

## UPDATE: COSTS, WITHOUT PREJUDICE AND MEDIATION

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### Judgment:

*Hall and Another -v- Pertemps Group Limited and Another* - High Court, Chancery Division, Mr Justice Lewison - 21 November, 2005 (reported in The Times on 23 December 2005)

### Questions:

In what circumstances, if any, can a Court have regard to alleged threat made during a mediation when making a costs order in proceedings?

### Quick Overview:

Two points were dealt with as preliminary issues:

1. In the ordinary case, public policy will prevent a court inquiring into what went on in a mediation conducted on a without prejudice basis. However, where, as here, there was satellite litigation in which one party alleged that threats had been made by the other party during the mediation and that other party denied that the

threats had been made, without prejudice protection was lost by reason of a mutual waiver in the satellite litigation. Accordingly, the court decided it could look at what took place in deciding what costs order to make.

2. The circumstances in relation to the withdrawal of a Part 36 Offer were different because that went wider than had been pleaded in the satellite litigation. So, it was covered by the without prejudice cloak and there had been no waiver by the parties. Accordingly, the court would not take the circumstances in relation to the withdrawal of the Part 36 Offer into account in deciding costs.

**The Detail:** In the earlier case of *Venture Investment Placement Limited -v- Hall* (16 May 2005), an injunction had been granted, until trial or further order, restraining Mr Hall from referring to or disclosing any part of the discussion that took place during the mediation (see *Mediation Update, September 2005*). This current decision deals substantively with that issue.

In relation to both the allegation of threats and the circumstances in which the Part 36 Offer was withdrawn, Pertemps contended that no regard should be had to the allegations since they were covered by the without prejudice protection of the mediation and that it would be an abuse of process if they were to be taken into account.

Mr Justice Lewison said that such protection was based on two strands:

1. public policy encouraged parties to speak frankly when attempting to settle disputes,

and

2. there was an implied agreement that certain information was protected, which could be altered by the parties, for example by making an offer without prejudice save as to costs.

However, none of that made mediation a no go area for investigation by the courts. The more relevant were the events to the underlying dispute to which the protection related, the more likely they were to be covered by the without prejudice protection. However, Mr Justice Lewison speculated that a court might investigate a situation where the alleged threats were so frightening to one party the he wanted to end his claim, notwithstanding its merits. This was not such a case.

In this case, there was a peculiarity in that threats were both alleged by one party and denied by the other in “satellite litigation.” It was that averment in a pleading that allowed the Judge to find that there had been a mutual waiver. However, that kind of analysis did not apply to the circumstances of the withdrawal of the Part 36 Offer, which remained covered by the protection of the without prejudice cloak. So what happened in the mediation in relation to the former could be taken into account in looking at costs, whilst it could not be taken into account in looking at the latter.

The moral of this case seems to be that in the ordinary case (not amounting to threats that frighten a party into settling), it is clearly possible to waive the without prejudice protection by a pleading in an action which can lead to unintended consequences.