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UPDATE: THE COURT OF APPEAL LOOKS AT EXPERT WITNESSES' AGREED STATEMENTS AND MEDIATION

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Recent case: *Aird and Another -v- Prime Meridian Limited* - Court of Appeal - [2006] EWCA Civ 1866, overturning the decision of HHJ Coulson. For the full judgment, click here >>

Question: If an expert witnesses' agreed statement is ordered by a court to be produced at a time to suit the timetable for mediation, is it privileged or a document that is open for the Court to see?

Quick overview: The Court of Appeal allowed an appeal against the decision of His Honour Judge Peter Coulson QC in the Technology and Construction Court (*Mediation Update*, November 2006 >>). Once an open joint statement is agreed and signed by expert witnesses, it is a document prepared for the court under the rules of the court (CPR Rule 35.12) and is not privileged from production even if one of the purposes for its preparation was use in a mediation which was itself conducted under the cloak of without prejudice. Further, orders should not be made in court proceedings that experts produce a privileged statement for use in mediation. The court has no power to order how parties conduct a mediation

arising out of the position that the court has no power to order parties to mediate.

The Detail:

This was an appeal from a decision by His Honour Judge Peter Coulson QC in the Technology and Construction Court - a decision that had been widely seen as supporting privilege in mediations. Lord Justice May gave the decision of the Court of Appeal.

The history was that an order had been made on 19 July 2005 in the following terms:

> "By 23.9.05, the parties' architectural experts ... do meet without prejudice and prepare a statement of the issues upon which they are agreed and those upon which they are not agreed with a brief statement of the reasons for the disagreement."

A statement was prepared and signed (after the words “without prejudice” had been removed from the preceding draft). Prime Meridian said they were entitled to use the statement in the proceedings because it was ordered by the Court under Rule 35.12; Mr and Mrs Aird said it was a statement prepared for the purpose of the mediation and was used in the mediation such that it was a privileged document that could not be used in the proceedings.

Lord Justice May decided that the order made on 19 July 2005 was an order pursuant to Rule 35.12. In construing the order, he said that the Judge had been wrong to give weight to what he believed was the intention of the Judge who made that order: to assist the mediation by ordering an expert’s statement at a much earlier date than would have otherwise been the case. The matter had to be looked at objectively.

Mr and Mrs Aird’s Counsel had emphasised to the Court of Appeal the public policy issues that relate to mediation and that the experts were only involved at the stage they were because of the proposed mediation. However, Lord Justice May said two things about that. Firstly, the order for a joint statement was clearly worded in relation to Rule 35.12 and the statement that was produced was a joint statement for use in the court proceedings. Secondly, the joint statement that was produced was not mediation material subject to the without prejudice tag, so there was nothing unfair or unjust that arose - the joint statement was ordered by the court for use by the court.

Whilst this decision contains impeccable legal analysis, it will certainly impact negatively on the way the Courts respond to considering the making of orders to assist mediation and it will also affect the conduct of mediations themselves.

As to the Courts, slowly but surely, some Judges had begun taking steps to make orders to assist the conduct of mediations, such as early disclosure of certain categories of documents needed for

the purposes of mediation or early experts meetings and statements (as here). As to that kind of approach, which is now to be regarded as something the Courts should not do, Lord Justice May said:

> "In the present case the court ordered and later extended a stay of the proceedings for mediation. The court did not order the parties to mediate. The court would never, I think, sensibly make such an order, since the court cannot, in the real world, compel a party who does not want to to participate in a mediation. The court can and does order a stay of proceedings for mediation, almost always when all parties have indicated that they are willing to try. The court may also perhaps, on occasions, consider making an adverse costs order against a party who is shown to have unreasonably refused to participate in mediation, although I personally regard that as a power to be exercised with caution. *Since the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation.* The most the court can do is to encourage." [Emphasis added]

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and

> "... in my view, the court has no power, nor would it be remotely sensible for it to have a power, to order parties to produce a privileged statement."

Advocates will now have to be careful about what they ask a court to order in support of a mediation. Perhaps the safest course is simply to have the timetable in relation to the directions the court would normally give set out in such a way that necessary steps for mediation are completed prior to the mediation. An opportunity may have been lost as a result of this decision for the courts to work on ways that can assist mediation, without imposing its will on the mediation. Time will tell.

As to conducting mediations themselves, clearly parties must be alert about their experts agreeing an open statement for the purposes of a mediation where a Rule 35.12 order has been made because such a statement will not be privileged. Clearly experts will continue to be needed to assist in mediations and any such work they do, jointly or alone, should be clearly marked as being for the mediation and without prejudice so as to avoid any possibility that any such documents could be treated as being for use by the Court.

This case has interesting reflections in the USA. A Judge in Michigan in *Irwin Seating -v- IBM* (available on Westlaw) has restrained experts for the plaintiff from giving evidence at trial because counsel for the plaintiff gave them confidential mediation statements from the defendant to read in preparing reports for the litigation. The experts said the confidential material did not influence them, but the court emphasised the importance of mediation confidentiality and "settlement privilege" in concluding that the experts not be allowed to give evidence.

It certainly looks like England and Wales is now ploughing a different furrow from that in New South Wales, Australia, where, as a necessary adjunct to the courts' power to order mediation against the opposition of one or more parties, the court has taken jurisdiction to make court

ordered mediations efficacious, by, for example, compelling attendance of parties (*Rajski and Another v Tectran Corporation and Others* [2003] NSWSC 478).