[2014] JMSC Civ. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV04850

BETWEEN	**MARGARETTE MACAULAY**	**APPLICANT/WITNESS**
A N D	**HAROLD BRADY**	**CLAIMANT/RESPONDENT**
A N D	**BRUCE GOLDING**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Mrs. Ursula Khan and Mrs. Eileen Felix instructed by Mrs. Eileen Felix for the Applicant.

Mr. Gordon Robinson and Mrs. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the Claimant/Respondent.

Mrs. Daniella Gentles-Silvera instructed by Livingston Alexander & Levy for the Defendant/Respondent.

Heard: October 10, November 11, 2013 & February 28, 2014

Mediation - Claimant seeking to strike out defence alleging Defendant failed to participate in good faith – Mediator summoned to testify regarding Defendant's conduct and attitude at mediation – Mediator applying to set aside witness summons – Scope of confidentiality

P.A. Williams, J.

Factual Background

[1] This application before the court has its genesis in an action for damages for libel commenced in October 2010 by Harold Brady, claimant/respondent, against Bruce Golding, defendant/respondent. It was referred to mandatory mediation

pursuant to Part 74 of the Civil Procedure Rules. The mediation was held on April 14, 2011.

[2] Mrs. Margarette May McCauley, the applicant, was the mediator the parties agreed should facilitate the process. The mediation report subsequently filed on April 26. 2011 indicated that the parties met but were unable to arrive at an agreement. The claimant/respondent has taken the view that the mediation process failed due to the conduct and attitude of the defendant/respondent which was interpreted as showing that he had no interest in participating.

[3] The claimant/respondent filed an application on November 1, 2011 seeking to strike out the defence or alternatively for costs against the defendant. It is the contention that the defendant/respondent failed to participate in good faith at the mediation thereby causing it to breakdown. The defendant/respondent denied that he demonstrated any attitude or behaviour during the mediation to indicate that he did not intend to co-operate with or frustrate the mediation process.

[4] The claimant/respondent, recognizing that the issue would now "centre narrowly" on the defendant/respondent's conduct and attitude at the mediation, served a witness summons dated November 30, 2011 on the applicant. The summons commanded her attendance for the following reason:-

> "To testify in behalf of the claimant regarding the defendant's conduct and attitude at the mediation session held April 14, 2011 at the Dispute Resolution Foundation."

[5] On December 19, 2012 the applicant filed a notice of application for Court Orders seeking the following orders inter alia:-

(1) The witness summons dated the 30th of November 2011 served by the claimant on the applicant/witness on or about the 14th day of December 2011, be set aside pursuant to Rule 33.3 (4) and (5) of the Civil Procedure Rules 2002 and amended.

(2) The applicant/witness be awarded the costs of this application and those which will rise for attendances pursuant to the service of the said witness summons such costs to be paid by the claimant/respondent.

[6] It is perhaps useful to firstly make note of some of the rules governing the mediation process. It is recognized that these rules are relatively new to our jurisdiction and, as Mr. Gordon Robinson submitted the mediation process can be regarded as one of the most important advances in the administration of justice as it can assist greatly in alleviating inordinate delays in the delivery of justice.

[7] Part 74 of the Civil Procedure Rule deals exclusively with mediation, becoming a part of the Rules in September 2006. It has as its objective the following statement:-

> 74.1 This part establishes automatic referral to mediation in the civil jurisdiction of the court for the following purposes:
>
> (a) improving the pace of litigation
>
> (b) promoting early and fair resolution of disputes
>
> (c) reducing the cost of litigation to the parties and the court system
>
> (d) improving access to justice
>
> (e) improving user satisfaction with dispute resolution in the justice system; and
>
> (f) maintaining the quality of litigation outcomes -
>
> through a mediation referral agency appointed to carry out the objects of this part.

[8] Mediation is defined at CPR 74.2 (1) as follows:-

"Mediation" refers to a dispute – resolving process in which a neutral third party called the "Mediator" facilitates and co-ordinates negotiations by parties in a dispute with a view to resolving or reducing the extent of the dispute."

[9] At CPR 74.10 the conduct of the mediation is outlined:

CPR 74.10 (2) The parties and their attorneys-at-law shall, at the first mediation session, execute an agreement absolving the mediator from any liability arising out of or relating to the mediation.

