NEWS

Confidentiality in mediations – when can a mediator be called to give evidence in Court?

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In the first of two articles, Michael Axe reports on a recent High Court decision that has clarified when a mediator will be ordered to give evidence.

In light of the costs that are involved in pursuing large litigation cases all the way through to trial, more and more parties are agreeing to use ADR (Alternative Dispute Resolution) methods to attempt to settle their disputes, either as part of ongoing litigation proceedings or as an alternative to going through the Courts. Probably the most popular form of ADR is mediation, as mediation allows the parties to retain a high degree of control over the resolution of the dispute, as opposed to having a decision imposed on them by a third party such as a judge or arbitrator.

The Importance of Confidentiality

One of the central concepts of mediation is that the process is confidential, allowing the parties to negotiate freely without fear that any comments made, special documents produced or concessions granted in the context of attempting to reach a settlement will later be used against them in Court proceedings. The Mediation Agreement which all of the parties to the mediation sign (including the Mediator) will almost always include an express provision that the mediation process is confidential. In addition to this contractual confidentiality provision, because the purpose of the mediation is to attempt to reach a negotiated settlement of the dispute, the information provided by either side during the mediation process will normally also be protected by "without prejudice privilege", which also renders any such information inadmissible in the related Court proceedings.

The Interests of Justice

However, in the May 2009 case of Farm Assist Limited (In Administration) v The Secretary of State for Environment, Food and Rural Affairs (No.2), the Claimant commenced proceedings to set aside a settlement reached with the Defendant at an earlier mediation. The Claimant alleged that it had only entered into the settlement due to the "economic duress" it was put under by the Defendant, and accordingly the settlement should be set aside.

The case therefore hinged on what was said and done by both of the parties at the mediation. Both parties initially agreed that the Mediator should be called to give evidence regarding what took place during the mediation, but when contacted by the parties the Mediator said that as the mediation had taken place several years ago she no longer had any detailed recollection of the events in question. She also confirmed that she had no personal notes on her file in relation to this mediation.

In light of the Mediator's response, the Claimant decided that there was no point in calling the Mediator as a witness, but the Defendant disagreed. As the Mediator refused to provide evidence voluntarily, the Defendant served her with a Witness Summons requiring her to attend the trial.

The Mediator then applied to the High Court to have the Witness Summons set aside, on the basis that:-

(a) the Mediation Agreement contained an express provision stating that what happened at the mediation was confidential;

(b) the Mediation Agreement contained an express provision that neither party would call the Mediator as a witness in any litigation in relation to the dispute;

(c) the mediation was in any event also covered by without prejudice privilege (as confirmed in the Mediation Agreement).

After considering the existing case law governing these issues in depth (see further below), the High Court dismissed the Mediator's application to set aside the Witness Summons, meaning that she would have to give evidence at the trial.

The High Court based its decision on the following conclusions:-

(a) **Confidentiality** – although the mediation was subject to a confidentiality agreement between both the parties and the Mediator, the Court has the power, in exceptional circumstances, to order the disclosure of confidential evidence when it is in the interests of justice to do so. In this case, as the Claimant's allegations of economic duress were extremely serious, and they could only be answered by consideration of all available evidence regarding what happened during the mediation itself, the Court was prepared to order that the confidentiality provisions in the Mediation Agreement not be upheld;

(b) **Prohibition on calling Mediator as a Witness** – the Mediation Agreement prevented either party from calling the Mediator as a witness in any litigation "in relation to the Dispute", and "the Dispute" was defined within the Mediation Agreement in such a way that the Court considered it meant the original, underlying dispute (i.e. the dispute that was the subject of the mediation). These current proceedings related to a new dispute, namely the Claimant's assertion that the settlement reached at the mediation should be set aside due to economic duress. On this basis, the provision in the Mediation Agreement did not prevent the Defendant from calling the Mediator as a witness in the current proceedings. The Court also indicated that even if the wording of the Mediation Agreement had been different, it would still have only been one factor taken into account by the Court when determining whether or not it was in the interests of justice to allow the Mediator to be called as a witness;

(c) **Without Prejudice Privilege** – without prejudice privilege is a privilege that exists between the parties themselves (i.e. it is not a privilege shared with the Mediator). As such, if the parties choose to waive that privilege (as they had done in this case), the Mediator could not prevent them from doing so. Similarly, if there are any other privileges (for example, legal advice privilege) attached to certain documents, then the party whose document it is will retain that privilege (and that privilege will not be lost by having shown that document to the Mediator during the mediation or by waiving without prejudice privilege generally).

The High Court was also not swayed by the Mediator's claim not to have any worthwhile recollections regarding the mediation. Such an assertion was no justification for setting aside the Witness Summons, as it was accepted that memories could be jogged and recollections clarified when witnesses attended Court and had the opportunity to focus on the documents and evidence presented to them.

Although in this case the Court ordered that the Mediator should be called to give evidence at the trial, the decision does reinforce that this will only be appropriate in exceptional circumstances. Conversely, it also serves as a reminder to participants in mediations that parties who engage in serious misconduct during the mediation process should not assume that they will be able to hide behind confidentiality provisions and privilege.

As for Mediators, they have been given a clear message that the Courts will look at any contractual protection

provisions with a critical eye, even though the Mediator is a party to the Mediation Agreement, if it is in the interests of justice to do so.

For further information on this or any other issue relating to ADR or mediation, please contact Michael Axe by emailing Michael or by calling him on 08450 990045, or speak to your usual contact in the Commercial Disputes Team.

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