Rush & Tompkins Ltd v Greater London Council*<sup>16</sup> and the general tenor of the courts in the nineteenth century.<sup>17</sup> Having reviewed the authorities, his Lordship agreed that singling out admissions was too subtle to apply in practice.<sup>18</sup> He pointed out that Lord Hoffmann's distinction rested solely on public policy and neglected the contractual ground of the without prejudice rule.<sup>19</sup> Indeed, the other opinions in *Rashid* expressed doubt about such a distinction.<sup>20</sup> Therefore, his Lordship concluded<sup>21</sup> :

“ Save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in

evidence, other than in exceptional circumstances such as those mentioned in the *Unilever* case [2000] 1 WLR 2436, 2444d-2445g.”

**\*C.J.Q. 195** It is now clear that the without prejudice rule is generous in its application. Statements made by the parties<sup>22</sup> and those obtained from non-parties<sup>23</sup> receive protection automatically,<sup>24</sup> provided that they form part of a genuine attempt to arrive at an agreed resolution<sup>25</sup> of an issue being litigated between the parties. The without prejudice protection belongs to all the participants of a settlement discussion. It does not attach to particular proceedings. For this reason Lord Neuberger was right to say that,

“ it would set an unfortunate precedent if your Lordships held that an admission of the claimant's title in a without prejudice letter [written with a view to settling earlier proceedings between the parties] was sufficiently remote from the issues in a possession action relating to the same land as to be outside the rule.”<sup>26</sup>

Wide as the protection may seem, the effectiveness of the without prejudice rule depends on its limits. Three of such restraints stand out in particular: where a mutual waiver exists, a well-established exception applies and a without prejudice statement is in no way connected with the merits of the cause being litigated.

A waiver is an agreement of all the parties participating in a settlement discussion, which allows without prejudice communications to be disclosed and used in subsequent litigation.<sup>27</sup> It is common to waive the right of non-disclosure to reduce the parties' liabilities as to costs. For example, in both *Chantrey Vellacott v Convergence Group Plc*<sup>28</sup> and *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)*,<sup>29</sup> the parties placed their mediation communications before the court for the determination of costs. It should be noted that an appropriate costs order may take into account the unreasonable position taken by a party in a mediation,<sup>30</sup> and even include the winning party's costs of a failed mediation.<sup>31</sup>

Absent such a mutual waiver, either party may rely on protected material in subsequent proceedings where an exception to the without prejudice rule applies. There are numerous exceptions to the rule. Robert Walker L.J. in *Unilever*<sup>32</sup> pointed out eight of the most important instances. It is convenient for the purpose of exposition to classify them into three categories. The first group of exceptions aims to uphold agreements between the parties. As has already been noted, the central goal of the without prejudice rule is to promote and maintain public confidence in agreed settlements. To determine whether without prejudice communications resulted in a concluded compromise the courts need to look at them.<sup>33</sup> Alternatively, such communications are admissible because they may **\*C.J.Q. 196** contain “ the offer and acceptance forming a contract which has replaced the cause of action previously in dispute”<sup>34</sup>. An illustration of the application of this exception is *Brown v Rice*.<sup>35</sup> The issue for the court was whether the parties had settled in a mediation that took place shortly before the trial. Stuart Isaacs QC, sitting as a High Court judge, admitted into evidence the mediator's manuscript, his correspondence to the parties, and testimonial evidence of what the parties had said and done in the mediation. The judge reasoned that recognised exceptions to the without prejudice rule would apply in mediation even though it is a form of assisted without prejudice negotiation.<sup>36</sup> Nonetheless, he found that the second respondent's offer to settle was incomplete because it did not deal with the manner of disposing the litigation. Thus, the offer was incapable of being accepted to form an agreed settlement.

