

Mediation and Privilege

By Peter Sheridan

Mediation is simply a negotiation assisted by a neutral person (a mediator). Communications in the context of a mediation are the subject of without prejudice privilege. This means that they may not be quoted or cited in subsequent proceedings, for example in an adjudication or court case, if the mediation does not result successfully in a negotiated settlement. The rule is designed to encourage parties to express themselves freely and without inhibition during the negotiation, knowing that what they say cannot be used against them later.

Walker LJ in the Court of Appeal identified a number of discrete exceptions to the without prejudice rule in *Unilever v The Proctor & Gamble Co* (2000). One was that 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. The Court of Appeal had warned in *Forster v Friedland* (1993) that this exception should be applied only in the clearest cases of abuse of a privileged occasion.

The Court of Appeal recently revisited the "unambiguous impropriety" exception in *Ferster v Ferster* (2016). An email recorded that one party withdrew an earlier offer to sell shares in a limited company and made a further offer to sell the shares at a higher price, accompanied by threats as to what would happen if the offer were not accepted. This involved alleged wrongdoing by the recipient of the offer that would lead to charges of perjury, perverting the course of justice and contempt of court proceedings, including a committal to prison. The alleged wrongdoing was withholding information about assets when complying or purporting to comply with a court order requiring disclosure of assets.

The question arose whether this email could be referred to in proceedings which were concerned with whether the affairs of the company were being conducted in a manner which was unfairly prejudicial to the interests of the members or some of them (a matter regulated by section 994 of the Companies Act 2006). The recipient of the revised offer and the threats and a member of the company wanted to refer to the email in this context.

There was no ambiguity in the purpose of the threat: it was to pressure the other party to pay more for the shares, not because of any increased value of the shares, but because it was thought the threat of committal proceedings would induce the other party to pay more for the shares.

The Court of Appeal found it unnecessary to decide whether the threats fell within the formal definition of blackmail and decided on the basis that this was a case where the "unambiguous impropriety" exception applied and therefore reference could be made to the email.

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