"No Mediation Privilege, as yet"[1] Why not?

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1. In the twenty or so years between the seminal decision of the Court of Appeal in ***Halsey v Milton Keynes***[2] , which gave the necessary impetus to the Overriding Objective introduced into our legal system by Lord Woolf, and the equally landmark decision of the Court of Appeal in ***Churchill v Merthyr Tydfil***[3] which corrected the mistaken interpretation by some of the obiter observations of Dyson LJ (as he then was), and gave the Courts power to order parties to mediate their disputes, the law's approach to the resolution of civil and commercial disputes has undergone a sea change. Initially it was labelled "Alternative Dispute Resolution" then many solicitors firms described their litigation services as simply "Dispute Resolution" and finally it is now recognised as an essential first step before commencing litigation and an integral part of the main line legal system. Although the adjective 'alternative' still persists in the CPR, most legal practitioners recognise that mediation is now an established and central part of our legal system and no longer merely an adjunct or an alternative to litigation.

2. However, one issue has remained constant through the years and is still to be resolved, and that is the precise nature of mediation and whether the time has come for the Courts to recognise that mediation should be accorded a separate distinct privilege. It is hoped that this lecture on behalf of the Civil Mediation Council will serve to bring the long running debate among practitioners and academics to a positive conclusion to the question behind the title of the Lecture: "should there be a discrete 'mediation privilege' beyond the protections offered for WP negotiations?"

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[1] Phipson on Evidence 20th Edition
[2] [2004] EWCA Civ 576
[3] [20223 EWCA Civ 1416

3. It is not just the mediation community who seek this recognition. In 2016-7, the International Mediation Institute conducted a worldwide Pound Conference gathering the views of the international commercial community, mediators and academia on what the international business entities require for alternative dispute resolution. An overwhelming majority favoured mediation over traditional litigation and international arbitration. When asked for their fundamental requirements for a successful mediation, the overwhelming response was the need for confidentiality and a means of enforcing mediated settlements worldwide. To those who mediate international commercial disputes regularly, neither of these conclusions came as a surprise. Those who mediate commercial disputes will regularly encounter questions about the preservation of confidential information, particularly from international companies, and frequently we mediators are asked whether what they say in mediation might be susceptible to judicial disclosure and scrutiny.

4. The Commercial Courts from several jurisdictions meet regularly at SIFoCC[4] meetings to discuss ways of working together to promote best practice and further the Rule of Law. I understand that mediation is frequently on their Agenda, and, when it is, questions of confidentiality always arise. As yet there is no common agreement about mediation confidentiality/privilege, but this adds to the necessity for deciding whether the courts should recognise that the unique features of mediation requires a distinct mediation privilege separate from the without prejudice privilege which attaches to settlement negotiations. The difficulty has arisen because there is no uniform definition of mediation and no unequivocal judicial acknowledgement that mediation's special features require a protection of privilege beyond that of settlement negotiation privilege. Moreover, there is often confusion between confidentiality and privilege among lawyers and sometimes a tendency to use both words indiscriminately.

[4] The Standing International Forum of Commercial Courts

5. Although judges appear to observe a distinction in principle, this has not always been followed in practice. Indeed, it was recognised in Phipson on Evidence[5] that "*[t]here is no decision to date which so holds*" that there is a self-standing mediation privilege, broader than WP privilege. This was repeated by HH Judge Tindall, sitting as a High Court Judge in ***Pentagon Food Group Ltd & Ors v B Cadman Ltd***[6], where it was considered (in *obiter*) that "*[t]he authorities do not - at least yet - support the view that 'mediation privilege' is distinct from 'without prejudice privilege.'*"

6. All those who are familiar with mediation appreciate that the very essence of Mediation depends upon all parties to the process being confident that at all times they can be as frank and open with each other and the mediator as they wish, without any fear that anything they may say, or any document they may produce solely for the purposes of the mediation, or any concession they may make in the course of exploring a settlement, may subsequently be admitted into evidence in later court proceedings. This is invariably the question asked by those mediating for the first time and automatically assumed by those who are familiar with mediation. Most mediations are governed by a written agreement as mediation is a contractual process. The contract is between the parties and their representatives and each other and the mediator. All the leading mediators use a standard mediation agreement which will contain provisions for Confidentiality and Privilege, which invariably will include the following:

> *"11. The Parties and the Mediator shall: keep confidential and regard as privileged, and shall not use, any information of any nature produced for, or arising in connection with, the Mediation save as may be necessary to implement and/or enforce any settlement agreement and/or as may be required by law and/or; to professional advisors, insurers and reinsurers, if strictly necessary and for bona fide reasons, and on the basis that the recipient is informed of the confidentiality of the information and agrees to maintain that confidentiality*

[5] (20th Edn) at [24-53]
[6] [2024] EWHC 2513 (Comm) at[60],

11.2 keep confidential and regard as privileged and shall not use what happened and what was said at the Mediation and the terms of any settlement (unless the settlement agreement has its own confidentiality terms in which case those terms will prevail).

12. All documents, correspondence or information (in any format) produced for, arising out of, or in connection with, the Mediation will be treated as privileged, and shall not be admissible as evidence or be disclosable in any proceedings connected in any way with the subject matter of the Dispute, unless such documents or information would have been admissible or disclosable in any event.

13. No formal record, transcript or mechanical, electrical or digital recording of the Mediation shall be made.

14. Each Party shall ensure that all those present at the Mediation on its behalf and any person in receipt of confidential and/or privileged information arising out of, or in connection with, the Mediation agree to be bound by clauses 11 to 14 of this agreement.[7]"

7. Thus, absent judicial recognition of a separate mediation privilege in its own right, the parties agree a contractual privilege which one hopes would prevent the disclosure of what was said in or produced at or for a mediation. The advantage of a privilege is that it is permanent unless a party decides to waive its own privilege or if by reason of a recognised disqualifying action the privilege is never acquired. It is well recognised that confidentiality is not an effective bar to disclosure in many circumstances, and most practitioners use the term 'Mediation Privilege' in all their correspondence with each other when discussing mediation.

8. At the beginning of each mediation, my invariable practice is to inform the parties that the whole process is privileged as far as I am concerned and that "nothing that anyone says; no figures agreed, arguments accepted or points conceded can be used outside the mediation, if the parties fail to achieve a settlement and you end up in court or an arbitration, without everyone else's written consent." However, every time I say it, I have my fingers firmly crossed, in case any bright lawyer asks: can the court order such matters to be disclosed? If they do ask, I

[7] Independent Mediators Limited standard Mediation Agreement

have difficulty in giving a clear unequivocal answer because of the uncertainty in the current state of the law in England and Wales. The uncertainty has been expressed in many cases but was clearly adumbrated by L. Samuels QC sitting as a Deputy High Court Judge in ***Re E (A Child) (Mediation Privilege)***[8]***:***

> *"[t]here is some complexity to this area of law. There is also overlapping terminology through the use of phrases such as 'mediation privilege', 'the without prejudice rule' and 'confidentiality', which appear on occasions to be used interchangeably but can refer to different legal principles."*

9. The current drive from the MoJ and the Courts to order even unwilling parties to mediate, and the introduction of compulsory free mediation of small claims up to £10,000 increases the urgent necessity to clarify the position and accept the call by commerce, lawyers and mediators for a separate mediation privilege The difficulty is partly caused by the absence of a common definition of 'mediation' and 'Mediator':

Definitions of Mediation in England and Wales.

10. The London Chamber of Arbitration and Mediation defines Mediation as:

> *"a flexible and confidential process used to settle a dispute between two or more parties. It involves appointing an independent and impartial third person as a 'mediator', to help the parties talk through the issues, negotiate, and seek to come to a mutually agreeable solution."*

11. At present, the only formal definitions of mediation within the English legislative framework are located in the CPR and the Family Procedure Rules (FPR), both of which are statutory instruments rather than primary legislation (Acts of Parliament).
    a. The Family Law Act 1996 – Section 13 (Mediation Definition Context): defines mediation in this context as:

> *'Mediation' means mediation to which Part IIIA of this Act applies; and includes steps taken by a mediator in any case—(a) in*

[8] [2020] EWHC 3379 (Fam) at [19],

determining whether to embark on mediation; (b) in preparing for mediation;

b. CPR – Practice Direction Pre-Action Conduct (Para. 10(a)):

"Mediation, a third party facilitating a resolution"

c. FPR Practice Direction 3A: A mediator is *"a qualified independent facilitator"* who discusses NCDR options

d. CPR – Practice Direction Pre-Action Conduct

(Para. 10(a)): "Mediation, a third party facilitating a resolution"

e. Government Guidance (GOV.UK):

"A mediator is a neutral third party who will attempt to facilitate negotiation by the parties of an agreed settlement."

f. Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): Section 8(2)(b): "legal services"

"The services described in subsection (1) include, in particular, advice and assistance in the form of—(b) mediation and other forms of dispute resolution."

<u>Suggested Definition of Mediation</u>

12. The European Code of Conduct for Mediators

"For the purposes of the Code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter "the mediator" - to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State."

13. For the purposes of identifying Mediation Privilege I suggest that the following are the basic necessities for a definition of Mediation. A process by which parties in dispute, contract in writing to appoint a neutral third party to act as Mediator to help them to a resolution in accordance with the terms of the written contract. The written contract must contain all the requirements of neutrality, impartiality and independence. Moreover, any settlement must be in writing and signed by all disputants.

Existing Protection for Mediation

14. The common law countries are divided in their approach as to what protection the courts will give to mediation in this respect. There are two distinct views: some jurisdictions consider that mediation is 'no more than assisted without prejudice negotiations' while others consider that mediation has an entirely separate privilege of its own. In the former case, the courts have therefore regarded meditation privilege/confidentiality as subject to all the usual challenges with which we are familiar, and some of which are examined below. In the latter case, some jurisdictions regard the mediation privilege as absolute and will not admit any evidence at all of what transpired in a mediation, while others, although recognising the privilege, permit the courts to admit evidence *'in the interests of justice*'.