(3) A mediator may:

(a) assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute or any part of it; or

(b) adopt any procedure that is just to the parties to facilitate and encourage an early settlement of one or more issues in dispute between them.

(4) Mediation is a confidential process such that:-

(a) discussions during the mediation and documents prepared solely for the purposes of mediation are confidential and may not be disclosed in any other proceedings or context;

(b) no party or attorney-at-law representing a party may at any time subsequent trial or hearing of the claim refer to any matters disclosed by them or any other party at the mediation;

(c) the mediator may not disclose to any other person or be required to give evidence about any matters disclosed by any party at the mediation;

(d) the mediator shall not be required to provide consultation notes, evidence or an opinion, touching on the subject matter of the mediation in any proceedings; and

(e) the mediator's report shall be absolutely privileged, unless it becomes an order of the court pursuant to rule 74.12

(f) Nothing in this rule 74.10 (4) is intended to affect any duty to disclose under any other rule.

[10] For the purposes of the matter under consideration, there are other provisions of this part of the Civil Procedure Rules that needs be noted. Firstly it is to be borne in mind that all parties along with their attorneys-at-law (where represented) must attend all mediation sessions per CPR 74.9 (1). Flowing from

this, one of the sanctions provided concerns non-attendance at the sessions CPR 74.14 (5) provides:-

> Where the mediators report indicates that the claimant party did not attend to mediation, the court may, on the application of a defendant party, strike out the claim.

CPR 74.14 (6) provides:-

> Where the mediators report indicates that a defendant party did not attend the mediation, the court may on the application of a claimant party strike out the defence and enter judgment against that defendant.

[11] It is to be further noted that there is a general provision speaking to the event of a party, an attorney-at-law representing a party or a mediator failing to comply with any of the requirements of this Part. In that event, any other party may apply to the court and the result of such is in CPR 74.14 (4) which provides the following:-

> The Court may make such order and impose such sanctions as may be permitted under these rules, including, but not limited to costs.

[12] Significantly also it is noted that there is provision for relief from sanctions at CPR 74.15 (2) which provides:-

The court may grant relief if it is satisfied that:

(a) the failure to comply was not intentional
(b) there is a good explanation for the failure or
(c) the party in default had generally complied with all other relevant rules, practice directions, orders and direction.

CPR 74.15 (3) states

In considering whether to grant relief, the court must have regard to:

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply had been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

[13] The next matter to be borne in mind is the mediation agreement which the parties and their attorneys-at-law are mandated to sign at the commencement of the session. It expressly sets out what is expected from the mediation process, the requirement of disclosure and confidentiality, the role and liability of the mediator and the fees to be paid.

[14] Mediation, in the agreement, is defined as a consensual process in which an impartial third party, with no power to impose a resolution, works with the disputing parties to help them explore and if possible reach a voluntary and mutually acceptable resolution of some or all of the issues in dispute. Further it states that the parties will discuss the issues with the mediator individually or together with a view to participating in good faith to achieve settlement.

[15] On the issue of disclosure and confidentiality it starts by providing that throughout the mediation the parties agree to disclose material facts, information and documents to each other and to the mediator. Consequent on this, the agreement goes on to stipulate that "either during or after the mediation, no party will call the mediator as a witness for any purposes whatsoever. No party will seek access to any documents prepared for or delivered to the mediator in connection with the mediation, including any records or notes of the mediator."

[16] One other significant provision of the agreement in this area of disclosure and confidentiality is the following:-

> Statements made by any person, documents produced and any other forms of communication made or transmitted during any stage of the mediation including pre-mediation are confidential. Any such statements, documents and communications shall not

unless otherwise discoverable, be subject to disclosure or any process, or be admissible into evidence in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding for any purpose, including impeaching credibility. The only exceptions are:-

(a) when the information/documentation discloses an actual or potential threat to human life;

(b) any report or summary that is required to be prepared by mediator; or

(c) when the information/documentation is non-identifiable (unless all of the parties otherwise authorize identification) and is used for research statistical, accreditation, or education purposes and is limited only to what is required to achieve these purposes.

[17] Finally, before moving on from the Rules; it is provided therein that although referral is now mandatory, there are provisions establishing how Mediation may be dispensed with. It is the Court to whom parties must look to have the process avoided.