Where, even if there is no concluded compromise, a party made a clear and unambiguous statement with the intention that the other party to the without prejudice negotiations would rely on it and in fact did so, the statement may be put in evidence to raise an estoppel.<sup>37</sup> This exception is founded on the grounds that it would be plainly unconscionable to allow the first party to hide behind the cloak of without prejudice.<sup>38</sup> It is consistent with the exception of proving the existence of a settlement agreement discussed above.<sup>39</sup> In *Brown*,<sup>40</sup> the second respondent made an oral offer to settle during a mediation, which remained open for

acceptance until midday on the following day. The applicant purportedly accepted the offer by fax within the acceptance period. However, an express term in the mediation agreement required that any settlement agreement must be in writing and signed by or on behalf of each of the parties. The applicant argued that giving effect to the express term would deprive the acceptance period of any meaning. The argument was one of estoppel, although the applicant relied on an implied waiver of the term instead. Stuart Isaacs QC rejected both grounds, holding that the express term laid down formality requirements for a settlement agreement, whereas the acceptance period was only relevant to the question of whether there was such an agreement.<sup>41</sup> Thus, the express term could not render the existence of the acceptance period otiose.

Quite apart from proving an intended settlement or unambiguous statement, without prejudice communications may come to light where the parties varied the rule's application by agreement.<sup>42</sup> Communications that are “without prejudice except as to costs”<sup>43</sup> provide an apparent example. In *Reed Executive Plc v Reed Business Information Ltd*,<sup>44</sup> the claimant sought an order of disclosure of without prejudice negotiations on the basis that the defendant's refusal to mediate was relevant to the question of costs. Jacob L.J. held that the court had no jurisdiction *\*C.J.Q. 197* to compel disclosure of such negotiations, even though that might prevent it from determining the reasonableness of a refusal to participate in an ADR process.<sup>45</sup> It is clear, therefore, that settlement negotiations remain inadmissible and immune from disclosure unless the parties stated that they are “without prejudice save as to costs”.

The second group of exceptions permits judicial control over the fairness of settlement agreements. Evidence of without prejudice negotiations is admissible to show that a concluded compromise should be set aside on grounds of misrepresentation, fraud or undue influence.<sup>46</sup> Such an issue arose in *Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs*<sup>47</sup> and *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs*.<sup>48</sup> The claimant in each case sought to set aside a mediated settlement on the basis of economic duress. At the interlocutory stage, Ramsey J. refused to strike out the claim in *Ruttle Plant* and declined to set aside a witness summons for the mediator in *Farm Assist*. The judge was right in reaching these conclusions, for it is in the interests of justice to find out and disapprove settlement agreements that were entered into against one's free will.

Evidence of without prejudice negotiations is also admissible if its exclusion would act as a cloak for perjury, blackmail or other unambiguous impropriety.<sup>49</sup> This exception targets a clear case of abuse of the rule's protection.<sup>50</sup> For this reason the claimant in the *Unilever* case<sup>51</sup> was not allowed to plead threats allegedly occurred at a without prejudice meeting, absent any evidence of oppressive, dishonest or dishonourable behaviour of the defendant. To a similar effect is the case of *Savings & Investment Bank Ltd (In Liquidation) v Fincken*.<sup>52</sup> The claimant could not plead additional particulars of the defendant's assets, which were disclosed at a without prejudice meeting subsequent to the swearing of the affidavit of means, because telling the truth did not constitute an abuse of the rule's protection even where the truth was contrary to the claimant's case. Recently, in *Venture Investment Placement Ltd v Hall*,<sup>53</sup> the claimant sought an interim injunction restraining the defendant from disclosing to any third parties what was said in a mediation meeting. In granting the application, Deputy Judge Reid QC held that it was not possible for the defendant to rely on the unambiguous impropriety exception, because there was a serious question to be tried as to whether anything said in the mediation could amount to impropriety.