15. This dichotomy is troubling, and as a recognised mediation centre for resolution of international disputes between parties from different states with different legal systems and laws, mediators in this country regard a uniform approach as essential. At the time of Halsey few judges had actual experience of mediation either as advocate or as mediator. This has changed over the twenty or so years during which the increasingly widespread use of mediation, and the greater judicial encouragement to mediate rather than litigate, has raised judicial awareness and understanding of mediation. However, now that the Courts' powers have progressed from encouragement with costs penalties for unreasonable refusal to mediate to actual power to order unwilling parties to mediate, it is imperative that the whole question of mediation confidentiality/privilege be seriously reviewed and a uniform approach agreed to avoid damaging mediation as an efficient, effective and altogether more beneficial resolution process for most disputes.

16. A review of the leading decided cases on the question in England and Wales may assist those unfamiliar with the development of the Courts' current approach to

mediation privilege and support the plea of this lecture for an unequivocal judicial recognition of a distinct mediation privilege.

17. Later in this lecture there are references to the protection given to mediation in other Jurisdictions.

Development of the Law on Without Prejudice Negotiations applying to Mediation

Unilever plc v Proctor and Gamble[9]

18. This is one of the leading cases on the court's approach to the admission of statements made in without prejudice negotiations in subsequent litigation. The Plaintiff wished to use statements made in a without prejudice meeting to support an action to restrain threatened infringement of a patent on the basis of alleged threats made in that meeting. Laddie J's decision to strike out the proceedings as an abuse was upheld by the Court of Appeal. Walker LJ (as he then was) reviewed all the modern authorities and summarised the major principles as follows[10]:

    (1) When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible[11].

    (2) Evidence of negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence[12].

    (3) Even if there is no concluded compromise, a clear statement made by one party to negotiations on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel.[13]

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[9] [2000] 1 WLR 2436
[10] [page 2444 D to 2445 G]
[11] *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 W.L.R. 1378
[12] *Underwood v Cox* (1912) 4 D.L.R. 66
[13] See Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'. However, the court would only allow the exception to be applied in the clearest cases of abuse of a privileged situation.[14]

(5) Evidence of negotiations may be given (for instance on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence, albeit that the exception is limited to the fact that such letters had been written and the dates at which they were written.[15];

(6) Offers made expressly "without prejudice save as to costs" are by their very nature open for scrutiny by the court on the question of costs.

17. Of particular importance to the question of mediation privilege are the observations of Robert Walker LJ[16] where he reiterated that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. The modern approach is to protect admissions against interest made in without prejudice negotiations, but:-

> *"to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties "to speak freely about all the issues in litigation both factual and legal when seeking a compromise and, for the purpose of establishing a compromise, admitting certain facts"* [17]

Halsey v. Milton Keynes General NHS Trust.[18]

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[14] *Forster v Friedland* C.A. (Civil Division) Transcript No. 205 of 1993

[15] *Walker v Wilsher* 23 Q.B.D. 335

[16] at page 2448H to 2449B

[17] quoting Lord Griffiths in ***Rush v Tomkins*** [1989] A.C. 1280 at 1300

[18] [2004] 1 W.L.R. 3002

19. A seminal decision of the Court of Appeal, principally concerned with the costs sanction on parties which unreasonably refuse to mediate, but which also re-establishes the importance the Courts give to encouraging the use of mediation to resolve their disputes. Of particular relevance to the issue of confidentiality in mediation are the observations of Dyson LJ (as he then was):

> *"We make it clear that it was common ground at the outset (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the mediation process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."*[19]

Reed Executive plc v. Reed Business Information Ltd [20]

20. This was an attempt to use the decision in Halsey to persuade the Court to look at without prejudice correspondence to establish a claim for costs on the basis that one party had unreasonably refused to mediate. The Court of Appeal rejected any suggestion that ***Halsey*** had changed the law as set out in ***Walker v Wilsher*** [21], and, in referring to the passage at paragraph 14 of that judgment, Jacob LJ reaffirmed the principle that the protection given to without prejudice negotiations will not be removed by the court save in exceptional circumstances.

Savings & Investment Bank Ltd (in liquidation) v. Fincken [22]

21. This was a successful appeal against the decision of Patten J to allow a party to amend its pleadings to plead a specific admission made in a without prejudice meeting that an affidavit sworn by one of the parties contained an untruth. The principal issue was whether or not the court would allow the privilege to be removed on the basis of unambiguous impropriety. Once more the Court of Appeal reviewed the authorities, and concluded that there was nothing in the

[19] [2004]1 WLR 3002 paragraph 14
[20] [2004]1 WLR 3026

[21] (1889) 23 QBD 335
[22] [2004] 1 WLR 667

decided cases which supported the judge's decision at first instance, and made trenchant observations about the dangers of too legalistic an approach to without prejudice negotiations, before weighing up the two conflicting principles and deciding that the public interest in favour of the protection of privilege was to be preserved. Of particular relevance to the question at issue are the observations of Rix LJ[23]:-

> *"A litigant understands in general that he may make admissions for the purposes of settling litigation under the protection of privilege if the negotiations fail. He may go into such a meeting without legal advisors, indeed very often such meetings have better prospects of success if the principals to the dispute meet alone. If the case against him is one of fraud or dishonesty, or if he has made an incautious affidavit in the past whatever the nature of the case against him, he moves into a situation of peril at the point at which he is most candid. There may be no one present to warn him that the privilege with which the meeting began is in the process of being lost, or of the danger of self-incrimination. In such circumstances, cases of fraud or dishonesty become almost impossible to settle. So..... (a litigant) .....in an analogous position to (Mr Fincken) would be conscious that he might never be able to achieve finality without exposing his own faults. Alternatively, the less scrupulous who make no admissions are better served by the very rules which are designed to encourage frank exchanges than are the more candid. Moreover, the well-advised litigant will be told that if he makes his admission in a hypothetical form, contingent upon settlement, then, as Ms Gloster herself accepted, the privilege cannot be lost. This is a recipe for legalism and has the danger of turning the without prejudice meeting into a potential trap and one which may moreover be exploited by litigants who do not enter into such discussions altogether in good faith."*

Venture Investment Placement Ltd v. Hall [24]

22. The Court granted an injunction against disclosure of the contents of a without prejudice discussion and Judge Reid QC rightly observed[25] :

> *"Mediation proceedings do have to be guarded with great care. The whole point of mediation proceedings is that parties can be frank and open with*

[23] at paragraphs 56-57, 59
[24] [2005] EWHC 1227 (Ch)
[25] Paragraph 11

each other, and that what is revealed in the course of mediation proceedings is not to be used for or against either party in the litigation, if mediation proceedings fail".

23. Thus far, mediation confidentiality seemed secure, and mediators and parties alike worked on the basis that the common law would protect the confidential nature of the interchanges between the parties and the mediator. Then the world changed…

Challenges to Mediation Privilege

24. From 2007, there were a series of cases in which parties sought, successfully, to introduce evidence of what had been done or said in mediation in support of a variety of applications. Some sought to establish that an agreement had been reached other than in the form prescribed in the mediation agreement which the parties had signed; others to set aside an agreement on the grounds of an alleged impropriety, and, in one bizarre case, to support a claim for the recovery of costs of a mediation on the grounds of the other party's unreasonable behaviour in the mediation. The trend has been to follow the 'assisted without prejudice negotiations' line and admit the evidence either where the parties have themselves waived their privilege, or where the court has been persuaded that the evidence was admissible under one of the exceptions adumbrated by Walker LJ in ***Unilever plc v Proctor and Gamble***.

Brown v Patel [26]

25. **The facts:** At a time when she was subject to an Individual Voluntary Arrangement, Mrs Rice purported to sell a property to Mrs Patel for £250,000 but omitted to tell her IVA Supervisor. As a result, she was made bankrupt. Her trustee, Mr Brown, brought proceedings under s.339 of the Insolvency Act against Mrs Patel alleging that the sale to her was at an undervalue. Mrs Patel denied this, and a three-day trial was set. A mediation took place shortly before trial, for which

[26] [2007] EWHC 625 (Ch)

the parties signed a standard form ADR Group mediation agreement which provided (among other things) that:

(a) confidentiality would apply to statements and documents prepared for the mediation save those already disclosed in the litigation, and

(b) no settlement would be legally binding unless reduced to writing and signed by each party.

26. The judge decided to hear evidence about what happened at the later stages of the mediation, even though he recognised that he might later rule that it was inadmissible. He turned first to the without prejudice rule and exceptions to its effect. He described mediation as "*assisted without prejudice negotiation*", with no special privileged status. Although it was argued that some kind of special mediation privilege existed or was beginning to emerge, he found no extant authority for this, even though he saw that the need for such a privilege might arise for consideration in the future. On the basis that he regarded mediation as a without prejudice negotiation, he held that the exceptions to the without prejudice rule which allowed evidence to be admitted, also apply to mediation. Following the decisions in ***Muller v Linsley & Mortimer***[27] and ***Tomlin v Standard Telephones and Cables***[28]***,*** he found that a court can find and enforce a binding contract reached by means of without prejudice negotiations. Therefore, he concluded that he was required to consider events, documents and offers, otherwise without prejudice, in order to make such a ruling.

27. Among the many arguments which the judge rejected as reasons why he should not hear the evidence of what transpired in the mediation were the following: -

(a) Clause 1.4 of the mediation agreement expressly stated that no settlement was legally binding unless reduced to writing and signed by the parties. As this had not occurred, it followed that there had been no settlement, and it was thus otiose to receive evidence as to whether any

[27] [[1996] PNLR 74
[28] {1969] 1 W.L.R. 1378

agreement had been reached, as, unless it complied with the self-imposed formalities of the mediation process, no Court could find there to be an (otherwise) enforceable contract of settlement.