74.4 (1) The court may postpone or dispense with a reference to mediation if it is satisfied that:-

(a) good faith efforts to settle have been made and were not successful;

(b) the costs of mediation would be disproportionate to the value of the claim; or the benefits that might be achieved by mediation;

(c) the case involves a matter of public policy and mediation may not be appropriate; or

(d) for some other good or sufficient reason, mediation would not be appropriate.

The Submissions

[18] A useful starting point in looking at the submissions for the applicant is the reasons stated in her notice of application to have the witness summons set aside. They are:-

(a) it is a breach of the said Mediation agreement;

(b) it is a breach of Part 74.10 (4) (a) of the Civil Procedure Rules and

(c) it is contrary to the spirit of mediation where the parties have agreed on confidentiality, were encouraged to be frank and free in their discussions during the mediation process.

[19] It was accepted that there is no statute governing mediation in Jamaica. The applicant's submission is that the court is to be guided by common law principles and especially case law on 'without prejudice' negotiations of which mediation, it was submitted, is "a structured extension." Thus Mrs. Khan took the court through a review of the leading authorities concerning the developments in the "without prejudice" privilege principle.

[20] For the claimant/respondent it was urged that this matter is not about the "without prejudice" privilege or any other type of privilege as there was no factual or legal basis for treating the mediation herein as being protected by privilege. Mr. Robinson commenced that the privilege arose out of negotiations which are not the same as the discussions arising out of mediation. In any event it is urged that Part 74 does not provide for privilege instead it provides that mediation is a confidential process. Further, even if the privilege was applicable to the mediation, the evidence sought by the witness summons would not violate the privilege.

[21] Mrs. Khan recognized the importance of the issue of confidentiality and identified one of the issues to be considered as being whether it would be permissible to lift the veil of confidentiality in the circumstance of this case. She also argued that although confidentiality is not a bar to the disclosure of

documents, because of the expressed nature of the confidentiality agreement, Part 74 of the CPR and the importance of mediation within the court system, the court should support the mediation process by refusing in normal circumstances to order disclosure of documents and communications within mediation.

[22] Mr. Robinson sought to emphasize the immense value of the mediation process in alleviating a back log in the judicial process. Thus he pointed to the important difference between the practice in England and that in Jamaica - it is mandatory in the latter, thus pointing to what he described as a conscious policy by legislators to try to ease the back log by ensuring that parties try to resolve their disputes without going to trial.

[23] His concern therefore was the potential for usurping the power given only to the Court to dispense with mediation when a party adopts an attitude of not wanting to participate in it, thereby subverting the process and insisting that they wanted the matter to go to trial. The contention was therefore that there was no good faith effort to settle and thus one party had made no effort to settle the matter but choose to enlarge the time it takes to go through the Court.

[24] The applicant's emphasis of the confidential nature of the mediation process was countered by the claimant/respondent assertion that it was not any document or communication that was being sought to present to the court. It was their submission that the public policy of encouraging parties to settle would not be offended by requiring the mediator to give the evidence sought. The evidence would not relate to admissions or even the underlying defamation claim. The evidence required was to be about the defendant's conduct and attitude; not to disclose any documents nor about anything regarding the underlying claim.

[25] It was recognized that one authority which considered matters similar in nature to the matter before the court was **Farm Assist Ltd. (in liquidation) v. Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 1102**. However, the applicant urged that it is distinguishable and the

facts themselves bear no resemblance to this matter. The claimant/respondent found that it approved the pronouncement that confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure of it considers it necessary for the fair disposal of the case. This pronouncement buttressed their submission that the mediator should, in the circumstance before the court, be required to give the evidence.

[26] In furthering her arguments for the applicant Mrs. Khan considered the position as exists in some states of the United State of America where she said there is a Uniform Mediation Act (UMA). She pointed to the definition of mediation communications as statements – (1) whether oral or in a record or verbal or non verbal that occurs during a mediation or is made for purposes of considering conducting or reconvening a mediation or retaining a mediator. The conduct and attitude fall within non-verbal communication. She noted that in California in the case of **Foxgate Homeowners' Association Inc. v. Bramalea California Inc. & Anor. 26 Cal 4/1/2001** it was held that a mediator may not report to the court about the conduct of participants in a mediation session.