*\*C.J.Q. 198* Occasionally without prejudice communications may be useful to explain delay in commencing litigation or a party's apparent acquiescence to such delay.<sup>54</sup> Lindley L.J. in *Walker v Wilsher*<sup>55</sup> noted that the court could have regard to the fact that without prejudice correspondences had been written and the dates at which they were written without infringing the rule. Robert Walker L.J. in *Unilever*<sup>56</sup> observed that the court might refer to fuller evidence in order to have a fair picture of the rights and wrongs of the delay. In practice, parties can get



round the limitation of this exception and rely on a wider range of evidence by negotiating “without prejudice save as to costs”.

There are situations in which disclosure of without prejudice communications in subsequent proceedings would be just, not because a party has acted improperly in settlement negotiations, but because it alleges to have reasonably mitigated its loss in reaching a compromise. Relying on the latter argument, the claimants in the *Muller* case<sup>57</sup> sought from a third party the shortfall between the settlement monies and the loss suffered. However, they refused to disclose all the documents leading to the settlement except the letter before action and the settlement agreement. The Court of Appeal unanimously ordered disclosure of all the other relevant documents. Although Hoffmann L.J.'s reasoning must now be read in light of *Ofulue v Bossert*,<sup>58</sup> Swinton Thomas and Leggatt L.J.J. pointed out that the claimants waived the without prejudice protection by putting their own conduct in issue. Leggatt L.J. went further and said that the claimants' partial disclosure of privileged documents constituted an implied waiver, for it was a concept as implausible as the curate's egg. *Muller* may be contrasted with the recent first instance decision in *Cumbria Waste Management Ltd & Lakeland Waste Management Ltd v Baines Wilson (A Firm)*.<sup>59</sup> In that case, the claimants sought the shortfall between the settlement monies and the amount invoiced from the defendants, who were not a party to a successful mediation involving the claimants. Here the other party to the mediation, not the claimants, resisted disclosure of the documents relating to the settlement. Her Honour Judge Kirkham, sitting as a High Court judge, found that the *Muller* exception did not apply.<sup>60</sup> This must be correct; the *Muller* exception is narrow in scope in that the court gave no consideration to the right of the other party to the settlement negotiation to assert the rule's protection in subsequent proceedings in which it was not involved.

The last group of exceptions refers to a distinct privilege analogous to the without prejudice rule. This privilege has developed in relation to family conciliation.<sup>61</sup> Based on the public interest to maintain stability of marriage, it renders settlement negotiations in matrimonial and parental disputes inadmissible except where it is necessary to adduce such evidence for protecting the well-being of a child.<sup>62</sup> The matrimonial and parental conciliation privilege lends support for the recent debate as to the possible existence of mediation privilege and the desirability for a *\*C.J.Q. 199* mediator's privilege in England and Wales. Ramsey J. in *Farm Assist*<sup>63</sup> said that there is no special privilege attached to the mediation process or the mediator. Nonetheless, Stuart Isaacs QC in *Brown*<sup>64</sup> made a positive note that the legislature or the judiciary may need to address this issue in the future.

Waivers and exceptions apart, a without prejudice statement is admissible if it does not connect with the merits of the cause being litigated. Lord Griffiths acknowledged this in *Rush & Tompkins Ltd v Greater London Council*<sup>65</sup> where he referred to *Waldridge v Kennison*.<sup>66</sup> In *Waldridge*, the court admitted a without prejudice letter as evidence of the writer's handwriting, which was extraneous to the subject matter of the settlement negotiations. More recently, Lord Hope in *Rashid*<sup>67</sup> echoed that “an admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise”.

