Mediation Confidentiality and Privilege

Endangered Species

International Academy of Mediators Virtual Conference

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CONFIDENTIALITY AND PRIVILEGE

OUTLINE ARGUMENT:

1. The decisions relied upon by those who seek to persuade us that there is no such thing as mediation confidentiality or privilege are flawed insofar as they are advanced as establishing a principle of law. Any judicial decision is quintessentially a decision based upon facts as found by the Judge or agreed between the parties. Any judge and any experienced trial advocate will confirm the truth of that statement.
2. One may ask a simple question: What are the benefits of mediation which persuade Courts and Judicial systems to encourage its use and which generally disputants accept is a better way of resolving their disputes. The list of advantages **always** includes "the process is confidential or privileged". This is enshrined in all jurisdictions which have a Mediation Act or equivalent and, as we shall hear from Mercedes and Birgit, upheld by civil law jurisdictions.
3. If one examines each of the decisions properly, they are just as much a justification for the argument that the reason for the decision lies with a failure by the lawyers of the disputants to perform their duties rather than supporting the proposition that Mediation Confidentiality/Privilege is a myth or an illusion. Therefore if the mediation confidentiality is jeopardised in the circumstances of the cases advanced by Bill and Jeff, an examination of the facts as found by the court demonstrate a failure by the lawyers or their clients to observe the basic tenants of good faith and honesty which are the bedrock of all contractual obligations between individuals and legal entities.
4. After all, every jurisdiction routinely tries actions in which a party to a contract, a trust or a mortgage, is seeking to be released from its obligations on the grounds that the terms were unclear, the obligation was induced by misrepresentation or fraud or undue influence. But, no sane lawyer would use those cases to support an argument that the basic principle pacta sunt servanda (contracts are to be protected) is a myth or an illusion.
5. Mediation is a contractual relationship between the parties and the mediator. In every well-regulated jurisdiction, the parties and the mediator enter into a written agreement to mediate the dispute upon the terms of that contract. I know of no agreement to mediate which does not contain the obligation to preserve the confidence of the parties in their exchanges with each other and their individual exchanges with the mediator. In Civil Law and some Common Law countries the position is governed by a Mediation Act or equivalent which expressly protects that confidentiality or privilege. While it is true that those statutes usually contain express exceptions relating to misrepresentation,

fraud, undue influence, interests of children, mentally impaired patients or the commission of a crime, that does not support any argument that mediation confidentiality or privilege is a myth or an illusion. On the contrary it supports completely the argument that it places an obligation upon those representing parties in mediation to protect their interests and if they fail to do so, they endanger the confidentiality and privilege of the mediation process.

6. The real problem lies with the Common Law. The failure of the Courts in England and Wales to recognise that there is a separate and distinct mediation privilege, but instead to treat mediation as "assisted without prejudice negotiations". Privilege is a matter of law and once privileged always privileged is a maxim which every law student learns in his first year. Privilege may be waived by the person who holds it, and it cannot be used to cover up unlawful or criminal activity. Nor can privileged be used by an individual who brings an action against his lawyer to prevent the lawyer referring to relevant material necessary to determine the issue.
7. The Civil Law jurisdiction does not have the same principle of privilege but does recognise confidentiality. In all the jurisdictions which have enacted a Mediation Act, there are specific exemptions from the confidential protection which are fairly universal. Birgit and Mercedes give examples of these for Spain and Switzerland, and my mentee, Tuba Bilecik has provided me with similar provisions for Turkey and Greece. The Uniform Mediation Act in the USA has similar provisions but it has only been adopted by eight States so far.
8. Those who wish to have a detailed examination of the cases where courts have admitted evidence of what transpired in mediation in England, can obtain one from after the Conference by emailing me. The decisions are based upon the principle of the exceptions to the without prejudice negotiation privilege.
9. I consider that the better approach for mediators to adopt is to ensure that the Settlement Agreement is in writing and contains all the necessary representations or factors which form the basis of the settlement. I have had one case recently where the Defendant insisted upon the Claimant giving a written warranty that identified matters stated in their position paper were true and an acknowledgment that the Defendant intended to rely upon the truth of those matters as a condition of mediating their dispute and the basis of any settlement which may be reached. Those of us who train mediators and mediation advocates urge lawyers to make sure to include all statements and representations on which their clients are relying and which have induced their clients to settle upon the terms they have in the Settlement Agreement. Thereby, any breach is a breach of a specific term of the Settlement Agreement and does not require any court to enquire into the mediation, let alone summon the mediator to give evidence.
10. Failure to observe this straightforward precaution could lead to the sort of case on which Bill and Jeff are relying and, to that extent, Mediation Confidentiality or Privilege are in danger of being undermined. It behoves all mediators to protect the process we espouse and which we urge upon disputants as a better way of resolving their disputes. Otherwise we are all peddling a 'lie'!