[27] Another thrust of the claimant/respondent's argument was that the applicant had in fact waived confidentiality by exhibiting the mediation agreement to her affidavit. They urged that the decision of **Derby & Co. Ltd. v. Weldon & Ors. (No. 10) 1991 2 All ER 908** confirms that where a party deploys privileged material in court then privilege that could otherwise be claimed in relation to associated material would be treated as waived altogether with the result that the party could not then assist the privilege over the associated material.

[28] For the Applicant, Mrs. Khan countered that the agreement to mediate is a contract with confidential provisions and not in itself a confidential document. It specifies what the parties intended to regard as confidential and its production was merely evidencing what should be so regarded and cannot be regarded as a waiver. I can say from this stage that I find this argument correct.

[29] In the submissions of Mrs. Khan in response to the matter of good faith participation, she described it as a vague concept which although desirable cannot guide parties, mediators or the court. Further, to ask a mediator to comment on bahaviour would in effect be asking her to make a judgment call.

[30] Mrs. Silvera-Gentles was asked if she wished to comment on behalf of the defendant/respondent having not been otherwise invited to participate in the process. She urged that an analysis of attitude and conduct would involve a large element of subjectivity and the question would then become whether it would be fair for the mediator to give this highly subjective opinion.

[31] There was an authority that the attorneys referred to for almost opposing reason. The case was **Halsey v. Milton Keynes General NHS Trust [2004] 1 WLR 3002** where the following observation by Dyson L.J at page 3007 paragraph 9 found favour with Mrs. Khan for the applicant:-

> "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction of their right of access to the court."

[32] Mr. Robinson pointed the court to another observation made by Dyson L.J at page 3009, paragraph 16:-

> "We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute (b) the merits of the case (c) the extent to which other settlement methods have been attempted (d) whether the costs of the ADR would be disproportionately high (e) whether any delay in setting up and attending the ADR would have been prejudicial, and (f) whether the ADR had a reasonable prospect of success."

The analysis and decision

[33] I feel compelled to recognize, as has been urged on me, that this might well be the first matter before the court requiring such an interpretation of the rules

concerning mediation. It is made that more unusual when one recognizes what it is that the mediator is being called upon to give testimony about and the purpose for which that testimony is being required.

[34] This testimony does not indeed touch on anything specifically outlined in the rules as being a part of that process to be considered confidential. By this I mean that the rules clearly provide that certain things may not be disclosed – namely discussions during the mediation and documents prepared solely for the purpose of the mediation; mediator's consultation notes, evidence or an opinion, touching on the subject matter of the mediation. The mediator is also protected from being required to give evidence about matters disclosed at mediation.

[35] Further the rules expressly states that the mediator's report shall be absolutely privileged. Hence, the claimant/respondent's argument that since it is not anything from this report that is being sought, the question of privilege may not arise.

[36] I find the case of **Farm Assist Ltd. (in liquidation) v Secretary of State for the Environment Food and Rural Affairs [supra]** instructive while acknowledging the distinction in that case since the parties to the mediation had waived confidentiality. The facts however are similar in that it was a mediator who was applying to set aside witness summons issued on the request of the defendant. She was to give evidence touching that mediation in an effort for one party to establish that the settlement was entered into under economic duress – a direct subject matter of the action and herein is another distinction from this matter before the Court

[37] It is however on the issue of confidentially that I find comments made by Mr. Justice Ramsey in the matter useful. At paragraph 21 he said:-

> "The fact that parties agree that something is to be confidential does not, in itself prevent a party from giving evidence of such matters in court or the court from ordering evidence of such matters to be disclosed. The general position on confidentiality is

> as set out in Confidentiality by Toulson and Phipps (2nd Edition 2006) in which they state at paragraph 17-001 that generally speaking, confidentiality is not a bar to disclosure of documents or information in the process of litigation but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see **British Steel Corporation v. Granada Television Ltd. [1981] AC 1096."**

[38] Further he quotes from the Toulson and Phipps text at paragraph 17-016:-

> "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."

[39] He reviewed various authorities concerning the question of privilege in mediations, confidentiality in mediations and said at paragraphs 34 and 43:-

> "The passages from those judgments emphasize the overlap between concepts of confidentiality and privilege in particular without prejudice privilege which applies to mediation. In my judgment they provide strong support for the proposition that the general confidentiality or privilege in mediations derives from the without prejudice nature of the mediation proceedings and applies that concept by analogy.....
>
> There is a tendency for the use of the words "confidential" "privileged" and "without prejudice" to be used in conjunction so as to emphasize the important general rules that what takes place in a mediation is not to be disclosed by third parties outside the mediation."

