# ORAL SETTLEMENTS IN MEDIATION AND CONFIDENTIALITY

In a recent case where the Court accepted evidence of what transpired in a mediation, the issue of confidentiality of the mediation process was not argued.

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The recent decision towards the end of last year in *Sully v Englisch* [2022] VSCA 184 (31 August 2022) (Sully's case) was of considerable interest. Not so much because of the decision itself (which is especially instructive to mediators who may consider leaving a mediation "open" to allow parties to prepare a settlement deed where there has been agreement "in principle"), but more particularly in relation to the evidence adduced about what happened at the mediation.

Sully's case considered whether an oral agreement on the "key terms" constituted a binding agreement, the mediation having been left "open" by Judicial Registrar for the parties to prepare and execute a deed of settlement. The oral agreement was subsequently disputed by Englisch. In the Court *a quo* (the Judicial Registrar did not give evidence) it was held that there was insufficient evidence to find the parties immediately bound at the mediation. In allowing the appeal, the judges of appeal, noting the evidence adduced as to what occurred at the mediation (both orally and by notes taken by the parties) held that a reasonable observer of mediation would have concluded that the parties had intended to be bound.

Leaving a mediation "open" is always risky. Nevertheless, occasionally the parties may not be in a position to draft and execute a settlement deed on the day of the mediation. In those circumstances mediators would generally adjourn the mediation for a telephone mention to a date agreed by the parties to allow for a deed to be drafted and signed, confirming with the parties that there is no agreement until a deed is executed.

In those circumstances the mediator, if required, will remain involved in further conversation with the parties concerning issues that arose in mediation. Acknowledging that it was a judicial mediation, one wonders whether considerable legal costs could have been avoided if this process had been adopted in Sully's case.

Perhaps a statement by the mediator at the commencement of the mediation that notwithstanding any oral agreement being reached in mediation such an agreement would not be binding unless reduced to writing and executed by the parties. That might potentially have avoided litigation in Sully's case. Yes, hindsight is 20/20 or, as is often said, an exact science. Instructively, if such a provision is not included in any mediation agreement it should be.

An aspect of Sully's case which had me thinking is that it was never argued in the Court *a quo* that the mediation conversations (and notes taken in the mediation) were confidential and could not be used in any other forum, that being on the basis of either express or implied agreement to confidentiality. The very nature of confidentiality of the mediation enables parties to talk openly and freely without fear of being quoted outside of the mediation.

It's not clear whether a mediation agreement was executed prior to the mediation and, if so, its terms. For example, most mediation agreements would contain a term generally agreeing to keep confidential all information disclosed by the other party during the mediation and not to disclose that information to any other person other than that party's professional advisers for the purpose of the mediation nor to use that information for a purpose other than the mediation.

Had the issue of confidentiality been argued in Sully's case by Englisch, one wonders how that would have been determined by the Court.

The issue of mediation confidentiality was considered in a case in the England and Wales High Court *(Farm Assist Limited (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2))* [2009] EWHC 1102 (TCC) (Farm Assist). The Court was asked to consider whether a mediator could be summonsed to give evidence at a trial following a mediation many years before.

*Farm Assist* involved a party's claim that a settlement agreement had been entered into under economic duress. The mediator had made application to set aside a witness summons seeking attendance to give evidence about what transpired at the mediation.

The mediator had not retained personal notes on the file and said that as the mediation occurred many years prior there was little she could do to assist. The mediator had further asserted that there were

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express provisions of confidentiality signed by the parties and in any event that her evidence was "confidential and/or legally privileged and/or irrelevant".

In *Farm Assist* there was a mediation agreement stating that information produced for or arising out of the mediation would be "kept confidential", that any documents produced for or arising in relation to the mediation would be "privileged" and not admissible as evidence or discoverable in litigation and that communications between the parties would be "without prejudice". There was also a term agreeing not to call the mediator in any litigation.

In relation to the issue of privilege, the Court decided that the general rule was that without prejudice privilege is the privilege of the parties to the dispute, which can be waived by the parties. It is not the privilege of the mediator.

The Court also noted that in relation to the obligation of confidentiality (expressly agreed in that case) it was between the parties and the mediator and the question for the Court to decide was whether confidentiality was absolute or whether the Court has the power to permit the evidence to be used or order it to be disclosed. The Court noted that although confidentiality could be waived it had to be done with the consent of all parties.

The parties had agreed with the mediator to treat the mediation as confidential, and the Court acknowledged that, but held that the Court can permit the use of or order disclosure of otherwise confidential material if it is "in the interests of justice" to do so. In the *Farm Assist* case the exception was an allegation that a settlement agreement was procured under duress, clearly a serious allegation.

In Sully's case, on the assumption that the parties had agreed (either expressly or impliedly) to keep conversations confidential (and therefore any documentation created in the mediation), it seems that the party asserting that agreement had not been reached in mediation could potentially have argued that the confidentiality of the mediation must be maintained.

Had the issue of confidentiality been raised in Sully's case one asks whether the Court would have adopted the "interests of justice" test enunciated in *Farm Assist* and ordered disclosure of what took place at the mediation.

Even though an England and Wales High Court decision, the *Farm Assist* case decided some 13 years ago might still cause some mediators to raise their eyebrows. Given the evidence of duress in that case (which I believe would be easily identified and dealt with appropriately in mediation by even the most inexperienced mediator) it seems that some very exceptional circumstances would need to exist to satisfy the "interests of justice" test and to justify overriding the confidentiality of the mediation process.

Whether the mere assertion that an agreement was reached in mediation would qualify as an exception remains to be seen. ■

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