Detailed examination of the cases relied on by Bill and Jeff

1. ***Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural affairs (No. 2)*** **2009 EWHC 1102 (TCC)**, the Court refused an application by a mediator to set aside a witness summons requiring her to attend court to give evidence as to what transpired in a mediation she conducted some six years ago.

   The facts, briefly stated, are these: Farm Assist brought an action against DEFRA which was successfully mediated. Farm Assist went into liquidation and the liquidator sold the right of action to Ruttle Plant Hire. An action was brought by Ruttle to set aside the settlement agreement on the grounds that it was entered into under economic duress. After various procedural difficulties, which were set out in the first judgment, (***Ruttle Plant Hire –v- The Secretary of State for the Environment and Rural Affairs*** **[2007] EWHC 2870 (TCC)**, Ruttle abandoned its attempt to pursue the action and this second action was brought by the liquidator. DEFRA sought and obtained a witness summons requiring the mediator to give evidence. The Order expressly gave the mediator liberty to apply.

   The Order required the parties to liaise over any issue concerning the mediator. A joint request to the mediator enclosing the Order evoked a response with which most busy mediators would sympathise:

   > "*You will appreciate that this mediation occurred many years ago and in the intervening period I have conducted up to 50 further mediations per year. I therefore have very little factual recollection of the mediation. Further, having retrieved my file from archive I find that whist it has a certain amount of administrative correspondence on it, together with a copy of the original Mediation Agreement and copies of the Position Statements (and is accompanied by a small lever arch file of papers), I have no personal notes on the file. This is unsurprising given that this was a mediation that settled on the day.*
   >
   > *Accordingly I genuinely believe that, even were it appropriate for me to become involved in this matter again, there is little I can do to assist either side.*"

   Notwithstanding the mediator's perfectly understandable response, her application to set aside the witness summons was refused. The Court concluded that the interests of justice required her to give evidence, basically for five reasons[1]:

   (1) *The allegations that the settlement agreement was entered into under economic duress concern what was said and done in the mediation and this necessarily involves evidence of what Farm Assist says was said and done by the Mediator. This evidence forms a central part of FAL's case and the*

[1] Paragraph 53 of the judgment

Mediator's evidence in necessary for the Court properly to determine what was said and done.

(2) *Although the Mediator has said clearly that she has no recollection of the mediation, this does not prevent her from giving evidence, frequently memories are jogged and recollections come to mind when documents are shown to witnesses and they are cross examined. Further provided that the summons is issued bona fide to obtain such evidence, as a general rule, it will not be set aside because the witness says they cannot recall matters: See R v Baines [1909] 1 KB 258 at 262 per Walton J.*

(3) *Calling the Mediator to give this evidence would not be contrary to the express terms of the mediation agreement which limited her appearance to being a witness in proceedings concerning the underlying dispute, because the Court in the instant case was dealing with a different dispute.*

(4) *The parties have waived any without prejudice privilege in the mediation which, being their privilege, they are entitled to do.*

(5) *Finally, whilst the Mediator has a right to rely on the confidentiality provision in the Mediation Agreement, this is a case where, as an exception, the interests of justice lie strongly in favour of evidence being given of what was said and done.*

Ramsey J's judgment is an important addition to the growing case law on the exact legal status of mediation privilege. It is unlikely to be more than persuasive authority until the Court of Appeal have an opportunity to consider the matter, but the careful analysis is worth studying, particularly as the learned judge is an experienced mediator himself.