### **Contractual confidentiality**

Each of the restraints outlined above could lead to a loss of confidentiality in mediation. Attempts have been made to impose express obligations of confidentiality by contract. A typical mediation agreement contains, among other things, a duty not to disclose to any other person all information produced for, or arising out of or in connection with, the mediation passing between any participants and between any of them and the mediator, including the existence, outcome or termination of the mediation proceedings.<sup>68</sup> The agreement may also provide that no party will call the mediator as a witness in any subsequent adjudication, arbitration, judicial or tribunal proceedings arising out of the same matter,<sup>69</sup> unless the evidence is required by law, the life or safety of any person may be at serious risk, refusal to

testify would result in criminal proceedings against the mediator, or the evidence responds to a negligence claim against the mediator.<sup>70</sup>

It is clear, however, that contractual confidentiality does not confer absolute immunity from disclosure in legal proceedings.<sup>71</sup> The law requires the private interest in maintaining confidential relationships and the public interest in preserving confidences to be balanced against the administration of justice, which requires disclosure of all relevant information needed for the fair disposal of litigation.<sup>72</sup> A good example is the *Farm Assist* case.<sup>73</sup> In that case, the mediator could not excuse herself from the duty to comply with a witness summons by enforcing an express obligation not to divulge information in the mediation agreement or an implied duty of confidentiality arising out of the nature of *\*C.J.Q. 200* mediation. The right of confidentiality yielded to the interests of the administration of justice in receiving her testimonial evidence for the purpose of assessing whether economic duress invalidated the concluded compromise between the parties.

For this reason, the protection afforded by contractual confidentiality is in general no wider than the without prejudice rule. Nonetheless, it may be the basis for the court to rule against production of mediation documents where exceptions to the without prejudice rule do not apply<sup>74</sup> or to grant an interim injunction restraining a threatened breach of that confidentiality.<sup>75</sup>

### Legal professional privilege

A better shield against disclosure obligations is legal professional privilege. Originally the privilege attached to confidential communications between lawyers and their clients in relation to contemplated or pending legal proceedings,<sup>76</sup> recognising that full access to legal representation was an essential component for the right to fair trial.<sup>77</sup> The privilege was later expanded to communications between the client or the lawyer with non-parties for the purpose of preparing for litigation. It also covers all legal advice,<sup>78</sup> founded on rule of law considerations that the law can only be enjoyed and enforced if persons know them, understand their implications and arrange their affairs accordingly.

Lord Bingham C.J. in *Paragon Finance Plc v Freshfields*<sup>79</sup> stated that generally the privilege offers an absolute level of protection:

“ Save where client and legal adviser have abused their confidential relationship to facilitate crime or fraud, the protection is absolute unless the client (whose privilege it is) waives it, whether expressly or impliedly.”

Lord Scott of Foscote in *Three Rivers DC v Bank of England (No.6)*<sup>80</sup> added that the privilege cannot be overridden as a matter of policy:

“ If a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute, but it is otherwise absolute. There is no balancing exercise that has to be carried out.” Ramsey J. in *Farm Assist*<sup>81</sup> clarified that a communication remains privileged even where the client shares it with the mediator on a confidential basis. Therefore, the client will be able to restrain the mediator from making any unauthorised use of those communications.

### *\*C.J.Q. 201* Comparative trends in mediation privilege

As already seen, the common law protection for mediation confidentiality is more limited than is generally perceived. Parties communicate in mediation on a without prejudice basis, subject to a non-exhaustive list of recognised exceptions. Their right to enforce an express duty of contractual confidentiality yields to the interests of justice. They may claim legal professional privilege only for the client-lawyer or client/lawyer-third party communications made for

obtaining legal advice or preparing for litigation, unless there is an abuse in the confidential relationship or where a statutory exception applies. In practice, mediators should qualify the bold assurance that mediation is confidential and without prejudice in the opening statement. William Wood QC suggested that they inform mediation participants of the limits of confidentiality and provide them with a realistic sense of security<sup>82</sup> :

“ Many of you will know that confidentiality is never absolute and unqualified. I should warn you that there are a limited number of situations in which statements and documents arising in the mediation can be referred to subsequently either by one or both of you or by third parties with whom you subsequently get into litigation. These situations are in our experience relatively rare. If any of you are troubled by that possibility or wish to discuss it further then either I or your legal advisor will be happy [to] discuss it further. But I do repeat the all-important assurance that you can mediate today without your proposals or your position being referred to in the event that we do not settle and this case goes on to trial.”

