

# WITHOUT PREJUDICE PRIVILEGE, CONFIDENTIALITY AND MEDIATION:

*Cumbria Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB)

by

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## Without Prejudice privilege: reminder of general principles

### Definition

The without prejudice rule applies to exclude all negotiations, whether written or oral, genuinely aimed at settlement, from being given in evidence (*Rush & Tompkins Ltd v GLC* [1988] 3 All ER 737).

### Dual rationale

There is a dual rationale behind the existence of without prejudice privilege (*Cutts v Head* [1984] Ch 290). It exists:

- **For reasons of Public Policy**

*‘That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and*

*that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings...'*  
**Cutts v Head [1984] Ch 290**, per Oliver LJ.

- **On the basis of an express or implied contract between the parties** that their communications made in the course of settlement negotiations should not be admissible in evidence should negotiations prove unsuccessful. As Robert Walker LJ noted in **Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783** this enables the parties to agree expressly or impliedly to modify the effect of without prejudice privilege either by extending or limiting its reach. A classic example of this is the well-known concept of 'without prejudice save as to costs' (considered by the Court of Appeal in **Cutts v Head** (above), and in **Reed Executive plc v Reed Business Information Ltd [2004] 4 All ER 942**).

### **Test of substance not form**

- Marking a document 'without prejudice' is not conclusive as to its status.
- Similarly, without prejudice privilege may apply even if a document is not labeled 'without prejudice' (**Chocoladefabriken Lindt v Sprungli AG v Nestle Co Ltd [1987] RPC 287**).

### **Privilege of both parties**

Unlike legal professional privilege, without prejudice privilege belongs to both (or all) parties to the negotiations, and therefore in theory can only be waived by both parties.

### **Without prejudice privilege and mediation**

It is clear that the without prejudice rule generally extends to cover mediations. The rule is often bolstered in mediations by written mediation agreements which include express confidentiality provisions (**Aird v Prime Meridian Ltd [2006] EWCA Civ 1866**).

### **Exceptions**

There are a number of exceptions to the without prejudice rule, in the context of which without prejudice material will be admissible.

A summary of key exceptions was set out by Robert Walker LJ in **Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783**. Accordingly without prejudice material is admissible where the issue being considered by the court is:

- whether a concluded settlement agreement was in fact reached;
- whether an agreement apparently concluded by the parties during negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;

- whether, even where there is no concluded settlement, a clear statement made by one party to negotiations, on which the other party was intended to act and did in fact act, gives rise to an estoppel;
- one where the exclusion of without prejudice evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety';
- one which calls for the explanation of delay or apparent acquiescence, such as on an application to strike out for want of prosecution;
- following *Muller v Linsley* [1996] PNLR 74, whether a Claimant acted reasonably in mitigating his loss in his conduct and conclusion of a settlement in prior related proceedings;
- the appropriate costs award where negotiations have been conducted on a 'without prejudice save as to costs' basis;
- a hybrid species of privilege which concerns communications received in confidence with a view to matrimonial conciliation.

**Focus on Mitigation of Loss Exception:**

***Muller v Linsley & Mortimer* [1996] PNLR 74 and *Cumbria Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB)**

***Muller v Linsley & Mortimer* [1996] PNLR 74**

C, a director and shareholder of a company, brought a claim against D, a firm of solicitors, in professional negligence.

C alleged that that D had given C negligent advice in relation to a dispute with C's fellow shareholders and directors, which led to C suffering loss. C initially brought a claim against the company and his fellow shareholders, which was settled prior to trial.

C then brought his claim against D to recover his residual loss, and claimed that the issue and compromise of the earlier proceedings against the company had been a reasonable attempt to mitigate C's loss.

D denied that the compromise was reasonable, and sought production of without prejudice correspondence between C and the company leading up to settlement, which C was withholding.

**Held:**

Hoffmann LJ (with whom the other members of the court agreed) analyzed the law in the following way:

- that the only basis for the application of the without prejudice rule in a case such as this was for reasons of public policy. It could not be based on an implied

contract between the parties because D was not a party to the without prejudice correspondence.

- that the public policy rationale is only concerned with admissions and not with statements which are relevant otherwise than as admissions i.e. independently of the truth of the facts alleged to have been admitted. Without prejudice correspondence could therefore be admitted where its relevance lay in something other than proving the truth of the contents of the correspondence.

On this basis, he held that D's use of the without prejudice correspondence would be to show whether C acted reasonably in mitigating his loss, and not to establish the truth of any implied or express admissions the material may contain. The material therefore fell outside the without prejudice rule and should be produced to D.