Having analysed the mediation agreement, which was in a form fairly standard at the time, the learned Judge made the following findings. First he approved of the passage at paragraph 17-001 in *Confidentiality* by Toulson and Phipps (2nd Edition) which states that *"confidentiality is not a bar to disclosure of documents in the process of litigation, but the Courts will only compel such disclosure if it considers it necessary for the fair disposal of the case".* Secondly he referred to the passage at paragraph 17-016 which states that "*Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice' rule set out above."*

The learned Judge concluded that the privilege was that of the parties and not the mediator and thus the parties were at liberty to waive their privilege regardless of the mediator's position.

However, Ramsey J did find that the mediator has a right to confidentiality which the parties themselves cannot unilaterally override. This right, he concluded, was not solely dependent upon the terms of the mediation agreement but also founded upon general principles which he derived again form Toulson and Phipps (paragraph 15-016) and the

decision of Bingham MR in ***Re D (Minors) (Conciliation: Disclosure of Information)*** **[1993] Fam 231**. Further, based upon the observations of the Master of the Rolls as to the Court's need to exercise a discretion to hear evidence which would otherwise be protected by privilege where the statement "*is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well-being of a child"*[2] Ramsey J concluded that this "*lends support for the existence of exceptions which permit use or disclosure of privileged communications or information outside the conciliation where, after balancing the various interests, it is in the interests of justice that the communications or information should be used or disclosed"*[3].

While acknowledging that in Re D the court was clearly dealing with a different position, Ramsey J does appear to have ignored the three express reservations which the Master of the Rolls made, namely:

1. The decision was solely concerned with the welfare of children;
2. The decision was only concerned with privilege *"properly so called...and has nothing to do with duties of confidence and does not seek to define the circumstances in which a duty of confidence may be superseded by other public interest considerations"*
3. The Court of Appeal "*deliberately stated the law in terms appropriate to cover this case and no other. We have not thought it desirable to attempt any more general statement. If and when cases arise not covered by this ruling, they will have to be decided in the light of their own special circumstances".*

Ramsey J also referred at length to the decision of HH Judge Frances Kirkham (also another trained mediator) in *Cumbria Waste Management v. Baines Wilson* [2008] EWHC 786, which the mediation community hailed as a welcome recognition that mediation privilege was to be upheld by the Courts. Curiously he did not refer to her unequivocal decision that the mediator should not be required to give evidence of what transpired in a mediation. It is perhaps ironic that the other party to the mediation in that case was, as in Farm Assist, DEFRA, which was vigorously resisting the application to reveal what happened in that mediation! It demonstrates perhaps the old adage that a party only wishes to break the rules if it perceives an advantage for itself in so doing!

Having analysed all the relevant authorities Ramsey J came to the following conclusions:

(a) *"Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.*

(b) *Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.*

[2] Re D supra at page240

[3] Farm Assist at paragraph 27

(c) *Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."*

These are important statements of the law in respect of mediation. It is questionable whether the conclusion that there is no mediator privilege in the process is right. Many jurisdictions, which have developed a mediation jurisprudence over several decades, recognise and enforce mediation privilege both in the process itself and that of the mediator. Moreover, the decision to order the witness summons potentially runs counter to Article 7 of the EU Directive on Mediation (and does not fall within its express exceptions).

The result of that decision is a rather convoluted set of rules in the CPR, and a recent decision of the TCC has also opened up the real possibility of mediation being subject to the scrutiny of the Courts.