Mediators should also keep abreast of the prospect of mediation legislation in their countries. Notwithstanding the lack of an empirical nexus between confidentiality and success of mediation,<sup>83</sup> the US and the EU relied upon policy reasons to provide qualified protection for mediation confidentiality in the form of a statutory privilege.

The US Uniform Mediation Act<sup>84</sup> creates a mediation communication privilege. Communications to initiate and participate in a mediation<sup>85</sup> are protected, because they are considered essential for promoting candour of parties and public confidence, and for balancing the interests of justice against the private needs for confidentiality.<sup>86</sup> Privileged communications are immune from compulsory disclosure and inadmissible in evidence<sup>87</sup> in subsequent court proceedings or other adjudicative processes.<sup>88</sup> Mediators and the parties are eligible to assert the privilege attached to a mediation communication.<sup>89</sup> In addition, mediators and non-party participants are entitled to protect their own communications in the mediation.<sup>90</sup>

**\*C.J.Q. 202** The privilege applies unless waived,<sup>91</sup> precluded by reason of prejudicing another party in a proceeding<sup>92</sup> or if it falls within one of the exceptions.<sup>93</sup> The exceptions may be classified into two groups: where societal interest in a mediation communication outweighs the private interest in confidentiality<sup>94</sup> ; and where the relative strengths of societal and private interests are left for the court to determine on a case by case basis.<sup>95</sup> It should be noted that, unless agreed to the contrary, the privilege extends to international commercial mediation, overriding the narrower evidentiary exclusions under art.10 of the UNCITRAL Model Law on International Commercial Conciliation.<sup>96</sup>

A similar development has been gaining currency in European law. The Mediation Directive<sup>97</sup> sets out five measures<sup>98</sup> to encourage the use of mediation in cross-border disputes.<sup>99</sup> Article 7(1) provides that mediators can refuse to testify in judicial proceedings or arbitrations regarding any information arising out of or in connection with a mediation process, unless the parties agree, overriding considerations of public policy arise, or the disclosure is necessary in order to implement or enforce a concluded agreement. The qualified protection for mediation confidentiality is founded on empirical assumptions that confidentiality is important<sup>100</sup> and fosters full and meaningful communications.<sup>101</sup>

The Directive does not only guarantee the minimum level of confidentiality in cross-border mediation,<sup>102</sup> but also stimulates a similar approach in domestic mediation. For example, Briggs J. advocated a mediator secrets privilege in the English legal system.<sup>103</sup> The proposed privilege is justified by appeal to the unique role of a mediator to receive sensitive information from a party without communicating it across the divide, and to use the knowledge gained in guiding the parties towards a settlement. Analogous to legal professional privilege, the protection of mediation secrets is absolute save in the rare case of misconduct by the mediator.

## Conclusion

The without prejudice rule provides the foundation for amicable dispute resolution by rendering statements made in settlement negotiations inadmissible and immune from disclosure. The rule is subject to certain riders. It is now clear that the rule \**C.J.Q. 203* and its exceptions apply to settlement discussions involving mediators. Express obligations of confidentiality in mediation agreements do not widen the limited protection afforded by the rule, as they must yield to the public interests in the administration of justice. Legal professional privilege adds strength but attaches only to communications made in a specific confidential relationship for particular purposes.

As part of its drive to assure confidentiality in mediation, the US Uniform Mediation Act created a mediation communication privilege. The privilege is in two respects similar to the without prejudice rule: it has both the inadmissibility and immunity aspects, and offers a qualified protection. The major breakthrough is that not only parties to the mediation can assert the privilege, but also non-party participants and mediators. On the other hand, the EU Mediation Directive only established a privilege for mediators to refuse to testify in subsequent adjudicative proceedings. Unfortunately, it says nothing about the confidentiality conferred by the without prejudice rule.

