Mediation and Confidentiality - part 2

Brian H Speers, Solicitor, Mediator and Alva Brangam QC, Barrister & Mediator.

In the first part of this article (carried in Issue 212) consideration was given to the reasons why confidentiality in mediation is of prime importance. We looked at the legal and practical origins of the rule or privilege of without prejudice protection and we directed attention to some decided cases in other jurisdictions. In Northern Ireland we do **not** have discrete mediation legislation; the rights, duties and obligations of the parties are governed by the ever developing common law. The flexibility and utility of the common law is renowned but it is not always easy to distil definitive principles.

Some mediators have raised concerns about the implications of cases in England & Wales where there has been what might be called a mediation content. The question for mediators, parties and their representatives is - do they represent some change in the favourable regard which the Courts have heretofore shown for mediation as a method of dispute resolution?

In *Brown –v- Rice & Patel* (2007) EWHC a mediation was arranged in an attempt to reach agreement in relation to a disputed sale of a dwelling house which arguably was part of a tangled insolvency arrangement. A well-structured mediation began at 9.30am and went on until late into the evening. No settlement was reached. As a result of a number of slightly unusual procedural applications the issue of whether or not there had been an agreed settlement came for determination before the High Court.

Under the terms of the Mediation Contract any agreement within the mediation process was required to be in writing. (This is a most sensible standard provision which is incorporated in the form of Contract recommended by the Dispute Resolution Service (DRS) administered by the Law Society). On one view the case might have legitimately floundered on this basis alone, but the Respondent contended that the course of dealing within and after the mediation had led to a concluded and enforceable agreement.

The official transcript indicates that in apparent response to inquiry from the Court, all parties accepted that the provisions of the Mediation Contract prevented either of them from calling the mediator as a witness. The judge, commended what was referred to as the budding evolution of mediation within the civil justice system and the without prejudice privilege of confidentiality which attached to the mediation process. It is interesting to note that whilst not part of the ratio decidendi he referred to a number of learned texts on ADR and noted that, in the future, the existence of a distinct "mediation privilege" might require to be considered by the Courts.

Whilst it was accepted that the mediator was not a competent witness, the parties were permitted to give evidence of what had been said during and after the mediation. Was this a violation of the primacy of confidentiality?

The report in *Malmesbury v Strutt and Parker* [2008] EWHC 424 makes it clear that, in the circumstances of that case, the parties were to a large extent permitted to "tell all" about what happened at the mediation. Part of the judgement includes the following extract:-

"I consider that the claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded. It would be wrong to say more. As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the Court can and should take account of in the costs order in accordance with the principles considered in Halsey". (Halsey v Milton Keynes General NHS Trust [2004 1 WLR 3002]).

At first blush, this looks like a significant violation of the primacy of confidentiality, but a careful study of the judgements in both *Brown* and *Malmesbury* reveals that they are **not** breaking new ground and, particularly in the *Malmesbury* case that they must be viewed in the context of the tight regulation imposed by the Civil Procedure Rules operated in England & Wales.

The *Brown* case supports the non compellability of the mediator as a witness and it was dealing with a situation where although both parties AGREED to confidentiality one party sought to waive the right with a view to supporting an alleged agreement. The procedure agreed with the parties was to hear the evidence and then rule on admissibility. The Court held that the admission of communications as to whether or not a concluded settlement had been agreed fell within the generally accepted exceptions to the without prejudice rule as enunciated in *Unilever plc v The Proctor & Gamble Co.* [2000] 1WLR 2436.

The *Unilever* case sets out a number of generic circumstances when "without prejudice"communications may be opened or disclosed. In every case the Court will be required to balance the importance of preserving the privilege with the consequences of suppressing possibly relevant evidence. The point may be made that there is logic in all of the generic circumstances posed by Lord Justice Walker in *Unilever*, but the dearth of actual decided cases with a mediation aspect tends to suggest that such occurrences are unlikely and will usually be prevented by thorough preparation of the mediation and the management of the process. As per *Unilever*, the mooted exceptions where confidentiality may be "trumped" by other considerations are:

(i) Is there an issue whether without prejudice talks led to a concluded deal?
(ii) Is there evidence of misrepresentation which would be sufficient to set aside a consensual settlement?

(iii) Even if there was no settlement, is there some equity which could raise a valid argument of estoppel?
(iv) Would the exclusion of evidence in some way cloak perjury?
(v Is reference to the without prejudice material necessary to explain delay or acquiescence which has an effect upon other rights?
(vi) Are third party rights adversely affected by preserving a privilege?
(vii) Were the negotiations proceeding exclusively on a without prejudice save as to costs basis and the issue to be decided is costs?

It is suggested that the decision in *Brown* was easily predictable and does not represent any new departure which is in any way hostile to the integrity of the process of mediation. When one looks more fully at *Malmesbury* it emerges that it was part of a sequence of five reported decisions concerning long running proceedings which seem to have involved all but a few of the complex Civil Procedure Rules. It becomes clear that it is not an authority which violates the primary principle of mediation confidentiality. On one view a full reading of the lengthy Malmesbury Chronicles might be seen as an example of how not to deal with this type of dispute. The following points should be noted:

- The issue at stake was the liability for costs
- The applicable rule was Part 44.3 of the CPR
- There had been an exchange of Part 36 *Calderbank* type offers
- There were alleged non compliances with the pre action protocols
- There was a very long trial which was also found to be prolonged by an exaggerated claim
- After a finding of liability there had been a stay of proceedings to permit mediation
- The mediation had been preceded by an exchange of Part 36 offers which were approximately £8 million apart

The decision in *Malmesbury* depends upon its special and particular facts. To a large extent it depends upon the application of the Civil Procedure Rules and is a clear example of Lord Justice Walker's seventh principle.