(b) The confidentiality provisions of the mediation agreement prevented the parties from giving evidence about what happened. However, as the court had rejected the first argument, the second ground for seeking to exclude enquiry into what had transpired, was effectively undermined, and it was conceded that this provision could not prevent an enquiry into whether a concluded agreement had been reached within what the Judge regarded as simply without prejudice negotiations.

28. The judge decided that although an offer had been 'left on the table' which had been accepted by the Trustee, the offer was not certain enough in its terms but also that the provisions of clause 1.4 were not met. He therefore concluded that the parties had agreed terms 'subject to contract'. He rejected the argument that, by agreeing to leave an offer open for acceptance, Mrs Patel had varied or waived the terms of Clause 1.4.

29. Vitally, for the sanity of most mediators, and their insurers, the Judge accepted the argument of the Intervener that offers were frequently found left open at this stage, so that a valid offer and acceptance the next day would still be bound by the mediation agreement as a settlement reached in the mediation. Thus, as the provisions of Clause 1.4 had not been complied with there was no binding agreement! It is standard training for mediators that if offers are to be left on the table for a limited period of time, the mediator should adjourn the mediation so that the contractual process is agreed to be continuing and further advise the parties that any communication between them concerning the potential settlement is marked 'mediation privilege and subject to contract' to avoid the situation in this case reoccurring.

30. In ***Cattley v Pollard*** [29] the solicitors who acted for a party in a mediation were ordered to give disclosure of their mediation file, on the basis that it was relevant to damages issues in subsequent proceedings. With the greatest respect to Master Bragge, it was an entirely unnecessary intrusion into the mediation in which the applicant was not a party. The issue was whether or not in separate proceedings against her, the Claimant was either seeking a double recovery because of a mediated settlement and/or estopped by reason of an election made by Claimant in the earlier action.

31. The brief facts illustrate the problem. Mr Pollard, a solicitor, misappropriated £317,000 from an estate his firm was administering as executors and trustees, of which £81,300 was used towards the purchase of a house in which subsequently Pollard and his secretary (whom he married) lived. The house was conveyed into her sole name. By an action begun in 2003, the beneficiaries claimed against Pollard and his innocent former partners. Mrs Pollard was added as a 12th Defendant. Insurers acted for the innocent partners and the action was successfully mediated by Tony Willis[30], Mrs Pollard was not a party to the mediation. In a second action begun in 2005, the beneficiaries sought damages against Mrs Pollard for dishonest assistance and tracing. She sought disclosure of the mediation file of the solicitors who acted for the innocent partners, on the basis that she needed them to make good her case that the Claimants had elected to sue for damages in respect of the misappropriation and could not reaffirm the breach of trust in a tracing action, and further that the Claimants could not make a double recovery. After hearing preliminary argument, Master Bragge ordered disclosure of the mediation file but invited the mediator to make any representations he thought fit. Tony Willis wrote a letter to the Master setting out the view that the papers generated for a mediation were privileged and asking, pursuant to the permission given by the Master, for the Order to be rescinded. In reliance upon the decision of Hoffmann LJ (as then was) in ***Muller v Linsley &***

[29] [2007] Ch 353

[30] one of the leading mediators in the UK and nominated in 2016 by "Who's Who Legal" as Lawyer of the Year for mediation).

Mortimer [31], and subsequently affirmed by Lord Hoffmann (as he now is) in ***Bradford & Bingley v Rashid***[32] Master Bragge upheld the Order for disclosure. The ratio of these decisions was that there is a distinction between the fact of making a communication and the truth of it, and that as disclosure was being sought on the basis that Mrs Pollard needed to be able to establish the basis upon which the first claim had been settled in the mediation, she should not be prevented from establishing her claim by an assertion of privilege. An easier solution which would not have involved disclosure of the mediation file, would have been to ask the solicitors simply to attest to the fact that an election had not been made and identify the proportion of the settlement sum attributed to costs.

32. In ***The Seventh Earl of Malmesbury v Strutt and Parker*** [33] in which a claim for some £88 million attracted an award of just under £1 million, Jack J allowed the parties to adduce evidence of the offers which had been exchanged between them in the pre-action mediation before making his ruling on costs, which totalled some £5.4 million! His justification was:

> *"As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail because of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view, it is something which the court can and should take account of in the costs order in accordance with the principles considered in Halsey."*

33. The parties appealed the costs decision to the Court of Appeal, but that appeal was successfully mediated by one of my colleagues[34], thus sparing the parties the condemnation and disapproval of such an exercise expressed subsequently by senior judges. Happily, the precedent has not been followed in any subsequent case although it has not yet been overruled.

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[31] [1996] PNLR 74
[32] [2006] UKHL 37 AT [72]
[33] [2008] 5 Costs LR 736
[34] Nicholas Pryor founder member of Independent Mediators

34. ***Cumbria Waste Management v Baines Wilson*** [35], DEFRA were facing a series of claims arising out of the foot and mouth epidemic. They settled an early claim by Cumbria after two mediations. Dissatisfied with the amount of the DEFRA payment, Cumbria sued the solicitors who had drafted their original contract. Those solicitors sought disclosure of the mediation papers to demonstrate the reasonableness of the settlement reached. Inevitably they relied on ***Muller*** to overcome DEFRA's assertion of without prejudice mediation privilege. But the Judge concluded that the truth or falsity of statements made in the mediation *would* be at issue in the claim against the solicitors. DEFRA successfully objected that statements made at the mediation could, once revealed, effectively be used as admissions in the upcoming claims by other similar companies. The solicitors could not bring themselves within the ***Muller*** exception to the without prejudice rule and disclosure was declined. After reviewing all the authorities, HH Judge Frances Kirkham (herself a trained mediator) recited an extract from **Confidentiality** [36]:

> *"Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf Reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice 'rule set out above* [37]*."*

and concluded that

> *"in my judgment, whether on the basis of the without prejudice rule or as an exception that confidentiality is not a bar to disclosure, the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation."*[38]

[35] 2008 EWHC 786 ADJ.L. R 04/16
[36] Toulson and Phipps 2006 17.016
[37] Paragraph 17-015
[38] Paragraph 30

35. The whole mediation community in the UK applauded her decision until Farm Assist was decided by one of her colleagues in the Technology and Construction Court.

36. ***Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural affairs (No. 2)*** [39] the Court refused an application by a mediator to set aside a witness summons requiring her to attend court to give evidence as to what transpired in a mediation she conducted some six years previously.

37. **The facts**, briefly stated, are these: Farm Assist brought an action against DEFRA which was successfully mediated. Farm Assist went into liquidation and the liquidator sold the right of action to Ruttle Plant Hire. An action was brought by Ruttle to set aside the settlement agreement on the grounds that it was entered into under economic duress, and other complaints. After various procedural difficulties, which were set out in the first judgment, ***Ruttle Plant Hire –v- The Secretary of State for the Environment and Rural Affairs***[40], Ruttle abandoned its attempt to pursue the action and this second action was brought by the liquidator. DEFRA sought and obtained a witness summons requiring the mediator to give evidence. The Order expressly gave the mediator liberty to apply.

38. A joint request to the mediator enclosing the Order evoked a response with which most busy mediators would sympathise:

> *"You will appreciate that this mediation occurred many years ago and in the intervening period I have conducted up to 50 further mediations per year. I therefore have very little factual recollection of the mediation. Further, having retrieved my file from archive I find that whilst it has a certain amount of administrative correspondence on it, together with a copy of the original Mediation Agreement and copies of the Position Statements (and is accompanied by a small lever arch file of papers), I have no personal notes on the file. This is unsurprising given that this was a mediation that settled on the day.*

[39] [2009] EWHC 1102 (TCC)
[40] [2007] EWHC 2870 (TCC)

Accordingly, I genuinely believe that, even were it appropriate for me to become involved in this matter again, there is little I can do to assist either side."

39. Notwithstanding the mediator's perfectly understandable response, her application to set aside the witness summons was refused. The Court concluded that the interests of justice required her to give evidence, basically for five reasons[41]:

    a. The allegations that the settlement agreement was entered into under economic duress concern what was said and done in the mediation and this necessarily involves evidence of what Farm Assist alleges was said and done by the Mediator. This evidence forms a central part of Farm Assist's case and the Mediator's evidence is necessary for the Court properly to determine what was said and done.
    b. Although the Mediator has said clearly that she has no recollection of the mediation, this does not prevent her from giving evidence, frequently memories are jogged and recollections come to mind when documents are shown to witnesses and they are cross examined. Further, provided that the summons is issued bona fide to obtain such evidence, as a general rule, it will not be set aside because the witness says they cannot recall matters: See R v Baines [42]
    c. Calling the Mediator to give this evidence would not be contrary to the express terms of the mediation agreement which limited her appearance to being a witness in proceedings concerning the underlying dispute, because the Court in the instant case was dealing with a different dispute.
    d. The parties have waived any without prejudice privilege in the mediation which, being their privilege, they are entitled to do.
    e. Finally, whilst the Mediator has a right to rely on the confidentiality provision in the Mediation Agreement, this is a case where, as an

[41] Paragraph 53 of the judgment
[42] [1909] 1 KB 258 at 262 per Walton J

exception, the interests of justice lie strongly in favour of evidence being given of what was said and done.

40. Ramsey J's judgment was an important addition to the growing case law on the exact legal status of mediation privilege. It was not regarded as more than persuasive authority as the parties settled the case before it was delivered and it has not been tested in the Court of Appeal. However, the decision has been referred to in several subsequent cases both in this jurisdiction and in other Common Law jurisdictions and its careful analysis is worth studying, particularly as the learned judge was a trained mediator himself.