For the reasons outlined above there is a strong case for the introduction of a distinct mediation privilege. Indeed, such an introduction would bring English law into line with the European jurisprudence. Further, if it is accepted that mediation participants must have a more secure sphere to communicate effectively with mediators, then the law governing confidentiality requires some revision, because the present law provides insufficient protection to promote mediation as a dispute resolution procedure alternative to litigation.

C.J.Q. 2011, 30(2), 192-203

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1. Practice Direction--Pre-action Conduct, paras 1, 6.1.
  2. CPR r.1.4(2)(e).
  3. CPR r.44.3(4)(a), (5)(a); Practice Direction--Pre-action Conduct, para.4.4(3); *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; *Leicester Circuits Ltd v Coates Brothers Plc (Costs)* [2003] EWCA Civ 333; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002; *Reed Executive Plc v Reed Business Information Ltd (Costs: Alternative Dispute Resolution)* [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026; *Burchell v Bullard* [2005] EWCA Civ 358; [2005] C.P. Rep. 36.
  4. A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London: Sweet & Maxwell, 2006), para.16.4.
  5. See, for example, Chartered Institute of Arbitrators, "Practice Guideline 5: CIArb Model Mediation Agreement", para.3.
  6. The National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Mediation Act in all states in August 2001 <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm> [Accessed January 23, 2011]. As of December 2009, 11 states adopted the Act. They are: District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, see <http://www.mwi.org/uma/> [Accessed January 23, 2011].
  7. Directive 2008/52 on certain aspects of mediation in civil and commercial matters (Mediation Directive) [2008] OJ L136/3.
  8. *Walker v Wilsher* (1889) L.R. 23 Q.B.D. 335 CA; *Cutts v Head* [1984] Ch. 290 CA; *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL.
  9. *Cutts v Head* [1984] Ch. 290 CA at 306, approved in *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL at 1299.
  10. *Muller v Linsley and Mortimer* [1996] P.N.L.R. 74 CA at 77; see also *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 CA at 2442; *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2)* [2003] EWCA Civ 1154; [2004] E.T.M.R. 29.
  11. *Zuckerman on Civil Procedure*, 2006, para.16.5.



