

## UPDATE: IS MEDIATION PRIVILEGE UNDER THREAT?

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### Judgment:

*Ruttle Plant Hire -v- The Secretary of State for the Environment and Rural Affairs - Technology and Construction Court - Mr Justice Ramsay - [2007] EWHC 2870 (TCC) - 4 December 2007. To read the judgment, [click here >>](#)*

### Questions:

Is a statutory mediation privilege needed?

### Quick Overview:

The *Ruttle* decision was on preliminary issues in a case where Ruttle seeks to overturn a mediated settlement agreement on the grounds of economic duress. In other court decisions in relation to privilege, the common law principle of “without prejudice” and the exceptions to it have invariably been applied in the mediation arena. That means that mediation is accorded the same protection in relation to privilege as without prejudice negotiations, not more, and not less, protection. Whether or not change is needed to a distinct statutory mediation privilege is a finely balanced question.

**The Detail:** The dispute between Ruttle and DEFRA is one of the several disputes that have arisen between contractors and the government about payments for emergency work done to contain and eradicate the outbreak of Foot and Mouth Disease back in 2001. In this *Ruttle* case, the judgment that has been given is on preliminary issues. The important issue that remains to be decided is the claim by Ruttle to have the settlement agreement reached in mediation in June 2003 set aside on the grounds of economic duress. So, for the first time in England and Wales, economic duress is the vehicle to try to set aside a mediated settlement. It seems possible that issues will arise as to what, if any, evidence can be adduced to the court in relation to what happened at the mediation that is argued to constitute economic duress. We shall have to wait for a further judgment in this case to see whether and how those evidentiary issues are dealt with or whether Ruttle rely on evidence outside of the mediation.

In other cases we can see what the approach of the courts is when faced with privilege issues arising out of mediation. In essence, the common law without prejudice rule has been treated as applying to mediation and some of the established exceptions to that rule<sup>1</sup> have been considered to see whether it is right to look behind the mediation “veil”. In most of the decided cases, the court has felt it inappropriate to look behind the mediation veil<sup>2</sup>.

However, in *Brown -v- Rice and Patel and ADR Group* ([2007] EWHC 625 (Ch) - [click here >>](#)), the Judge decided to hear evidence of what happened in the later stages of a mediation on the basis that to do so was within one of the exceptions to the without prejudice rule, namely that the court can have regard to without prejudice material in order to decide whether or not a concluded agreement had come into existence. He adopted that position notwithstanding the fact that the mediation agreement contained the standard form provision that there is no settlement unless it is reduced to writing and signed by the parties. There had been no such written settlement. He said

*“I also do not accept ADR Group's submission that nothing said or done in preparation for, at or in consequence of the mediation which is liable to disclose the nature of the negotiations can ever be used outside the mediation process, in the absence of a prima facie case, or credible evidence, of unambiguous impropriety<sup>1</sup> by a party to the mediation. As I have indicated, the exceptions to the without prejudice rule, even in the mediation*

*context, go wider than this.”*

So his view was that, whilst it might be desirable to have a special category of mediation privilege, it was not necessary to decide whether there was such a privilege. He treated mediation as being “assisted negotiation” *simpliciter*, whereas in reality it is much more. In mediations, England and Wales remain firmly rooted in the common law principle of without prejudice, but *Brown* has caused some to call for statutory mediation privilege.

If we accept that proposition, we need to address the difficult question: what form should it take and what exceptions should there be? Most people would suggest

exceptions like fraud, threats of violence or actual violence and criminal activity (such as the Prevention of Crime Act), imminent danger to life, health and safety, but where do we draw the line? We can learn from experience in Australia and various states in the USA where rules of law have been introduced (and some unintended consequences have resulted alongside the positive aspects). The Uniform Mediation Act enacted in many states in the USA (including recently, in New Jersey) creates a privilege against disclosure of any “mediation communication” by (1) parties to the mediation, (2) the mediator, and (3) non-parties, such as experts, who attend the mediation. The privilege applies to judicial, administrative, or legislative proceedings and arbitration. It applies unless waived by all parties to the mediation and the mediator. Exceptions to the privilege are few and are set out in Section 6 of the UMA. Essentially they are: a signed settlement agreement; a public mediation; threats of bodily injury or crime of violence; planning crime or attempting to commit crime or concealing a crime; professional misconduct of the mediator and protection of children.

Public policy for the greater use of mediation probably now requires us to begin looking at a Mediation Act for England and Wales (and other parts of the UK), perhaps on the back of the draft EU Mediation Directive. Such an Act might well have benefits beyond issues of privilege, such as mediator immunity; mediator disclosure of conflicts of interest; providing that mediators cannot be compelled to give evidence and preventing them from being required to report on the mediation to a court. However, we should proceed slowly and with caution, learning the lessons from other countries that have mediation legislation. In the meantime, mediation can continue to rely on the common

law and the fact that Judges are mostly supportive of mediation in their decisions.

## Footnotes

1 See *Unilever plc -v- Proctor and Gamble* [2000] 1 WLR 2436, discussed in *Update, September 2005*

2 See for example:

- *Halsey -v- Milton Keynes General NHS Trust and Steel -v- Joy and Halliday* [2004] 1 WLR 3002 (the court should not know or investigate why a mediation did not produce a settlement); [click here >>](#)
- *Reed Executive PLC and Another -v- Reed Business Information Limited and Others* [2004] EWCA Civ 887 (refusal to look at without prejudice documents going to the consideration of a wrongful refusal to mediate); [click here >>](#)
- *Hall -v- Pertemps Group Limited* [2005] ADR LR 11/01 (refusal to look at what happened in a mediation when considering costs; see *Mediation Update, January 2006*)
- *Venture Investment Placement Limited -v- Hall* [2005] EWHC 1227 (Ch) (injunction granted to restrain disclosure of an exchange in a mediation);
- *Aird and Another -v- Prime Meridian Limited* [2006] EWCA 1866 (at first sight an undermining of mediation privilege but, on careful analysis, supporting it); [click here >>](#)

*Framlington Group Limited and Anor -v-Ian Barnetson* [2007] EWCA Civ 502 (refusal to allow a party to rely on matters discussed in without prejudice meetings); [click here >>](#)