2. In ***Mrs AB and Mr AB v CD Limited*** **[2013] EWHC 1376 (TCC)** Edwards-Stuart J heard an application for a declaration that a dispute had been settled by an oral agreement arrived at after a mediation. The case was a claim for damages for professional negligence against an architect, which the parties agreed should be mediated. At the end of the day, the Claimants made an offer to settle which the Defendant said it was unable to respond to without making further enquiries. The mediator informed the Claimants of the Defendant's position and stated that there was no more to be done that day. There were subsequent exchanges and messages between the parties' respective solicitors which were copied to the mediator; and the mediator held telephone conversations with the parties himself. The Defendant's solicitors had forwarded correspondence to the mediator on the basis that "we would prefer you to be kept in the loop". Subsequently an offer to settle was made by the Claimants in a letter marked 'without prejudice save as to costs' and the mediator was asked to communicate that to the Defendant. Further exchanges took place between the parties via the mediator, who wrote in one e-mail to the Claimants' solicitors:

> *"Both parties have said that their offers are final. To state the obvious, over the next week or so, costs will start to escalate. I am happy for either party to continue to use my services as required if there is any possibility of reaching a settlement. I await your response to the Defendants' latest offer."*

The mediator was summoned to give evidence albeit limited to what was said at the end of the mediation and what was said to him and by him in the course of the telephone calls he had with both parties on the final day of telephone exchanges which resulted in what the Claimants asserted was a binding agreement. The mediator was cross examined about those conversations and the upshot was a conclusion by the judge that the mediator was no longer acting as a mediator but simply as a go-between on an ad hoc basis. The terms of the Mediation Agreement were also interpreted by the Judge as having the effect that *"the mediation process will normally end at the*

conclusion of the hearing……unless the parties agreed expressly of impliedly that (it) should continue beyond the conclusion of the hearing if the dispute has not settled."

3. There is a salutary lesson to be taken from this judgment. It is quite normal in my experience for parties these days not to conclude a settlement of the day of the mediation itself but wish to continue to see whether or not agreement can be reached still using the offices of the mediator. My practice in such situations, and one I recommend to all practitioners, is to seek the parties' consent to an adjournment of the mediation to allow further exchanges between them (with or without the mediator) on the basis that all communications in whatever form are covered by mediation privilege. As an extra precaution I head all e-mails and letters "**CONFIDENTIAL AND MEDIATION PRIVILEGE AND SUBJECT TO CONTRACT"** and direct the parties to do likewise. This avoids the uncertainty which led to the finding by Edwards-Stuart J, and makes it clear that the terms of the Mediation Agreement have not been varied so as to permit a binding settlement to be concluded without it being reduced to writing and signed by all parties.

4 The most recent example is the decision of Roth J in ***Berkeley Square Holdings v Lancer Property Asset Management Ltd*** **[2020] EWCH 1015 Ch.**

5 The opposite extreme is illustrated by a recent decision of the California Supreme Court in ***Cassel v Superior Court*** **: 51 Cal.4th 113, 244 P.3d 1080, 119 Cal.Rptr.3d 437,** the Court reversed the decision of the Court of Appeal, and held that under Evidence Code section 1119*, "all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants."* The Supreme Court cited with approval the decision in ***Wimsatt v. Superior Court,*****(2007) 152 Cal.App.4th 137 1t 150**, in which the court declared that : *"when clients, such as [the malpractice plaintiff in that case], participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel."*

6 However, the Court was clearly not happy with such an obviously unfair and (I suspect unjustifiable) consequence. Chin J, concurring albeit 'reluctantly' said:

> *"But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the*

Legislature remains free to reconsider this question. It may well wish to do so. This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point."

Unfortunately a bill to achieve precisely that amendment to the Californian Statute was talked out, and thus the situation in California remains unchanged at present.

7 The Supreme Court of Canada in ***Union Carbide Canada Inc v Bombardier Inc*** **2014 SCC 35** was faced with a not uncommon problem which can arise in a mediation when settlement is reached but a binding agreement not concluded. The Parties are locked into a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. B commenced an action for damages against D in Montréal, in the Quebec Superior Court. The parties agreed to private mediation and a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process: *"Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding".* During the mediation process, an offer was made by D and accepted by B. Two days after B's acceptance, counsel for D stated that his client considered this to be a global settlement amount. Counsel for B replied that the settlement amount was for the Montréal litigation only. D refused to pay the discussed settlement amount, and B then filed a motion for homologation of the transaction in the Superior Court. D brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process.