12. *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74 at 79.
13. *Bradford & Bingley Plc v Rashid* [2006] UKHL 37; [2006] 1 W.L.R. 2066.
14. *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 at 2448-2449.
15. *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 A.C. 990.
16. *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL.
17. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1021.
18. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1023.
19. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1023.
20. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1023.
21. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1022.
22. *Jackson v Ministry of Defence* [2006] EWCA Civ 46.
23. *Rabin v Mendoza & Co* [1954] 1 All E.R. 247 CA.
24. *Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd* [1978] R.P.C. 287 Ch D; *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL; *Bradford & Bingley Plc v Rashid* [2005] EWCA Civ 1080; *Jackson v Ministry of Defence* [2006] EWCA Civ 46.
25. *Buckinghamshire CC v Moran* [1990] Ch. 623 CA; *Parry v News Group Newspapers Ltd* (1990) 140 N.L.J. 1719 CA.
26. *Ofulue v Bossert* [2009] 1 A.C. 990 at 1022.
27. *Walker v Wilsher* (1889) L.R. 23 Q.B.D. 335; *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74; *Somatra Ltd v Sinclair Roche & Temperley (No.1)* [2000] 1 Lloyd's Rep. 311 QBD.
28. *Chantrey Vellacott v Convergence Group Plc* [2007] EWHC 1774 (Ch).
29. *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2008] EWHC 424 (QB); 118 Con. L.R. 68.
30. *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)*, 118 Con. L.R. 68.
31. *Chantrey Vellacott v Convergence Group Plc* [2007] EWHC 1774 (Ch).
32. *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 at 2444-2445.
33. *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 W.L.R. 1378 CA at 1382-1383.
34. *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74 at 79-80.
35. *Brown v Rice* [2007] EWHC 625 (Ch); [2008] F.S.R. 3.
36. *Brown v Rice* [2008] F.S.R. 3 at [15], [21].
37. *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd (No.2)* [1997] F.S.R. 178 Ch D at 190-191; reversed in [1998] F.S.R. 530 CA but not disapproved on this point.
38. *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd (No.2)* [1997] F.S.R. 178 at 190-191.
39. *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd (No.2)* [1997] F.S.R. 178 at 191.
40. *Brown v Rice* [2008] F.S.R. 3.
41. *Brown v Rice* [2008] F.S.R. 3 at [56].
42. *Cutts v Head* [1984] Ch. 290 CA at 306.
43. *Calderbank v Calderbank* [1975] 3 All E.R. 333 CA, reaffirmed in *Cutts v Head* [1984] Ch. 290 CA and approved in *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL.
44. *Reed Executive Plc v Reed Business Information Ltd* [2004] 1 W.L.R. 3026.
45. *Reed Executive Plc v Reed Business Information Ltd* [2004] 1 W.L.R. 3026 at [27]-[34].
46. *Underwood v Cox* (1912) 4 D.L.R. 66.
47. *Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2870 (TCC); [2008] 2 All E.R. (Comm) 264.
48. *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 (TCC); [2009] B.L.R. 399.
49. *Forster v Friedland* Unreported November 10, 1992; [1992] CA Transcript 1052; *Finch v Wilson* Unreported May 8, 1987; *Hawick Jersey International v Caplan*, The Times, March 11, 1988 QBD.
50. *Forster v Friedland* Unreported, November 10, 1992 per Hoffman L.J., “ the value of the

without prejudice rule would be seriously impaired if its protection could be removed [for] anything less than unambiguous impropriety” ; *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2003] EWCA Civ 1630; [2004] 1 All E.R. 1125 at [57].

51. *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436.

52. *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 All E.R. 1125.

53. *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227 (Ch).

54. *Walker v Wilsher* (1889) L.R. 23 Q.B.D. 335.

55. *Walker v Wilsher* (1889) L.R. 23 Q.B.D. 335 at 338.

56. *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 at 2444-2445.

57. *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74.

58. *Ofulue v Bossert* [2009] 1 A.C. 990.

59. *Cumbria Waste Management Ltd v Baines Wilson (A Firm)* [2008] EWHC 786 (QB); [2008] B.L.R. 330.

60. *Cumbria Waste Management Ltd v Baines Wilson (A Firm)* [2008] B.L.R. 330 at [24].

61. *D (Minors) (Conciliation: Disclosure of Information), Re* [1993] Fam. 231 CA at 238.

62. *D (Minors), Re* [1993] Fam. 231 CA at 240-241.

63. *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] B.L.R. 399 at [43].

64. *Brown v Rice* [2008] F.S.R. 3 at [20].

65. *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 HL at 1300.

66. *Waldridge v Kennison* (1794) 1 Esp. 143.

67. *Bradford & Bingley Plc v Rashid* [2006] 1 W.L.R. 2066 at [25].

68. See, for example, Chartered Institute of Arbitrators, “ Practice Guideline 4: Mediation Rules” , arts 12.1 and 12.2.

69. See, for example, Chartered Institute of Arbitrators, “ Practice Guideline 4: Mediation Rules” , art.14.1.

70. See, for example, Chartered Institute of Arbitrators, “Practice Guideline 1: Confidentiality in Mediation” , para.9.

71. *Paragon Finance Plc (formerly National Home Loans Corp Plc) v Freshfields* [1999] 1 W.L.R. 1183 CA at 1188.

72. *Three Rivers DC v Bank of England (No.4)* [2004] UKHL 48; [2005] 1 A.C. 610 at [28].

73. *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] B.L.R. 399.