41. Having analysed the mediation agreement, which was in a form fairly standard at the time, the learned Judge made the following findings. He approved of the same two passages in ***Confidentiality*** to which HH Judge Frances Kirkham had referred in ***Cumbria Waste Management*** and concluded that the privilege was that of the parties and not the mediator and thus the parties were at liberty to waive their privilege regardless of the mediator's position.

42. However, Ramsey J did find that the mediator has a right to confidentiality which the parties themselves cannot unilaterally override. This right, he concluded, was not solely dependent upon the terms of the mediation agreement but also founded upon general principles which he derived again from Toulson and Phipps (paragraph 15-16) and the decision of Bingham MR (as he then was) in ***Re D (Minors) (Conciliation: Disclosure of Information)*** [43]. Further, based upon the observations of the Master of the Rolls as to the Court's need to exercise a discretion to hear evidence which would otherwise be protected by privilege where the statement "*is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well-being of a child"*[44] Ramsey J concluded that this *"lends support for the existence of exceptions which permit use or disclosure of privileged communications or information outside the*

[43] [1993] Fam 231
[44] Re D page 240

conciliation where, after balancing the various interests, it is in the interests of justice that the communications or information should be used or disclosed" 45.

43. While acknowledging that in Re D the court was clearly dealing with a different position, Ramsey J appears to have ignored the three express reservations which the Master of the Rolls made, namely:
    a. The decision was solely concerned with the welfare of children.
    b. The decision was only concerned with privilege *"properly so called…and has nothing to do with duties of confidence and does not seek to define the circumstances in which a duty of confidence may be superseded by other public interest considerations"*
    c. The Court of Appeal *"deliberately stated the law in terms appropriate to cover this case and no other. We have not thought it desirable to attempt any more general statement. If and when cases arise not covered by this ruling, they will have to be decided in the light of their own special circumstances"*.

44. Ramsey J also referred at length to the decision of HH Judge Frances Kirkham in ***Cumbria Waste Management v. Baines Wilson***, but he did not refer to her unequivocal decision that the mediator should not be required to give evidence of what transpired in a mediation. It is perhaps ironic that the other party to the mediation in that case was, as in Farm Assist, DEFRA, which was vigorously resisting the application to reveal what happened in that mediation. It demonstrates perhaps the adage that a party only wishes to break the rules if it perceives an advantage for itself in so doing!

45. Having analysed all the relevant authorities Ramsey J came to the following conclusions:

[45] Farm Assist paragraph 27

(1) "Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

(2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

(3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

46. These are important statements of the law in respect of mediation. It is questionable whether the conclusion that there is no mediator privilege in the process is right. Many jurisdictions, which have developed a mediation jurisprudence over several decades, recognise and enforce mediation privilege both in the process itself and that of the mediator. Moreover, the decision to order the witness summons potentially runs counter to Article 7 of the EU Directive on Mediation[46] (and does not fall within its express exceptions).

47. ***Mrs AB and Mr AB v CD Limited*** [47] Edwards-Stuart J heard an application for a declaration that a dispute had been settled by an oral agreement arrived at after a mediation. The case was a claim for damages for professional negligence against an architect, which the parties agreed should be mediated. At the end of the day, the Claimants made an offer to settle which the Defendant said it was unable to respond to without making further enquiries. The mediator informed the Claimants of the Defendant's position and stated that there was no more to be

[46] Directive 2008/52/EC of the European Parliament and of the Council
[47] [2013]EWHC 1376 (TCC)

done that day. There were subsequent exchanges and messages between the parties' respective solicitors which were copied to the mediator; and the mediator held telephone conversations with the parties himself. The Defendant's solicitors had forwarded correspondence to the mediator on the basis that "we would prefer you to be kept in the loop". Subsequently an offer to settle was made by the Claimants in a letter marked 'without prejudice save as to costs' and the mediator was asked to communicate that to the Defendant. Further exchanges took place between the parties via the mediator, who wrote in one e-mail to the Claimants' solicitors:

> *"Both parties have said that their offers are final. To state the obvious, over the next week or so, costs will start to escalate. I am happy for either party to continue to use my services as required if there is any possibility of reaching a settlement. I await your response to the Defendants' latest offer."*

48. The mediator was summoned to give evidence albeit limited to what was said at the end of the mediation and what was said to him and by him in the course of the telephone calls he had with both parties on the final day of telephone exchanges which resulted in what the Claimants asserted was a binding agreement. The mediator was cross examined about those conversations and the upshot was a conclusion by the judge that the mediator was no longer acting as a mediator but simply as a 'go-between on an ad hoc basis'. The terms of the Mediation Agreement were also interpreted by the Judge as having the effect that *"the mediation process will normally end at the conclusion of the hearing……unless the parties agreed expressly or impliedly that (it) should continue beyond the conclusion of the hearing if the dispute has not settled."*

49. With great respect to the judge, those observations suggest that the judge equated mediation with a court hearing (which it is not) and failed to comprehend that mediation is a process and not a period of time. This is recognised by the EU Directive's use of the phrase 'mediation process' to encompass all that passes between the parties once they have engaged in a mediation. That would include

correspondence setting up the mediation, all that transpires between the parties and the mediator during the mediation and afterwards. It is increasingly the case that agreement is not actually reached during the mediation but, apart from the small number that go to trial, the parties conclude an agreement afterwards within a matter of days or months. If it is the intention to continue to explore settlement, it is common and good practice for the mediator to suggest that the mediation be adjourned to allow the negotiations to continue between the parties under the cloak of mediation privilege so that the situation which arose in ***Brown v Patel*** and ***Mr and Mrs AB and D Ltd*** is avoided, and the mediator's role, if he continues to be involved, is unequivocally that of mediator.

50. ***Ferster v Ferster***[48] was another appeal involving an application to amend a pleading to refer to statements made in mediation. Mrs Justice Rose allowed an application to add to an existing Petition under section 994 of the Companies Act 2006[49] the contents of a letter which she concluded was a clear attempt by two brothers to pressurize their other brother into paying them more for their shares under threat of committal proceedings for contempt of court, alleged perjury and likelihood of imprisonment and subsequent loss of livelihood due to the loss of his on-line gaming licence. The letter had been e-mailed to the brother's solicitors by the mediator at the request of the solicitors acting for the other two brothers. The Court accepted that it was sent in the context of a mediation and *"thus would be the subject of mediation/without prejudice privilege"*. However, the Court refused to set aside the order of Mrs Justice Rose and concurred with her decision that the threats amounted to *'unambiguous impropriety'* and fell within the exception listed by Walker LJ in ***Unilever Plc v Proctor & Gamble Co.*** The importance of this decision is that the Court of Appeal appears to be accepting that there is a 'mediation privilege' and reaffirms previous statements that it is only in the clearest of cases that the privilege will be lifted by the courts. The unusual feature in this case was that the 'threats' were not alleged to have procured a

[48] [2016] EWCA Civ 717
[49] The unfair prejudice provisions for minority shareholders

settlement agreement, but were made in the mediation calls to the mediator who passed them on.

51. There is also a very helpful clarification of the jurisprudence underpinning the decisions in ***Forster v Friedland*** and ***Savings Investment Bank Ltd v Fincken***.in paragraph 10 of the judgment Floyd LJ quoted at length from the passage in the judgment of Rix LJ which distinguished between an unequivocal admission and an unambiguous impropriety. Then on paragraph 11 of the judgment, Floyd LJ stated:

> *"..the critical question is whether the privileged occasion is itself abused. Although the test remains that of unambiguous impropriety, it may be easier to show that there is unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth."*

52. In practice and in the course of a mediation it is not unusual to encounter the less subtle and more aggressive advocate engaging in attempts to persuade the other party to accept a position by referring to the obvious consequences of not resolving the dispute and losing the subsequent court action. If a party succumbs to such hectoring threats and accepts the compromise offered, then in theory one can envisage an application to set aside the settlement on the grounds that the applicant's consent was vitiated by undue influence or oppression. However, in practice if a party is represented then one would expect that representation would shield their client from such actions and threats and advise their client not to accept. More importantly, a competent mediator would intervene and prevent that happening and if the aggressive party persisted the mediator always has the authority in the standard mediation agreement.

Oceanbulk Shipping SA v TMT Ltd [50]

53. The dispute related to a settlement agreement for payments due under various forward freight agreements, specifically how a provision within the settlement agreement should be construed. Lord Clarke JSC acknowledges that the without

[50] [2011] 1 AC 662

prejudice rule has developed and has a much wider scope to exclude (with exceptions) "*all negotiations genuinely aimed at settlement whether oral or in writing from being in evidence*" (at [23], quoting Lord Griffiths in ***Rush v Tomkins***[51] and the Supreme Court found there was an exception to the without prejudice rule in disputes of contractual interpretation and rectification, summarised as follows:

a. Lord Clarke at [45]: *"evidence of what was said or written in the course of without prejudice negotiations should in principle be admissible, both when the court is considering a plea of rectification based on an alleged common understanding during the negotiations and when the court is considering a submission that the factual matrix relevant to the true construction of a settlement agreement includes evidence of an objective fact communicated in the course of such negotiations", such that "the interpretation exception should be recognised as an exception to the without prejudice rule"* (at [46])

b. Lord Phillips at [48]: *"When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted "without prejudice". This principle applies both in the case of a contract that results from the without prejudice negotiations and in the case of any other subsequent contract concluded between the same parties."*

54. While mediation itself is not specifically referenced, the definition of the rule implicitly would embrace mediation privilege, and in subsequent decisions, this exception was relied upon to persuade the court to allow what was said in mediation to be adduced in evidence.

