

**Farm Assist Ltd (in liquidation) v Secretary of State for the Environment,
Food and Rural Affairs (No 2)**

[2009] EWHC 1102 (TCC), 125 ConLR 154, [2009] BLR 399, [2009] All ER (D) 228 (Jun)

Court: TCC

Judgment Date: 19/05/2009

Catchwords & Digest

EVIDENCE - PRIVILEGE – CONFIDENTIAL RELATIONSHIPS – MEDIATOR – CLAIMANT SEEKING TO SET ASIDE SETTLEMENT AGREEMENT CONCLUDED AT MEDIATION – PARTIES WAIVING CONFIDENTIALITY – MEDIATOR SEEKING TO UPHOLD CONFIDENTIALITY CLAUSE IN MEDIATION AGREEMENT – DEFENDANT ISSUING WITNESS SUMMONS ON MEDIATOR – MEDIATOR APPLYING TO SET ASIDE WITNESS SUMMONS – WHETHER IN THE INTERESTS OF JUSTICE TO SET ASIDE WITNESS STATEMENT

The applicant was an experienced mediator and a partner in a firm of solicitors. The mediation agreement contained a number of terms including: cl 6, that provided 'each party in signing this agreement is deemed to be agreeing to the confidentiality provisions of the mediation procedure on behalf of itself and all of its directors, officers, servants, agents and/or representatives and all other persons present on behalf of that party at the mediation', with para 1 of the mediation procedure providing 'all communications relating to, and at, the mediation will be without prejudice'; cl 11, that provided 'every person involved in the mediation will keep confidential and not use for any collateral or ulterior purpose ... all information (whether given orally, in writing or otherwise), produced for, or arising in relation to the mediation including the settlement agreement (if any) arising out of it, except insofar as is necessary to implement and enforce any such settlement agreement or to comply with any order of the court in any subsequent action; cl 12, that provided 'all documents, which include anything upon which evidence is recorded (including tapes and computer discs), or other information produced for, or arising in relation to, the mediation will be privileged and not be admissible as evidence or discoverable in any litigation or arbitration connected with the dispute except any documents or other information which would in any event have been admissible or discoverable in any such litigation or arbitration; and cl 13, that provided 'none of the parties to the mediation agreement will call the mediator as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the dispute and the mediator will not voluntarily act in any such capacity without the written agreement of all the parties'. The applicant brokered a settlement agreement between the claimant and defendant. Subsequently, the claimant sought to set aside the settlement agreement of the 25 June 2003, on the ground that the settlement had been entered into under economic duress. On 9 December 2008, the claimant and defendant's solicitors wrote a joint letter to the applicant seeking disclosure of all documents relating to the mediation including matters that, but for the order of the court requiring compliance, might have otherwise been the subject of privilege and/or confidentiality. In January 2009, the applicant replied concluding that there was little assistance she could provide given the effluxion of time since the mediation and the lack of personal notes. In response, the defendant's solicitors indicated that they nevertheless wished to take a witness statement. In February, the applicant wrote referring to the terms of the mediation agreement and stated that she did not believe that she could help and would not devote further time unless required by the court to do so. On 31 March, the defendant served a witness summons on the applicant seeking her attendance at the trial of the action. On 30 April the applicant sought to set aside the witness summons under CPR rule 34.3(4).

The applicant contended that her evidence was subject to express provisions of confidentiality and non-attendance pursuant to the mediation agreement, and, in any event, the evidence was confidential and/or legally privileged and/or irrelevant.

Held – The application would be dismissed.

It was established law that confidentiality was not a bar to disclosure of documents or information in the process of litigation, but the court would only compel such disclosure if it considered it necessary for the fair disposal of the case. The position as to confidentiality, privilege and the without prejudice principle in relation to mediation was generally: (1) with regard to confidentiality, the proceedings were confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agreed that matters could be referred to outside the mediation, the mediator could enforce the confidentiality provision. The court would generally uphold that confidentiality but where it was necessary in the interests of justice for evidence to be given of confidential matters, the courts would order or permit that evidence to be given or produced; (2) in respect of without prejudice privilege, the proceedings were covered by without prejudice privilege that existed as between the parties and was not a privilege of the mediator. The parties could waive that privilege; and (3) with regard to other privileges, if another privilege attached to documents which were produced by a party and shown to a mediator, that party retained that privilege and it was not waived by disclosure to the mediator or by waiver of the without prejudice privilege.

In the instant case, the parties to the mediation had clearly waived privilege. However, the parties could not waive confidentiality in the mediation so as to deprive the applicant of her right to have the confidentiality of the mediation preserved. No matter the wording of the mediation procedure, if it applied to the instant stage of proceedings, the mediation agreement would not, in itself, lead to the witness summons being set aside, rather it would be a factor for the court to take into account in deciding whether, in the interests of justice, a mediator should be called as a witness. Balancing the various considerations, it was in the interests of justice that the applicant should give evidence as to what was said and done in the mediation.

Cases referring to this case

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Treatment	Case Name	Citations	Court	Date	
Considered	Digicel (St Lucia) Ltd v Cable and Wireless plc	[2009] EWHC 1437 (Ch), [2009] All ER (D) 44 (Jul)	ChD	17/06/2009	

Cases considered by this case

Annotations: All Cases **Court:** ALL COURTS

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Treatment	Case Name	Citations	Court	Date	
Considered	Brown v Rice	[2007] EWHC 625 (Ch), [2008] FSR 61, [2007] BPIR 305, [2007] All ER (D) 252 (Mar)	ChD	14/03/2007	
Considered	Aird v Prime Meridian Ltd	[2006] EWCA Civ 1866, 111 ConLR 209, [2007] BLR 105, (2007) Times, 14 February, [2006] All ER (D) 358 (Dec)	CACivD	21/12/2006	
Considered	Muller v Linsley & Mortimer (a firm)	[1995] 03 LS Gaz R 38, [1996] PNLR 74, (1994) Times, 8 December, [1994] Lexis Citation 2330, 139 Sol Jo LB 43	CA	circa 1994	
Considered	D (minors), Re	[1993] Fam 231, [1993] 2 All ER 693, [1993] 2 WLR 721, [1993] 1 FLR 932, [1993] 1 FCR 877, [1993] Fam Law 410,	CACivD	11/02/1993	

		[1993] NLJR 438			
Considered	British Steel Corp v Granada Television Ltd	[1981] AC 1096, [1981] 1 All ER 417, [1980] 3 WLR 774	ChD	02/04/1980	

Document information

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