74. *Cumbria Waste Management Ltd v Baines Wilson (A Firm)* [2008] B.L.R. 330.

75. *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227 (Ch).

76. *Balabel v Air India* [1988] Ch. 317 CA; *Three Rivers DC v Bank of England (Disclosure) (No.5)* [2003] EWCA Civ 474; [2003] Q.B. 1556; *Three Rivers DC v Bank of England (No.4)* [2005] 1 A.C. 610.

77. *Anderson v Bank of British Columbia* (1876) L.R. 2 Ch.D. 644 CA at 649; *Wheeler v Le Marchant* (1881) 17 Ch.D. 675 CA; *Waugh v British Railways Board* [1980] A.C. 521 HL; *Three Rivers DC v Bank of England (Disclosure) (No.5)* [2003] Q.B. 1556.

78. *Greenough v Gaskell* [1824-34] All E.R. 767.

79. *Paragon Finance Plc (formerly National Home Loans Corp Plc) v Freshfields* [1999] 1 W.L.R. 1183 CA at 1188.

80. *Three Rivers DC v Bank of England (No.6)* [2005] 1 A.C. 610 at 646.

81. *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] B.L.R. 399 at [44].

82. W. Wood QC, “ When Girls Go Wild: The Debate Over Mediation Privilege” (September 17, 2008), see <http://www.themediator magazine.co.uk/features/13-expert-briefings/46-mediation-privilege> [Accessed January 23, 2011].

83. S.H. Hughes, “ A Closer Look -- The Case for a Mediation Confidentiality Privilege Has Not Been Made” (1998) 5 Disp. Resol. Mag. 14; S.B. Goldberg et al, *Dispute Resolution:*

*Negotiation, Mediation, and Other Processes*, 4th edn (Aspen Publishers Inc, 2003), p.429.

84. Uniform Mediation Act, see fn.6 above.

85. Uniform Mediation Act s.2(2), see fn.6 above.

86. Uniform Mediation Act, Prefatory Note and Comments to s.4, see fn.6 above.

87. Uniform Mediation Act s.4(a), see fn.6 above.

88. Uniform Mediation Act s.2(7), see fn.6 above.

89. Uniform Mediation Act s.4(b)(1), (2), see fn.6 above.

90. Uniform Mediation Act s.4(b)(2), (3), see fn.6 above.

91. Uniform Mediation Act s.5(a), see fn.6 above.

92. Uniform Mediation Act s.5(b), see fn.6 above.

93. Uniform Mediation Act s.6, see fn.6 above.

94. Uniform Mediation Act s.6(a), see fn.6 above. No privilege attaches to a mediation communication which is a signed mediated agreement, a public document, a threat of bodily harm or violent crime, a plan to commit or conceal criminal activity, the response to a claim of misconduct or malpractice of a mediator or a mediation participant, and evidence related to abuse, neglect, abandonment or exploitation in child or adult protection proceedings.

95. Uniform Mediation Act s.6(b), see fn.6 above. Where a mediation communication is proposed to be used in a criminal proceeding or in challenging the mediated agreement, the court may hold an in camera evidentiary hearing and allow disclosure if the need for the evidence substantially outweighs the interest in protecting confidentiality under the facts and circumstances of the particular case.

96. Uniform Mediation Act s.11, see fn.6 above.

97. Mediation Directive, see fn.7 above.

98. Mediation Directive arts 4-8, see fn.7 above.

99. Mediation Directive art.1, see fn.7 above.

100. Mediation Directive Recital 23, see fn.7 above.

101. *Green Paper on alternative dispute resolution in civil and commercial law* COM(2002) 196 final, para.79.

102. Mediation Directive, Recital 23, art.7(2), see fn.7 above.

103. Mr Justice Briggs, “ Mediation Privilege? Part 1” (2009) 159 N.L.J. 506, and “ Mediation Privilege? Part 2” (2009) 159 N.L.J. 550.