The motion judge held that in light of the confidentiality clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *Code of Civil Procedure*. She granted D's motion to strike in part, ordering that four of the six allegations be struck because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. The Court of Appeal allowed the appeal and found that the rules of the *Code of Civil Procedure* with respect to confidentiality do not apply to extrajudicial mediation proceedings. It observed that when mediation has resulted in an agreement, communications made in the course of the mediation process cease to be privileged and held that settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement.

The Supreme Court upheld the Quebec Court of Appeal. In his judgment Wagner J reaffirmed the observations of Abella J in ***Sable Offshore Energy Inc. v. Ameron***

International Corp., 2013 SCC 37, [2013] 2 S.C.R. 623 adding *"Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose."* He went on to affirm the Courts' commitment to protecting parties who are negotiating to achieve a settlement of their disputes. At paragraph [34] of his judgment he said:

> *"Settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality, and parties do not have to use the words "without prejudice" to invoke the privilege: "What matters instead is the intent of the parties to settle the action . . . . Any negotiations undertaken with this purpose are inadmissible" (Sable Offshore, at para. 14). Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: Sable Offshore, at paras. 15-18. As with other class privileges, there are exceptions to settlement privilege:*
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> > *To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (**Dos Santos Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20**). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (**Unilever plc v. Procter & Gamble Co., [2001] 1 All E.R. 783 (C.A. Civ. Div.), Underwood v. Cox (1912), 26 O.L.R. 303 (Div. Ct.)),** and preventing a plaintiff from being overcompensated (Dos Santos*).
> > *(**Sable Offshore** at para. 19)*

He went on to state the well-known rule that a *"communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement. Far from outweighing the policy in favour of promoting settlements (Sable Offshore, at para. 30), the reason for the disclosure — to prove the terms of a settlement — tends to further it. The rule makes sense because it serves the same purpose as the privilege itself: to promote settlements."*

He then turned to the question of confidentiality in the Mediation Contract and reviewed several legal articles and judicial observations before concluding that mediation discussions are not only protected by common law settlement privilege but also by the contractual confidentiality agreed by them in the mediation contract. He observed that "*Although the confidentiality provided for in a clause of a mediation contract may be broader, and set out in greater detail, than the common law settlement privilege, several authors caution that such a clause nevertheless does not represent a "watertight" approach to confidentiality and that a court may refuse to*

enforce it after balancing competing interests, such as the role of confidentiality in encouraging settlement, and evidentiary requirements in litigation."[4]

Wagner J accepted the Respondents' argument that the courts should look beyond the plain meaning of what was accepted was an unambiguous confidentiality clause to account for the wishes of the parties. The question to be decided was "Can a Confidentiality Clause in a Mediation Agreement displace the exception to settlement privilege that applies where a party seeks to prove the Terms of a Settlement? His judgment continued:

"The common law settlement privilege and confidentiality in the mediation context are often conflated. They do have a common purpose: facilitating out-of-court settlements. But,…, confidentiality clauses in mediation agreements can also have different purposes. In most cases involving such clauses, the status of the common law settlement privilege will not arise, because the two protections generally serve the same purpose, namely to foster negotiations by encouraging parties to be honest and forthright in reaching a settlement without fear that the information they disclose will be used against them at a later date. However, as I mentioned above, settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

The differences between these protections may be muddled in a case like this one in which both of them could apply, but to different parts of the sequence of events. The parties met for the mediation session on April 27, 2011, the day after they had signed an agreement with a confidentiality clause. The clause in question applied to discussions that took place in the course of the mediation session and prohibited the disclosure of information about those discussions at any time in the future. A settlement offer was made at the mediation session, was kept open for 30 days after that date, and was discussed by the parties' lawyers after the session. Any additional information that came up in the course of these subsequent discussions falls outside the protection of the confidentiality clause — however, since it formed part of negotiations aimed at reaching a settlement, it is protected by settlement privilege.