[51] [1989] AC 12)80

***Savings Advice Limited & Anor v EDF Energy Customers Plc*[52]**

55. The case concerned whether information about a party's costs which was provided for the purpose of mediation could be admissible in a costs hearing. Master Haworth ultimately ruled that such information was admissible as they were "*statements of facts [which] can be separated out from documents or other information that comes into the domain of either party for the purposes of negotiating a settlement of the substantive claim*" (at [30]).

56. Master Haworth did not distinguish between a without prejudice/mediation privilege but went further to provide for an apparently new exception to the exception provided in ***Unilever*** that mediation offers can be evaluated on the questions of costs when it is expressly made 'WPSATC'[53] He stated at [29]:

> *"In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent's costs. The amount of the costs of litigation conditions any subsequent negotiations or mediation that may follow. Documents that are brought into existence for the purpose of a mediation or settlement in order to settle the substantive claim should in my judgment be treated as inadmissible in any subsequent litigation in accordance with the judgment of Ramsey J in Farm. It seems to me that "without prejudice privilege" exists to protect the disclosure of admissions or concessions made in negotiations, not to protect statements of pure fact."*

57. Such a distinction has been rejected in previous cases on the basis that requiring parties to a negotiation to constantly analyse whether they are making admissions or factual statements would undermine the privilege's purpose of enabling parties to speak freely in settlement. It demonstrates the importance of a clear rule which is available if the courts recognise that there is a distinct mediation privilege, which protects all the communications between the parties and the mediator from disclosure.

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[52] [2017] EWHC B1 (Costs)
[53] Without Prejudice Save As To Costs

Re D (A Child) (Hague Convention: Mediation) [54]

58. This was an application for a child to be returned to their mother in the US from England, where the child was currently residing with the father. Even if there was not a completely distinct form of general mediation privilege, there exists a distinct form of mediation privilege in relation to child arrangements which extends beyond the general rule. At [8], Williams J observed:

> *"I would say that I consider there is a strong argument for holding that mediation in the context of 1980 Hague Convention proceedings, with the international dimension that it contains, with the peculiar intensity of the post-abduction environment, and where the cloak of confidentiality arises not simply from inference but from express terms, will not necessarily attract the Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436 exceptions but rather would be immune from disclosure in all circumstances, save for those identified in Re D (Minors) (Conciliation: Privilege) [1993] 1 FLR 932, CA and accepted within the mediation framework itself, namely disclosure might be justified where there was a risk of significant harm to a child. Insofar as I can, in this limited context, I would want to reassure mediators that the cloak of confidentiality remains as securely fastened as ever it was."*

59. Williams J observed at [7] that *"[i]f experienced mediators become unwilling to mediate because, even when within a written agreement, they might be called to give evidence, they may cease to mediate. That would be a huge loss."* If mediation confidentiality and privilege did not exist and is construed as part of the broader WP rule (which has less strict protections around what material may be admissible in court), this is a risk that would be run.

Re E (A Child) (Mediation Privilege)[55]

[54] [2017] EWHC 3363 (Fam)

[55] [2020] EWHC 3379 (Fam)

60. This was another case by a mother applying for a child to be returned to the US from England, where the child was currently residing with the father. The parents attempted to mediate on child arrangements and reached a detailed parenting plan. However, the father later alleged that the mother breached the agreed plan and attempted to unilaterally substitute it with a new plan. The issue turned on whether a new agreement had been reached. As noted above, the case recognised that 'mediation privilege' is a legally distinct concept in principle. This is particularly highlighted at [35], where L. Samuels KC refused the father's application for the disclosure of the mediator's notes and his reliance upon the fact that the mediator herself did not object to the disclosure of her notes but

> *"has agreed to provide them on the agreement of the parties or by order of the court. However, the stance taken by the mediator is of little or no relevance to the determination of the dispute between the parties. The 'without prejudice' nature of the discussions is as between them and only their waiver or consent could operate to remove the attached privilege."*

61. As a general comment relevant to this lecture, the Judge observed [35], that

> *"[p]arties must be free to discuss candidly all options for settlement and 'think the unthinkable' without fearing that their words will be used against them in any subsequent litigation. Mediators must be free to perform their valuable role without fearing they will be dragged into that litigation either by court orders for provision of their notes or to be called to give evidence for one parent and against the other. Otherwise, to paraphrase Lord Bingham MR, the mediation process is likely to fail."*

***Berkeley Square Holdings Limited & Ors v Lancer Property Asset Management Ltd & Ors*[56]**

62. This was an appeal against the refusal to strike out parts of the Defence which relied on statements made in position papers exchanged between the parties for a mediation. The underlying dispute concerned bonus payment entitlements for management of a property portfolio which the parties successfully mediated under the CEDR Model Mediation Agreement Clause 4 of which provided that

[56] [2021] EWCA Civ 551

"Every person involved in the mediation will keep confidential all information arising out of or in connection with the mediation (4.1)....and acknowledges that all such information passing between the Parties, the Mediator and /or CEDR Solve however communicated is agreed to be without prejudice to any party's legal position and may not be disclosed to any judge, arbitrator or other decision maker or other formal process, except where otherwise disclosable in law..(4.2)"

63. Proceedings were subsequently issued against one of the agent representatives for breach of fiduciary duty relying upon matters disclosed in the mediation which wrongfully caused settlement payments to be made (amongst other payments). The Court of Appeal held that evidence of mediation statements was admissible. In his judgment [at 36] David Richards LJ stated that that no exception to WP privilege applies in this case:

> *"it is not alleged that anything wrongful or actionable was said or done in the mediation. Instead, this is simply a case where the claimants' assertion of a lack of knowledge is said to be contradicted by the mediation statements. This is a commonplace occurrence which has never been held to justify an exception to the exclusionary rule."*

and at [75]:

> *"the use of words such as "central", "serious" and "fair" introduce value judgments, bringing it very close to saying that there is an exception to the without prejudice rule where justice requires it, an approach which has been disavowed by the English courts. This would make operation of the without prejudice rule uncertain generally, and unpredictable to participants in mediations and other without prejudice negotiations, thereby reducing the value and purpose of the rule"*

And, importantly at [38]

> *"However, since Clause 4.2 includes an exception for information "otherwise disclosable in law".....If an exception to the WP rule applies under the general law, that has an equivalent effect under the agreed mediation terms. Accordingly, the question whether anything said in the position papers is disclosable turns on the application of the WP rule at common law."*

64. Thus the question of mediation privilege was circumvented and the issue decided purely on WP principles.

Swiss Re Corporate Solutions Ltd v Sommer[57]

65. This was an employer's appeal against an ET decision that a letter headed "without prejudice and subject to contract" by solicitors was admissible in ET proceedings. The appeal was allowed and the letter was rendered inadmissible for the forthcoming merits hearing. While this did not involve mediation privilege, it does illustrate a conflation of mediation privilege and the WP rule by characterising ***Ferster*** as a case concerned with the scope of the WP rule. Bourne J distinguished ***Ferster*** on the basis of the impropriety of the threats made, as opposed to the nature and context in which those threats were made (mediation), suggesting that he views mediation/WP privilege as falling under the same broader rule.

66. At [50], Bourne J seems to conceive of one broader WP rule applying in different contexts of mediation and WP negotiations (as opposed to two, doctrinally independent rules) by referring to ***Ferster*** as a case concerned with applying the rules "*[i]n the context of a mediation*".

67. At [51], Bourne J continues *"[w]hat mattered in Ferster was the type of threat made. It is entirely normal for parties in negotiations to threaten to bring or continue legal proceedings against each other, for example."* By focusing on: (i) the nature of the threat as a justification for making an exception to admission, and; (2) describing the mediation as "*negotiations*" (despite expressly making reference to the mediation context just one paragraph ago), it continues to blur the boundaries between the two.

[57] [2022] EAT 78; [2022] 4 WLUK 395

68. In the original ET decision (referred to at [10] of the EAT judgment), the Employment Judge also appears to conflate mediation/WP privilege by characterising ***Fincken*** and ***Ferster*** as cases concerning exceptions to the WP rule, and not a distinct mediation privilege rule.

Bond v Webster[58]

69. The underlying dispute concerned a probate trial, but the issue in the case was whether certain witness statements could be admitted on the basis that they referenced without prejudice negotiations. On the facts, Master Bowles found that there was no improper conduct to allow for the references to be made under an exception to the WP rule and the witness statements had to be accordingly struck out, redacted, and re-served.

70. As with ***Sommer***, there was no express reference to mediation and/or mediation privilege but the discussions around the WP rule and the treatment of ***Ferster*** illustrate that mediation/WP prejudice are still considered to be the same rule by some members of the judiciary.

71. At [61], Master Bowles summarised ***Ferster*** as *"a case where the alleged impropriety was not in the making of admissions in a without prejudice situation which demonstrated that the case being advanced was perjured and where without prejudice privilege was being used as a cloak for perjury, but where the allegation was one of improper threat."*. Again, the mediation/WP privilege is conflated by the characterisation of the dispute as a WP situation.

72. At [63], Master Bowles held that *"the question for determination did not require any resolution of fact by the court but rather, […] an evaluation as to whether the threats in question unambiguously fell outside the ambit of what was 'permissible*

[58] [2024] EWHC 989 (Ch)

in settlement of hard fought commercial litigation'." By placing emphasis on the threats made and whether that fell into the exception to WP privilege and bypassing any mention of the mediation context (and consequently, all of the other protections normally accorded in mediation), it fails to recognise that there is something unique to mediation which extends beyond an 'assisted WP negotiation'.