The other two members of the court, Swinton Thomas LJ and Leggatt LJ, whilst agreeing with Hoffman LJ's reasoning, also decided that the without prejudice material should be produced to D on the basis that C had waived privilege in the material by asserting the reasonableness of the settlement, and therefore raising it as an issue for the court.

### **Cumbria Waste Management Ltd v Baines Wilson (a firm) [2008] EWHC 786 (QB)**

C brought a claim against D, a firm of solicitors, in professional negligence.

C alleged that D had negligently acted for C in the drafting of an agreement with a third party, DEFRA, by which C agreed to provide waste management services to DEFRA. As a result of D's negligence, C claimed, there was a dispute as to how much C was owed under the terms of the agreement.

C initially brought a claim against DEFRA under the contract, which was settled before trial at mediation.

C then brought the claim in professional negligence against D to recover its residual loss, and pleaded that the settlement with DEFRA was reasonable.

C disclosed the existence of the mediation documents, but refused to produce them to D. D sought production of the documentation in order to support its claim that the settlement reached by C and DEFRA was unreasonable.

C consulted both DEFRA and the mediator to ask whether they would consent to the documents being shown to D. Whilst the mediators took a largely neutral position, DEFRA refused consent on the basis that it had a number of other similar cases on foot, and disclosure of the mediation documents might reveal DEFRA's approach to such disputes and their resolution, which would prejudice DEFRA in other cases.

Both mediations which had taken place between C and DEFRA were governed by mediation agreements which contained confidentiality provisions in a standard form. The first agreement, for example, contained terms as follows:

*'every person involved in the mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.*

*All information (whether oral, in writing or otherwise) arising out of, or in connection with, the mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information which would in any event have been admissible or disclosable in any such proceedings.'*

The argument before the judge was largely between D and DEFRA. C took a neutral stance.

### **Held:**

The judge, HHJ Kirkham QC (sitting as a judge of the High Court), held that the documents should not be produced to D.

The judge upheld DEFRA's objections to disclosure both on the basis of without prejudice privilege and confidentiality.

In considering without prejudice privilege, the judge distinguished the case from *Muller* on the following basis:

- (a) The position of DEFRA - the objection to disclosure in *Cumbria Waste* was from a third party not the claimant. The Court of Appeal had given no consideration to the position of the third party in *Muller*. Without prejudice privilege belonged to DEFRA as well as to C, and there were public policy reasons why DEFRA should be able to assert it. There was also an express (not just implied) agreement between DEFRA and C that the without prejudice rule should apply.
- (b) The relevance of the truth/falsity of the contents of the mediations - Hoffmann LJ's rationale in *Muller* was that the issue as to whether the claimant had reasonably mitigated his loss was unconnected with the truth or falsity of anything stated in the negotiations and the material therefore fell outside the scope of the without prejudice rule. However, in this case, the judge felt that the truth or falsity of what was argued at mediation may be an issue in the litigation.
- (c) Mediation – a long line of authorities and the CPR encouraged parties to attempt to settle their disputes through without prejudice communications and mediation. There was clear public policy to encourage mediation in place of litigation and courts should be slow to find exceptions to the without prejudice rule.

The judge also dealt with the issue of confidentiality and held that the case formed an exception to the general rule that confidentiality is not a bar to the disclosure of documents, largely on the basis of the express confidentiality agreement and because of the importance of mediations within the court system. The judge stated that *'the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation'*.

## Analysis of *Cumbria Waste* and *Muller*

- The structure of the cases was largely the same:
  - A sues B
  - A settles claim with B out of court
  - A then sues C, whose negligence A claims gave rise to the claim against B, for A's remaining losses not recouped from B
  - A pleads that A's settlement with B was in reasonable mitigation of A's loss
  - C seeks disclosure and production of settlement documents passing between A and B.
  
- But the outcome in each case was different – in *Muller* the documents had to be produced to party C, in *Cumbria Waste* they did not.
  
- The main differences between the cases were that unlike *Muller*, *Cumbria Waste*:
  - Was settled at mediation;
  - The mediation was governed by a formal mediation agreement, which contained confidentiality provisions;
  - Party B, DEFRA, was consulted and refused consent to production of the documents.
  
- Does this mean that settlements within mediations have a superior status to settlements made outside mediation in the context of without prejudice privilege?
  - Courts have frequently emphasized the importance of mediation: see the discussion in ***Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002**.
  - However, mediations do not appear to be immune to the exceptions to the without prejudice rule.