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[4] "(see Boulle and Kelly, at pp. 309 and 312-13; F. Crosbie, "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests" (1995), 2 *C.D.R.J.* 51, at p. 70; K. L. Brown, "Confidentiality in Mediation: Status and Implications", [1991] *J. Disp. Resol.* 307; E. D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 *Ohio St. J. Disp. Resol.* 1, at pp. 19-22; Freedman and Prigoff, at p. 41).

> *As regards the timing of the communications, the scope of settlement privilege is broader, because it is not limited to the duration of the mediation session.*

On the other hand, there are recognized exceptions to settlement privilege at common law that limit the scope of its protection, but such exceptions may be lacking in the case of a confidentiality clause. The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception, thereby preventing parties from producing evidence of communications made in the mediation process in order to prove the terms of the settlement.

There is indeed a delicate balance to be struck. The concerns articulated by commentators about the uncertainty of confidentiality clauses in mediation contracts are legitimate. Boulle and Kelly accurately identify the most important of these concerns:

> *The principle of sanctity of contract supports the maintenance of confidentiality where the parties have committed themselves to it. If, however, the confidentiality is too wide, it will sterilise too much evidence and seriously undermine the trial process. If the confidentiality is too narrow, it will discourage parties from entering mediation and from using their best endeavours to settle once there. A balance is required between supporting mediation, on one hand, and not freezing litigation or upholding illegality, on the other. [pp. 312-13]*

In my view, the inquiry in each case will begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. I have discussed reasons why parties might desire greater confidentiality protection, and allowing parties to freely contract for such protection furthers the valuable public purpose of promoting settlement. As Professor Green states,

> *if a written confidentiality agreement exists, the parties are in a stronger position to argue that the court should exercise its discretion to grant a protective order assuring confidentiality because protecting the confidentiality of mediation statements furthers the expressed intentions of the parties as well as the public policy of encouraging extra-judicial settlements. [p. 22]*

Wagner J then observed that the case turned on the express terms of the confidentiality clause in the mediation agreement. He stated that it was open to parties to create its own rules with respect to confidentiality that entirely displace the common law settlement privilege, which freedom he observed *"furthers both freedom of contract and the likelihood of settlement, two important public purposes"*. But, he warned, *"the mere fact*

of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. As I mentioned above, these protections do not have the same scope. For instance, settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. It cannot be argued that parties who agree to confidentiality in respect of a mediation session thereby deprive themselves of the application of settlement privilege after the conclusion of the mediation session. The protection afforded by the privilege does not evaporate the moment the parties contract for confidentiality with respect to the mediation process, unless that is the contract's intended effect."

He referred to Article 9 of the UNCITRAL Model Law on International Commercial Conciliation, which provides for an express exception to the confidentiality of conciliation proceedings "for the purpose of implementation or enforcement of a settlement agreement", and held that the terms of the clause in question did not oust the usual rules of common law settlement privilege and, making it clear that he was addressing the sole exception which applies when a party is seeking to prove the terms of a settlement, concluded that the evidence should be admitted.

Tantalisingly, he stated that he would not *"consider whether the mediator could be compelled to testify in a situation such as this one. The evidence before this Court is limited to the impugned paragraphs of the motion for homologation, so I will not address the appropriate legal threshold for permitting or compelling direct testimony by the mediator. I will leave that question for another day".*

8. It seems to me that there must be a happy medium between the blanket confidentiality afforded by the California Evidence Code and the wide exceptions available to the court in the UK where the majority appear to favour regarding mediation as 'simply assisted without prejudice negotiation' and apply all the exceptions to the without prejudice rule adumbrated in ***Unilever plc v Proctor & Gamble*** **[200] 1WLR 2436**, with the additional coat hook provided by the Civil Procedure Rules, namely the *Overriding Objective*. Privilege is a concept well known to the Common Law, and it has the benefit that 'once privileged always privileged' is easy to understand; equally it is quite comprehensible to the most basic of litigants that one can waive one's own privilege and equally cannot assert it against one's lawyer if one sues them and vice versa. The Uniform Mediation Act sets out four easily comprehensible exceptions which are readily adaptable to the English Common Law. Best of all we should give thanks to those who drafted the Mediation Act 2017 in Eire, and gratefully adopt it in the UK.

16th October 2020