David Edgerton Wedgwood v Reeta Hosein & Anor[59]

73. The underlying case relates to a will dispute, but the specific issue concerned the making of a Beddoe application which would normally involve consideration of WP/confidential mediation material (if applicable)

74. Master Marsh (sitting in retirement) did not address the issue of whether there was a stand-alone mediation privilege but hinted at a potential difference between *"the without prejudice privilege and confidentiality which cloaks a mediation"* At [16] Master Bowles said: *"parties to a Beddoe application should consider carefully the effect of both the without prejudice privilege and confidentiality which cloaks a mediation."* And at [17]:

> *"caution should be exercised before there is any encroachment upon the confidentiality of a mediation, which will be governed by the mediation agreement. It may be permissible, depending upon the express or implied terms of the agreement, to refer to offers made during the mediation; but even this cannot be taken for granted. Offers made outside of mediation can be referred to in the context of a Beddoe application but it does not necessarily follow that the court may be referred to offers that are made within the scope of the mediation agreement".*

75. At [18] Master Marsh drew an important distinction which is enlarged later in this lecture *"The parties to a Beddoe application will need to consider the contractual obligations they have entered carefully before referring to any aspect of the*

[59] [2024] EWHC 1836 (Ch)

mediation. Unless the agreement expressly permits a party to reveal, to a greater or lesser degree, confidential information relating to the mediation, it will be wise for consent to be sought from all parties to the agreement, including the mediator. The position is even more sensitive concerning information shared or discussions in open or private sessions during the mediation. It is doubtful whether it will ever be appropriate, even with full consent, to place such matters before the court."

Pentagon Food Group Ltd & Ors v B Cadman Ltd [60]

76. This case dealt with alleged misrepresentation and breach of a settlement agreement as a basis for an application to open up a mediation settlement. HHJ Tindal dealt specifically with the question of whether there was a different type of 'mediation privilege' beyond the general WP rule and rejected the existence of such a rule in English law, even post-*Churchill*:

77. The learned Judge observed [60]:

> *"This [Churchill and mandatory ADR] begs the question whether the undoubted enhanced importance of mediation and ADR generally justifies a more enhanced form of ' mediation privilege' beyond traditional 'without prejudice privilege' e.g. with narrower exceptions. The learned editors of Phipson are not convinced by that and I respectfully agree with them. The authorities do not - at least yet - support the view that ' mediation privilege' is distinct from 'without prejudice privilege'. Nevertheless, the contractual and formal context of mediation means that it is a particularly clear - certainly not now 'fuzzy' - example of 'without prejudice privilege', which can be enhanced by the parties' mediation contract and conduct by the imposition of superadded duties of confidentiality. These can even be raised by the mediator if they are called upon to give evidence, even if the parties both waive 'without prejudice privilege': Farm Assist v DEFRA [2009] EWHC 1102 (TCC)."*

[60] [2024] EWHC 2513 (Comm)

***Krishna Holdco Ltd v Gowrie Holdings Ltd & Ors*[61]**

78. The was an application in ongoing unfair prejudice proceedings, seeking disclosure of a signed board minute containing valuation reports which were prepared for and used in, *inter alia*, mediation between parties. Adam Johnson J recognised, in principle, that there was debate about whether WP privilege and mediation privilege were the same by acknowledging that one of the *parties "resist the claim for without prejudice privilege, or mediation privilege if that is a different thing"* at [8], but appeared to accept that the two may be the same by agreeing with the submission that the reports disclosed in mediation *"were disclosed only in the context of discussions which were plainly intended to be and in fact were without prejudice"*, at [12].

***Houssein & Ors v London Credit Ltd & Anor*[62]**

79. This is less central as an authority but provides an interesting glimpse into a contrasting view to the above, namely Richard Farnhill (sitting as a Deputy Judge of the Chancery Division) holding the view that mediation is separate from WP negotiations. The underlying dispute is complex, but the material issue was whether the parties made a new offer of repayment or varied their original offer, as this had attendant implications on when the commercial debt became due for repayment.

80. The parties had made various offers and counteroffers via a mediator and the claimant relied on one such communication to the mediator to argue that the parties had made an offer for repayment. In rejecting the submission, the learned Deputy Judge made some very pertinent observations at [104-105] and held that it was not an offer for payment on the basis that *"[n]ot only is this without prejudice, it is made via a mediator. One does not typically need to engage the*

[61] [2025] EWHC 341 (Ch)

[62] [2025] EWHC 2749 (Ch)

services of a mediator to repay a debt; the value that they add is in resolving disputes, not facilitating payments of undisputed sums. Moreover, by its terms the offer seeks to roll up a number of matters – "in full and final settlement" – and not just repayment. It is not an offer to repay an undisputed sum; it is an attempt to settle a dispute arising out of a debt."

81. This observation is very relevant to the question of mediation privilege, as it highlights the fact that a mediator brings a unique element to dispute resolution which distinguishes it from WP negotiations.

Why is Mediation distinguishable from WP Negotiations?

82. As everyone who is engaged in mediation knows, Mediation is distinguishable in three important respects from litigation. First a mediator does not make findings of fact or judgments of law to resolve a dispute: it is the parties themselves who decide the solution and agree the resolution. Unlike a judge, an arbitrator or a Tribunal Chair, a mediator can and does speak privately to the parties and their representatives and receives confidential statements before, during and sometimes after a mediation which are not shared with the other parties. This places the mediator in a unique position which is not recognised by the judicial description of mediation as "assisted WP negotiation", or a mediator as a "go-between". Lastly, although most mediators do not usually draft the settlement agreement, it is the mediator's responsibility to be satisfied that the parties understand its terms. Where parties are represented by lawyers or other advisers, a mediator will rely upon them to draft the settlement agreement in terms which fully reflect the parties' agreement and explain them to their client. However, if in private discussions with the parties the mediator has learned that one or either party is making assumptions based upon what the other party has said or represented in the course of the mediation, then a prudent mediator should make sure that the settlement agreement includes whatever representations,

warranties or undertakings are necessary to give effect to the factors which the mediator knows are the basis of the settlement.

83. The continuing confusion and uncertainty as to the exact nature of mediation and the privilege which the Law attaches to it, is in danger of reducing mediation to a mere 'tick box' exercise (as it is described in some jurisdictions) and undermining the real advantages which it gives to disputants.

84. Briggs J (as he then was) recognised the problem in two masterly articles for the New Law Journal in 2009[63]. He is in a unique position to understand what transpires in mediation, not least because his wife Beverly-Ann Rogers is one of the country's leading mediators! He rightly points out that confidentiality created by contract (eg an agreement to mediate) is unlikely to provide a shield against disclosure in English civil proceedings where the principle is that the public interest in determining disputes on the basis of all available evidence overrides the private interest of maintaining a purely contractually created confidentiality. Unsurprisingly, given his personal familiarity with the mediation process, he observes that:

> *"There is a widespread concern that if the confidentiality which surrounds the mediation process is limited to that conferred by the without prejudice principle, and if attempts to widen it by contract are likely to be ineffective, then mediation will lose one of its main attractions as a dispute resolution process."*

85. This sentiment is amply borne out by the overwhelming expressions of the international business community in the IMI Global Pound Conferences referred to above and in the preamble to the Singapore Convention which sets out the rationale for the WG II which drafted it. It is also an important issue which commercial communities in different jurisdictions attempt to address in a variety of ways which are discussed later in this paper. Moreover, it is invariably a matter raised by international organisations when considering mediation as a means of

[63] New Law Journal 3rd and 9th April 2009

resolving disputes particularly where there may be related litigation in progress or threatened in other jurisdictions.

86. In the second part of his article, Lord Briggs posited a solution to protect what he identifies as the 'special element' of mediation. Lord Briggs observed:

> . *"Looked at from the outside, (and in particular from the perspective of a judge called upon to determine a dispute previously made the subject of an unsuccessful mediation) the mediation process may appear to have little that is special about it, beyond the frank exchange of views between the parties which frequently occurs within without prejudice negotiations*

87. Having identified the unique and important part of the mediator's facilitative role he continues:

> *"Viewed from the inside however, the picture is rather different. True it is that the mediator will act as a conduit for the sharing of such information between the parties as is commonly shared in without prejudice negotiations (shared information). But an important part of the mediator's facilitative role is to encourage the parties to share with him or her information, views, hopes and fears about the dispute which the party communicating them does not wish the other party to know, and which the mediator agrees to keep secret from the other party (mediator secrets). By that process the mediator becomes uniquely appraised of aspects of the parties' attitudes to the dispute (such as, but by no means limited to, their respective bottom lines) which may enable him or her to promote a compromise route which would not occur to either of the parties, and which sufficiently meets their different (secret) concerns, to be able to form the basis of a durable settlement. The ability of a mediator to receive mediation secrets from the opposing parties without communicating them across the divide, and to use the knowledge thereby gained in assisting the parties towards a settlement, is unique to mediation as a dispute resolution process, and an important part of its success to date in sparing the parties the time, stress and enormous cost of pursuing their disputes to a judgment. Put in the language of legal professional privilege, it enables the parties separately to unburden themselves to the mediator, so as to receive assistance which would be otherwise unavailable to them".*

88. He rightly observes that none of the Courts which have adjudicated upon the various applications to enquire into what transpired in particular mediations has

identified this special element and, as a consequence, have approached mediation as merely "assisted without prejudice negotiation" and therefore subject to all the exceptions adumbrated by Robert Walker LJ in ***Unilever plc v Proctor & Gamble***. The failure to recognise and take account of this unique feature, inevitably means that those courts have also overlooked the real risk that once it becomes generally known that the English courts apply the same exceptions to the confidential nature of mediation, the disputants' willingness to share their 'mediation secrets' with the mediator will be impaired and ultimately may well undermine mediation as a means of resolving disputes in this jurisdiction. Lord Briggs' solution is to suggest that the Courts should recognise a distinct 'mediation secrets privilege' to protect the private discussions between the parties and the mediator. He suggests that it could easily be achieved by extending or adapting the non-status privilege identified by the Court of Appeal in ***Re D*** (supra). No statute would be required and, he argues, such a common law privilege would be limited to 'mediation secrets' and therefore would not prevent future intervention by the courts where necessary to ascertain whether or not a settlement agreement had been procured by misrepresentation, fraud, undue influence and all the other exceptions to the legal professional privilege which the courts accord to without prejudice negotiations.

