

When can confidentiality at mediation be overridden?

by Harry Spurr, 11 August 2020

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1. Central to the success of mediation is the concept of confidentiality: parties are encouraged to negotiate openly and realistically, unfettered by concerns that what they disclose in the process might be used against them in the future, in legal proceedings or otherwise. Provided at common law, and typically reinforced by a mediation agreement to which the parties sign up, this protection is seen as sacrosanct by mediators and clients alike. But, as a recent decision in the High Court reminds us, it is not unqualified.
2. *Berkeley Square Holdings & Ors v Lancer Property Asset Management Ltd & Ors* [2020] EWHC 1015 (Ch) involved off-shore property companies, the Emir of Abu Dhabi, eye-watering sums of money, and allegations of shady dealings. Despite this exotic backdrop, the question before Roth J. at a preliminary hearing was a rather dry one: in contesting accusations of secret and fraudulent transactions, could the Defendants rely on extracts from their position statement submitted in the course of a mediation with the Claimants conducted some years earlier? The extracts were said to be relevant because they referred to the transactions in question, would show that the Claimants were aware of them, and thus defeat the allegations. The Claimants responded that the position statement was protected by mediation privilege and could not be disclosed.
3. In the course of an extensive review of the authorities, the judge explored the exceptions to the without prejudice rule. He went on to set out a useful summary of the position, indicating that privilege that would otherwise protect negotiations may in principle be set aside in the following situations:
 - a. where there is a dispute over whether the negotiations have resulted in a concluded settlement;
 - b. where one party claims that the negotiated settlement should be set aside because of fraud, misrepresentation or undue influence;
 - c. where, despite the absence of a settlement, an estoppel is said to arise out of something said during negotiations;
 - d. where privilege is being used as a cloak for perjury, blackmail or other 'unambiguous impropriety';
 - e. where evidence of the negotiations could be used explain delay or apparent acquiescence;

- f. where it be relevant to the interpretation of the settlement agreement to admit objective facts referred to in the negotiations;
 - g. where the notoriously difficult 'Muller exception' circumstances arise – seemingly where (i) there is no issue as to the truth or falsity of anything stated in the negotiations; and (ii) admitting evidence of what was said is necessary in order to ensure that an issue raised by one party is 'fairly justiciable'; and (iii) there is no adverse effect on the protection to which the other parties are entitled.
4. In this case, the Judge held that two of those exceptions applied: (b) – fraud, and (g) – Muller.
 5. As to the former, he rejected the Claimants' case that the exception existed to protect only the victim of fraud, and that the Defendants should not be allowed to 'turn the rule on its head'. If privileged evidence of negotiations may be introduced to prove that a settlement should be set aside due to fraud, he said, then it is equally legitimate to do so in response to an allegation of fraud.
 6. The Judge's conclusions in this respect are important for two reasons: first, they appear to represent the first reported occasion on which this long-established fraud exception has been successfully relied on in the English courts – turning theory into practice; second, in allowing the exception to operate in reverse, they amount to a small but significant extension to its scope.
 7. As to Muller, the Judge offered useful clarification to the scope of the exception in two respects. First, it will be necessary to show that the privileged evidence of negotiations is so central that there is a serious risk that a fair trial will not take place if it is excluded. Second, he dismissed the suggestion that the exception applies only to a three party case, where the other party to the without prejudice negotiations is absent from the current dispute. This had no logical basis, he said, and there was no reason why the exception should not be invoked in a two party context.
 8. So the Defendants were permitted to introduce the contentious passages from their mediation position statement, and the matter proceeded to trial. Meanwhile, the wider significance of Roth J's judgment (putting aside the minor extension to the scope of the fraud exception) is to offer the most comprehensive and up to date analysis of the law in this area. Importantly, it acts as a useful reminder to practitioners and their clients that what is said in a mediation will not, in absolutely every case, remain within the four walls of the room in which it is disclosed – whether made of bricks and mortar, or something more virtual.