Indeed in sharp contrast, it should be noted that the primacy of mediation confidentiality is demonstrated in the decision in *Venture Investment Placement Ltd-v- Hall* (2005) EWHC Ch 1227 where one of two parties to a concluded but unsuccessful mediation obtained injunctive relief to restrain disclosure of commercial communications discussed and disclosed during the mediation.

The Mediation Bill 2012 – Republic of Ireland

Section 10 of the proposed Bill may be viewed as a helpful enunciation of principles of confidentiality within the swiftly developing process of civil and commercial mediation. The Bill comes subsequent to a most thorough analysis of Mediation Issues produced by the Law Reform Commission. It may be significant that there is a convenient link on the Northern Ireland Courts and Tribunal Service's website. The provision in full is set out below:

> *"(1) Subject to this Head, mediation communications shall be confidential and shall not be admissible as evidence in any court or other proceedings except where, in the case of a mediation communication of a party, confidentiality is expressly*

waived by all the parties.
(2) Notwithstanding subhead (1), confidentiality shall not apply –
(a) where disclosure of the content of a mediation communication is necessary in order to implement or enforce a mediation agreement
(b) where disclosure is necessary to prevent physical or psychological injury to a party
(c) where disclosure is required by law
(d) where a mediation communication is used to-
(i) attempt to commit a crime
(ii) commit a crime
(iii) conceal a crime, or
(iv) threaten a party to the mediation process
(e) to a mediation communication which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator occurring during a mediation process, or a complaint to a professional body concerning such negligence or misconduct
(3) Evidence introduced into or used in a mediation process that is otherwise admissible or subject to discovery in civil proceedings shall not be or become inadmissible or protected by privilege in such proceedings solely because it was introduced into or used in mediation".

This draft legislation is certainly compliant with Article 7 of the EU Directive referred to in the Part 1 of this article. It provides a guideline to parties as to the extent and limit of confidentiality. It is arguable that it has offered too much specific explanation but, it is our view, that it represents a codified statement of what actually **IS** the common law position in this jurisdiction. It may be summarised as follows: all communications within the mediation are subject to confidentiality and have "without prejudice"protection; nothing can be disclosed to a third party unless required by law.

Conclusion

A mediator will always wish to reassure parties that the process is confidential. Parties need this reassurance if they are to strive for a consensual settlement. A mediator must certainly understand the limits of, and the exception to, the without prejudice privilege.

It may be misleading for a mediator to say to the parties that everything within the mediation process is confidential. Different considerations will apply to different situations. Are the parties legally represented? Is the mediation conducted before the issue of proceedings? Is there a lodgement or *Calderbank* offer?

Clearly parties should be aware that they cannot cloak illegality or what Lord Hoffmann refers to as "an iniquity "under a without prejudice communication. A mediator should aim to make clear the major areas of exception to confidentiality without embarking on extensive reference to the interesting but complex jurisprudence found in decided cases. This is easier said than done.

In some jurisdictions there are detailed rules of procedure for mediation. We think that such a development in this jurisdiction is unlikely to be helpful and indeed the speed, efficiency and flexibility of mediation could well be lost or damaged by excessive regulation.

Many providers of mediation services already equip parties and their representatives with an explanatory document and it would certainly be good practice to address the issue of confidentiality in such documentation and then re-enforce by reminder at the commencement of the mediation.

A simple form of words for a mediator to use might be:

> "the law respects the good sense and practicality of disputing parties seeking to sort out an agreed settlement . In addition to the confidentiality in the Mediation Contract which each of you have signed, the law gives you what is called a without prejudice privilege so that things which are said during this mediation with the legitimate purpose of finding settlement will not be used to confront or challenge you in any current or subsequent legal proceedings. I am here to assist you to your settlement. I do not impose any outcome, make orders against you or provide reports on what has happened."

It would be no bad thing for debate to be initiated involving mediation practitioners, the legal profession, the judiciary and our politicians so as to ensure both complete clarity of understanding and sensible incremental growth of principle. Whilst to a large extent dependent upon the detailed provisions of the CPR there are aspects of the *Malmesbury* case which could cast a shadow on the efficient evolution of mediation.

The present reality is that our Courts do ensure the confidentiality of the process of mediation provided that there is no overriding issue which requires a sort of "trumping" of this principle.

The number of mediations in this jurisdiction has increased significantly over the last ten years. Many parties have resorted to the process and have achieved a swift and unpublished solution. Mediation is a forum designed to explore what motivates parties, what is important to parties in terms of resolution outcomes and is a process which can design flexible outcomes which are not within the jurisdiction of the Court to order. The European Code of Conduct for Mediators requires practitioners to be independent, impartial and to respect confidentiality

Whilst accepting the seventh principle of Lord Justice Walker and recognising the impact of the Civil Procedure Rules, it would be an erroneous and retrograde step if – particularly in any court mandated schemes - the conduct of parties at mediation was to be made the subject of a Court report. Such a development would transform the mediator from an independent neutral facilitating agreement into a potential "spy in the cab ". This could have serious and unhelpful implications for the mediation process and would impact on how parties participate.