89. Lord Briggs' intervention in the debate is very welcome as is his identification of some of the unique elements of mediation which the Courts have overlooked. However, with the greatest respect to him, I wonder whether the limited privilege he proposes goes far enough to ensure that the commercial community will continue to regard mediation as a better way of settling disputes unless one of its main attractions for them – confidentiality- is safeguarded. It is trite law that all disputants have a right to have their disputes adjudicated and decided by a court of law. Equally, for nearly three decades it has been commonplace for the English Courts to encourage parties to resolve their disputes by alternative means. It is enshrined in the Woolf civil procedure reforms ; ***Halsey*** established the condign penalties for unreasonably refusing to explore ADR before litigating; and now, after ***Churchill***, the court has the power to order even unwilling parties to mediate

before commencing litigation, and after litigation has begun: see ***DKH v City Football Club***[64] If parties choose or are ordered to resolve their disputes by mediation, they have a right to expect that the courts will safeguard them from any consequences of fully engaging in the mediation process. Nowadays parties engaging in mediation to resolve any civil or commercial dispute are invariably represented by lawyers and often experts as well. Quintessentially mediation settlements are fashioned by the parties themselves with the aid of their legal and professional teams. Training for mediation advocates normally instructs them to ascertain from their respective clients' essential elements which are matters which are 'red lines' for inclusion or exclusion in any settlement agreement and advises preparing a draft settlement agreement to guard against the 'midnight omission error'!

90. By sharing these private and often highly personal and private feelings and information, the party concerned is placing a large burden of trust upon the mediator. How the mediator uses that information is of course part of the skills which experienced mediators have acquired in the course of practice The mediator is trained in 'rephrasing' to adapt offers and suggested resolution elements so as present them to the other party in a way which his knowledge of that party's sentiments and wishes gained in the private discussions with that party, suggest is best likely to be received. Those private discussions also require the trust by both the party and the mediator that they too are protected by privilege and thus safe from disclosure in any subsequent litigation. Equally the experienced mediator will use that private knowledge to head off or address an approach by one party in plenary sessions which the mediator knows or suspects might derail the mediation. Every mediator has abundant examples of situations where an incautious remark made in ignorance of facts and matters which the other party has made known to the mediator has caused needless distress and set back discussion of resolution while the mediator is trying to repair the damage.

[64] [2024] EWCA3231 (Ch)

91. The need for court intervention to 'protect' parties who have been disadvantaged is more theoretical than practical. Experience suggests that the oft quoted examples for the need for court intervention in practice ought never to arise. Seeking to open up the mediation process to set aside a settlement agreement on the grounds that a misrepresentation by one party which induces the other party to enter a settlement is not a situation which ought to arise at all. Given that commercial entities are invariably represented, if a specific representation is relied upon it is for the lawyers representing the party relying upon such a representation to ensure that the representation is included in the settlement agreement so that if it is in fact false, the remedy is to sue upon the settlement contract either for damages or to set aside the settlement agreement. There is simply no need for there to be any judicial enquiry into the mediation process at all. Fraud of course naturally destroys any settlement if the innocent party chooses that course, but again, it is for the lawyers for the innocent party to ensure that properly drafted warranties, undertakings and statements are included in the settlement agreement so that the fraud is easily demonstrable without the need to delve into the mediation itself which led to the settlement. Recognising that a mediation privilege exists does not prevent a party suing for breach of the settlement agreement if it has been correctly drawn by the parties' lawyers, and, if fraud has been committed no privilege arises. Similarly, using mediation as a cloak to cover up crime or unlawful acts automatically results in that party not acquiring privilege. By the same token if a party brings an action against his lawyer or even the mediator for a breach of duty or contractual obligation, it is well recognised that the courts will not countenance raising privilege to prevent the other party from being able to refute the accusation.

92. Furthermore, it is a pre-requisite in standard mediation agreements that the process is non-binding unless and until an agreement is reduced to writing and signed by all parties. The difficulties which have been caused in the English Courts (eg in **Brown v Patel**); in Canada in ***Union Carbide Canada Inc and Dow***

Chemical v Bombardier Inc et al [65]; and in other common law jurisdictions, which allow parties to assert an oral contract in spite of agreement to mediate on the basis of a mediation agreement which specifies that any settlement to be binding must be in writing and signed by all parties, would be obviated if the common law courts held the parties to their agreement. The common law's recognition of such oral agreements is likely to come into conflict with the Singapore Convention developed to provide a worldwide mechanism of enforcing mediated settlement agreements of international commercial disputes. The overwhelming consensus of the 84 or so delegates and representative bodies which formed WGII, was that any settlement agreement must be in writing. If the quid pro quo for parties wishing to resolve their disputes for all the commercial reasons they do is that they must accept that a settlement agreement will not be enforced by any court unless it is in writing, then they and their lawyers will realise that applications to the court to investigate the mediation process to ascertain whether there was a concluded oral agreement which the other party disputes will be fruitless. This would also remove the perceived 'need' for the court to hold a watching brief over mediations to protect "fallible human beings" from the *"ordinary failings which lead to misrepresentation, fraud, duress, and undue influence, like any other contract making process."*[66]

93. To summarise; where a party seeks to rely upon warranties or representations which induced his agreement to a settlement, this should not be a question of setting aside mediation privilege but more a question for the lawyers representing parties in such situations to ensure that the settlement agreement itself contains all the necessary elements on which parties have relied in concluding the agreement. As already noted above, prudent and experienced Mediators will be well aware of the need in some circumstances to advise parties to include within the settlement agreement all facts and matters which were relevant to their decision to accept or enter into the compromise agreement. In those

[65] 2014 SCC 35
[66] Briggs LJ New Law Journal Part 2 9th April 2009

circumstances, it would be a simple matter of adducing evidence as to the truth or otherwise of those matters without the need for trawling through the mediation itself to adduce in evidence what was said. Such a course would also protect all parties in the mediation who may not be involved in the settlement agreement.

94. Similar principles apply where a party seeks to pursue an action against a Mediator. If the question is one of breach of confidence, for example where a Mediator may have, without authority, revealed to one party information about the other side's position, that would be a clear breach of the mediation contract between that party and the Mediator. It would not be necessary in those circumstances to waive the mediation privilege; it would be a simple question of fact of whether or not the Mediator did disclose the information and whether or not he was authorised to do so. Article 5 (1) (e) and (f) of the Singapore Convention does raise the possibility that a court requested not to enforce a settlement on one or other of the grounds set out might need to enquire into what transpired in the mediation. However, a careful examination of the wording of the Articles makes such a situation in the context of international commercial disputes as defined in the Convention highly unlikely[67].

Judicial approach to mediation Post Churchill

95. There is strong anecdotal evidence to suggest that mediation practitioners have a much rosier view on the unique benefits of mediation than some judges and litigators. In particular, mediators daily recognise the ability to confidentially shuttle between parties as unique to assisting settlement. Exploring with the individual parties their private positions can be crucial to understanding the economic and emotional drivers behind the dispute. That information is rarely apparent on paper in the correspondence between the parties' respective representatives or in the pleadings and would never be shared in a WP negotiation Judges often sense that there is something behind the issues they are trying but not shared with them, much as sometimes they would like to be privy to it.

[67] See **XXXXXX article by MK**

Mediators have the chance to understand individual needs and wishes which equips them to help parties to more creative solutions of their disputes which would not be available at the end of litigation. An additional and frequently seen consequence of a settlement is the patent relief of the individuals who are the real victims of a trial and the real beneficiaries of a settlement. Judicial pronouncements often give the impression that this essential benefit is not appreciated or disregarded when describing mediation.

96. However, even now after mediation has been a feature for over two decades, there are disparities in the judicial attitude towards mediation. Two post-*Churchill* cases illustrate the different judicial approaches and demonstrates how deeply some of these attitudes are ingrained, in spite of all the mediation training and case law available which supports the drive towards compulsory mediation.:

***DKH v City Football Group*[68]**

97. This was a trademark dispute relating to football kit branding. The judicial attitude towards mediation was largely positive, with Miles J adumbrating the benefits of time and costs-savings, breaking parties' entrenched views, *and "remove roadblocks to settlement"* even if parties appeared diametrically opposed [32]-[42] of judgment. Miles J listed the objections from the Defendant: the court should only exercise its powers where there was a realistic prospect of success which it was argued this was not; both parties wanted their position to be judicially determined because the Defendant wished to know once and for all whether it can place the Asahi branding on football kit and other clothing; all these issues needed to be determined and the was entitled to a judicial determination of that question; that the parties had already incurred several hundred thousands in costs and there had been statements that one party would not be prepared to allow the Superdry brand to be shown as the sponsor on any particular club's kit. The Claimants argued that the dispute was capable of resolution: it is not a

[68] [2024] EWHC 3231 (Ch)

particularly complicated one, and there are several variables in the dispute between the parties which might allow an out-of-court compromise (and which might not be available in a judgment of the court). These include agreement about the form and size of any logo or lettering on the relevant sports kit, payment of money, and the timing of any changes.

[41] *A mediation of this case will be short and sharp, and the documents needed for it would be brief.…*

[43] *I take account of all of the considerations identified by the parties. Overall I am satisfied that this is a case where I should order the parties to mediate with a view to seeking, if possible, to resolve the dispute between them and that it should take place during December 2024."*

98. The Law Report has a Postscript: "on 13 January 2025 the parties notified the court that they had settled their dispute."