[40] And at paragraph 44 he said:-

Therefore, in my judgment, the position as to confidentiality, privilege and without prejudice principle in relation to mediation is generally as follows:-

(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 the confidentiality but where it is 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."

[41] Into what category then does the "defendants conduct and attitude" fall? It does indeed seem to be a notion that cannot be defined such that it can fall into any distinct category. It depends and relies solely on the assessment and opinion of the applicant. It must be a subjective matter and to my mind its admittance into evidence to determine whether a litigant ought to be deprived of his day in court must be very carefully approached when considered.

[42] It is the strong submission by Mr. Robinson that in effect the defendant/respondent in failing to participate in the mediation process is to be seen as frustrating the administration of justice. The court is, to my mind, being invited to turn its face against this by ensuring the applicant be summoned to testify such that the defendant may be sanctioned in the strongest possible way – by having his matter struck out or by having to pay costs. One might well be forgiven for thinking that the hope is for the defendant/respondent to be punished for what is perceived to be his lack of interest in participating in the mediation and accordingly causing it to end prematurely. It is to be remembered that the rules

provide for the matter of striking out of a party's case only on grounds of their non-attendance.

[43] In the decision of **Halsey v. Milton Keynes General NHS Trust** [supra] Dydon L.J made some comments that I found most interesting. At paragraph 9 he said:-

> "The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement but such waiver should be subject to "particularly careful review" to ensure that the claimant is not subject to "constraint"..... If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court, and therefore a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstance in which it would be appropriate to exercise it"

[44] One is of course immediately reminded of the fact that mediation is mandatory here in Jamaica; so every party, whether he wants to or not, must attend. Thus this must be considered when one seeks to go further to say that a party who must attend must co-operate or participate in the proceedings such that the matter can be resolved – hence the argument that there needs be good faith efforts. However while it can be appreciated that successful mediation resulting in resolution of matters will ensure that there are fewer cases to be tried by the court, the right of a litigant to seek redress through that part of the judicial process should not be sacrificed. There is continued argument as to whether mandatory mediation is not a contradiction in terms.

[45] The reference to good faith efforts in the Rules is made in relation to the court being asked to postpone or dispense with mediation itself. This suggests it is in reference to efforts outside of the mediation process. However, in the mediation agreement it is noted that the parties are required to discuss the issues with the mediator "with a view to participating in good faith to achieve settlement."

Ultimately however, the fact is that the mediation report requires the mediator to indicate whether both parties attended, whether the parties met but were unable to agree or whether a settlement was reached. This to my mind preserves the expectation that the mediator will state merely the fact of failure of mediation without expressing a view as to the reason for failure. This would be appropriately an objective approach.

[46] The mediation process remains undoubtedly an important part of new dispensation in the judicial system. The fact that it is mandatory does in fact point to the significant role it plays in assisting the process. Parties must indeed be encouraged to be frank and free in their discussions with each other and the mediator. The need for the participants to trust that their discussions will not be used for any other purpose is what ensures that the process works. One must therefore be very mindful of not doing anything that would cause participants to feel restrained in their discussions. The removal of expectations of confidentiality privilege and non-disclosure of documents must be done in exceptional circumstances. It may well be that in being free and frank a person may not want to settle – if this is said expressly it may well be considered privileged or confidential. To say that one's attitude and conduct should be interpreted and then be disclosed to my mind would contribute to diminishing the process.

[47] In the **Farm Assist Ltd**. case [supra] the judge decided that the mediator's application to set aside the witness summons ought not to be granted. After balancing the various considerations he concluded that it was in the interests of justice that she should give evidence of what was said and done in the mediation. In the instant case, I am satisfied that the interest of justice will not be served by the applicant being compelled to give evidence as to her opinion of the claimant/respondent's attitude and conduct. The claimant/respondent may be able to pursue the matter of costs on what is available to him.

[48] Accordingly there will be an order made on the applicant's notice of application for court orders as follows:-

(1) The witness summons dated the 30th day of November 2011 served by the claimant on the applicant/witness on or about the 14th day of December 2011 is hereby set aside.

(2) Cost of this application to the applicant/witness against the claimant/respondent, to be taxed, if not agreed.

Leave to appeal is granted.