See in particular, ***Brown v Rice* [2007] EWHC 625 (Ch)** where Stuart Isaacs QC (sitting as a deputy High Court Judge) held that, even in the light of a confidentiality provision, mediation documents were admissible to determine the issue of whether a concluded settlement had been reached by the parties at mediation. The judge stated that '*as a matter of practicality*' the confidentiality provisions in the mediation agreement could not be invoked to prevent the court determining the issue of whether or not there had been a concluded settlement. He also did not consider that mediations should have a special status in the context of without prejudice privilege:

*'The fact that the communications took place in the context of a mediation – a form of assisted without prejudice negotiation – does not confer on them a status distinct from any other without prejudice communications such as to take them outside the scope of the exception or otherwise to render them inadmissible...'*

*do not regard this conclusion as running counter to the public policy which exists in favour of mediation. It would be an odd result if in any given case the court was prevented from determining the existence of a concluded settlement solely because the alleged settlement arose in the context of a mediation’.*

- See also:  
**Reed Executive plc v Reed Business Information Ltd [2004] 1 WLR 3026** – per Jacob LJ at para 30: *‘I can think of no rational reason why party-to-party negotiations should not be treated on the same basis [as ADR]. Indeed sometimes the line between a third-party assisted ADR and party-to-party negotiations may be fuzzy...’.*  
**Hall v Pertemps [2005] EWHC 3110 (Ch)** – allegations of threats made at mediation.  
Cf. **Smith v Weiss [2002] All ER (D) 356 (Mar)** – relating to the estoppel exception in the context of mediation. The judge accepted that the estoppel exception could apply in the context of mediation, but stated that *‘...the court should be slow, both for the reasons that that is what the parties agreed [in their mediation agreement], as well as for ...public policy reasons...to hold that the without prejudice status of the [mediation] material...has been lost except in clear and unequivocal circumstances’.*  
**Venture Investment Placement Ltd v Hall [2005] EWHC 1227 (Ch).**

- Perhaps the key features of *Cumbria Waste* were therefore DEFRA’s refusal of consent to the production of mediation documents in litigation in which it had no interest or involvement, and the express confidentiality agreement. As the judge in *Cumbria Waste* stated, the position of the other party to negotiations had simply not been considered in *Muller*.

### **Practical application of Muller and Cumbria Waste**

The following considerations are likely to be relevant to parties in the position of claimant (party A) in a professional negligence claim brought against his advisor (party C) needing to prove reasonable mitigation of loss in compromising a prior related claim (against party B):

### **Settlement reached outside mediation**

- If parties A and B have settled informally without recourse to mediation, following *Muller* party A is likely to have to disclose and produce without prejudice material to party C;
- However, it is unclear what the position would be if party B was consulted and objected to the disclosure of without prejudice documentation from a settlement reached outside the context of mediation. Following *Cumbria Waste* it may be that documents should not be produced to party C.
- This is particularly the case if, as is possible, a settlement concluded outside mediation includes a confidentiality provision (e.g. as in **David Instance v Denny Bros Printing Ltd [2000] FSR 869**).

## **Settlement reached at mediation**

- If parties A and B settled at mediation in which a confidentiality agreement was signed, party A may need to consider whether or not party B's consent should be sought before producing mediation documentation to party C or relying on such documents at trial. Depending on the terms of the mediation agreement party A may also need to consider whether the mediator's consent should be sought;
- If party B refuses consent, following *Cumbria Waste*, party A may well not be able to produce without prejudice material to party C or rely on it at trial, even where it is relevant to the issue of whether or not party A has reasonably mitigated his loss;
- It seems unlikely that a mediator would refuse consent (the mediators in *Cumbria Waste* took a largely neutral stance), but if a mediator did refuse consent the position is unclear. Following *Cumbria Waste* there is a possibility that the mediator could prevent documents being produced, at least on the grounds of confidentiality;
- If party B (and the mediator) consent to the use of the without prejudice material, but party A withholds consent (as in *Muller*) again the position is unclear, although on the basis of *Muller* it may well be that documents would be admissible.
- For parties in the position of A and B it is vital to consider the terms of the mediation agreement prior to signature and to assess whether or not without prejudice communications will need or be able to be relied on in future litigation against C.

## **Conclusions**

- *Cumbria Waste* is a bold decision in a difficult, practical area of the law.
- The decision, and other recent decisions, make clear that there may now be scope for differing approaches to be adopted at High Court level.
- Further consideration, analysis and guidance are needed from the Court of Appeal.