Assensus Ltd v Wirsol Energy Ltd[69]

99. By contrast, Constable J took an unfavourable view of mediation's effectiveness. The dispute was over a claim for bonus payment for the development of a solar park. Constable J dismissed an application for a costs order for an alleged unreasonable refusal to mediate on the basis that: *"the parties' positions were polarised"* [6]; *"There was a large gulf between the parties"* [7]; and There was *"a significant gap in expectations"* [7] Constable J *"consider[s] it very unlikely indeed that ADR would have been successful"*, notwithstanding that attempting mediation and/or ADR would not have been disproportionately costly or caused prejudicial delays [7], and described the prospects of a successful outcome from mediation or other ADR was *"vanishingly small"* [8].

100. Unsurprisingly there has been much academic criticism of this decision, some writers expressing surprise that there was not a single mention of ***Churchill*** or the wholesale consequential changes in the CPR[70].

[69] [2025] EWHC 503 (KB)
[70] See CEDR Mediation Insights by Tony Allen 4th April 2025

101. These two cases can therefore illustrate the-continuing divide in judicial attitudes on the effectiveness of mediation, which undoubtedly colours their perception of mediation itself. All those who mediate propound the advantages of mediation over simple negotiation and their opinion is based on the actual experience of several thousand meditations of civil and commercial disputes. Recognising that mediation does have a distinct privilege which is distinguishable from WP negotiation privilege is a necessary step towards providing confidence in a process which can and often does encourage the parties themselves to fashion solutions and resolution of disputes which may only be capable of a narrow binary decision from a court, tribunal or arbitration. One final decision encompasses the issue for the justification for a separate privilege for mediation and aptly explains why describing it simply as 'assisted WP negotiation is quite inappropriate. The soubriquet misses the essential differences between the parties' ability with the guidance of an experienced mediator to achieve a holistic resolution of 'all issues' that may exist and not the narrow legal issues within which a court has to operate. One final decision succinctly describes the essential difference.

Merck KGAA v Merck Sharp & Dohme Corp [71]

102. This was a dispute over Merck trademarks, and the specific issue in this case was compliance with a judicial order, including whether Meade J should give any directions for a neutral evaluation or mediation. The Claimant had argued against mediation, to which Meade J responded at [13] that *"I have formed the clear impression that the Claimant is being far too restrictive about having mediation and far too pessimistic about the results that it might achieve.* ***Mediations often succeed exactly when without prejudice discussions have not; it is when they are most useful.*** *(emphasis added). I think it is foolish to rule out, in the context of this dispute, the possibility that one could bear fruit". In identifying why it was that mediation may be more successful, Meade J draws upon "[t]he experience of those who have attended mediations is that an explanation, moderated by an experienced mediator, of exactly such issues as whether something has been done on purpose, why it has caused upset, why it*

[71] [2022] EWHC 1246 (Ch)

has caused aggravation, is exactly the kind of setting in which a mediation can bear fruit" [14].

A Solution?

103. There are several potential solutions which have been introduced into different common law jurisdictions. At one end of the spectrum there is the 'blanket ban' enshrined in the California Evidence Code which provides a complete protection from disclosure for all and any communications in mediation, and which caused the California Supreme Court, when reversing the decision of the court of appeal in a malpractice suit by a party against her attorney to rule:

> *"all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants."*

104. However, the Court was clearly not happy with such an obviously unfair and (I suspect unjustifiable) consequence. Chin J, concurring but 'reluctantly' said:

> *"But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so. This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be*

immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point."

Unfortunately, a bill to achieve precisely that amendment to the Californian Statute was talked out, and thus the situation in California remains unchanged at present.

105. The other end of the spectrum is represented in the cases cited above in the English Courts. A similar (but not identical) approach has been adopted by Canada, Australia, New Zealand, Singapore and Hong Kong. As far as I am aware apart from New Zealand[72], and those States in the US who have enacted the Uniform Mediation Act, no other country has enacted a provision prohibiting the use of information exchanged in mediation from use in litigation. All those other jurisdictions have a Mediation Act, but the protection given to mediation confidentiality is not that of privilege but a WP negotiation privilege It seems to me that the common law jurisdictions which have not already done so, should accept that there is a real need for the recognition of a distinct mediation privilege.

106. The basic principle is easily stated:

> Once parties to a dispute have agreed to mediate their dispute nothing which is communicated in any form between the parties themselves and between them and the mediator before, during or after a mediation, and whether in private or joint meetings, in connection with the dispute may be used outside the mediation without the written consent of all the parties and the Mediator unless:

[72] New Zealand Evidence Act section 57

1. it is necessary to enforce or implement a concluded written agreement between the parties (but NOT to determine whether an agreement had been concluded in some other form);

2. it is necessary for overriding considerations of public policy of the Country where the settlement agreement is to be enforced, which should be limited to

   (i) protecting or securing the best interests of children or patients;

   (ii) to prevent harm to the physical or psychological integrity of a person;

   (iii) to prevent the commission of a crime;

   (iv) in the interests of national security;

3. it would be disclosable in any event in any court or arbitral proceeding.

107. There are other areas where those who oppose the creation of a distinct mediation privilege argue that there should be exceptions, namely:

1. where a party seeks to bring an action against his own lawyer in respect of advice given or conduct during a mediation;

2. where a party seeks to bring an action against the Mediator in respect of the Mediator's conduct of or in the mediation;

3. where a party enters into a settlement which he alleges was induced by fraud, misrepresentation or duress

108. As far as the first two of these particular instances are concerned, what is being overlooked is the position of the innocent party. If one party alleges that their lawyer was negligent in terms of advice given during the mediation process, how is justice served by dragging the other party or parties into a protracted examination of what went on in the mediation process on an application to set aside a settlement agreement. The other party or parties would be quite justified in resisting such a course not least on the grounds that what transpired between

the claimant party and their lawyer was nothing to do with them. What can they add to a judicial enquiry into what transpired between the complaining party and their lawyer? Why should they be involved at all? Who is to pay their costs?

109. All lawyers these days are only too familiar with actions being mounted against them by disgruntled clients. The Courts recognise that, with few exceptions, a party cannot hide behind his own lawyer client privilege when suing his lawyer and will be deemed to have waived that privilege. Similarly, if a party brings an action against his former lawyer in respect of advice given during or conduct of a mediation, it is unlikely that any court would permit that client to assert his own privilege in an attempt to prevent the lawyer adducing relevant evidence to enable the court to adjudicate upon the matter fairly.

110. If the action complains of matters that went on in the presence of a Mediator, that may make the Mediator a relevant witness but does not make them compellable. If it considered essential that a Mediator be called as a witness in such circumstance, the court must hear from the Mediator and take account of the Mediator's views as they too have a privilege which must be protected.

111. Similar principles would apply as regards a party seeking to pursue an action against a Mediator. If the question is one of breach of confidence, for example where a Mediator may have, without authority, revealed to one party information about the other side's position, which is a clear breach of the mediation contract between the party and the Mediator. It would not be necessary in those circumstances to waive the mediation privilege, it would be a simple question of fact of whether or not the Mediator did disclose the question and whether or not he was authorised to do so. The party complaining can simply sue the mediator for breach of contract claiming damages if any have been cause. All mediators registered with the Civil Mediation Council are obliged to carry sufficient insurance. If the allegation is of oppression or undue influence which vitiated the consent of the complaining party, how is it just that the other party or parties should have a settlement agreement set aside if they themselves entered

into it in good faith. The financial consequences to them could be punitive and beyond the scope of any award of damages or costs. Why did the complaining party's lawyers allow their client to enter into a settlement agreement in such circumstances? Thus again, in practice there is no real need to include an exception to the privilege as in each case neither the complaining party nor the mediator would be allowed to raise their own privilege as a defence.

112. Where a party seeks to rely upon warranties or representations which induced his agreement to a settlement, this should be for the lawyers representing parties in such situations to ensure that the settlement agreement itself contains all the necessary elements on which parties have relied in concluding the agreement. Experienced Mediators will be well familiar with the concept of advising parties to include within the settlement agreement all facts and matters which were relevant to their decision to accept or enter into the compromise agreement. In those circumstances, it would be a simple question of adducing evidence as to the truth or otherwise of those matters without the need for trawling through the mediation itself to adduce in evidence what was said.

113. If fraud is alleged, that defeats privilege in any event and would not need to be stated as part of the basic principle, but for the sake of clarity it could form part of the overriding considerations of public policy exception under the heading of criminal activity.

CONCLUSION

114. The importance of the subject question cannot be over emphasised. With global trade a feature of commercial activity everywhere, global disputes are a natural consequence. Global disputes require a uniform method of resolution. The incidence of mediation as a preferred means of resolving these disputes is increasing as corporate entities, as well as individuals realise the potential for savings in both cost and management time by resolving disputes rather than litigating them. This has also been given a boost by the adoption of the Singapore Convention which provides for enforcement of mediated international

commercial disputes in all the jurisdictions which have ratified it. Failure to protect mediation confidentiality effectively by leaving the current position as it is, could well undermine the provisions of the Singapore Convention.

115. It is incumbent upon the mediation community and the legal system to recognise that for commercial disputes a novel approach might be required to protect the privilege of the mediation process. It would require some surrender of rights for both entities. The courts would have to accept that its role in serving the public interest in determining disputes upon the basis of all available evidence might need to be limited. The commercial business community would need to recognise that by electing to have disputes resolved through mediation they too are surrendering certain rights. Few would argue that the extreme consequences stated in ***Wimsatt*** should be universally adopted, but I suspect that all parties would have to accept that once they entered into a settlement agreement, the available avenues for setting aside are limited. It would be a necessary condition of any such regime that settlement agreements need to be in writing and that all parties would need to be represented. There is clearly a debate to be had, but a solution must be found if the integrity of our legal system is to be preserved.