

MEDIATION IN REVENUE CASES¹

by Sir Gavin Lightman² and Felicity Cullen QC

History of mediation

We should begin by saying a little bit about the history of mediation as an alternative dispute resolution (“ADR”) method – that is to say, a method of dispute resolution which is an alternative to the two conventional forms, namely litigation and arbitration. But before we do so, we should, as best we can, describe mediation. There are many methods available for negotiating an agreed resolution of a dispute between the disputants. Mediation is only one of such methods. Its unique and distinguishing feature is the central role of an independent third party, the mediator, of facilitating a settlement agreement between the disputants. Experience has shown that, in cases where a dispute may prove difficult, if not impossible, for the parties to resolve between themselves, the presence and assistance in their search for a settlement of a third party trusted by both parties and acceptable to both parties, and most particularly the presence and assistance of a trained or experienced mediator, can immeasurably facilitate the negotiation process and increase the prospects of success. That is the rationale for mediation. It is the appointment and role of the mediator which distinguishes mediation from other negotiating processes. This distinguishing feature is credited justly with the exceptional success rate of mediation, and that in turn has led to its particularly favoured treatment by the courts, for this is the only rationale for the rule of practice of the courts on the matter of costs – that if a party unreasonably refuses an offer of mediation, (but not any other offer of negotiation) whatever the outcome of the litigation, that party may be penalised as to costs.

Mediation has a very long history, dating back to Biblical times if not earlier. Aaron, Moses’ brother, is often credited with being the first mediator, earning the love of the children of Israel for his mediating skills. Mediation was the original dispute resolution mechanism in many, if not most, legal systems. Though the development of mediation may be a new and welcome addition to our jurisprudence, it has been part of the system in countries such as India and China from earliest times. The reality is that this alternative form of dispute resolution pre-dated and obviated the need for recourse to judges and lawyers, and only lost its primacy with the emergence of national courts and the legal profession, which did not favour this challenge to their exclusive roles in dispute resolution.

Reception of mediation in the UK

Mediation sprang into fashion in this country in the early 1980s, when increasingly it came to be realised that mediation was not a challenge to the supremacy of the courts or the livelihood of lawyers, and that mediation, as well as affording a means of access to justice to litigants who could no longer afford the increasing costs of litigation, furnished a valuable service to the courts in reducing court lists and provided an additional career opportunity for the legal profession and indeed others – both as practitioners in the field of mediation and as mediators. (It has also offered job opportunities to retired judges, and, in revenue disputes, should offer

opportunities for revenue practitioners.) But the welcoming of mediation was not universal or unconditional, and, for many years, artificial barriers were erected and maintained to the wide use of mediation and objection was taken to its use in various and varying categories of cases for a multitude of diverse and conflicting reasons.

There were, for many years, protestations by solemn practitioners and sober judges against the extension of the use of mediation to tort cases, to administrative and public law cases, to cases involving the resolution of important questions of law or cases which (if tried) might prove to be test cases. It was as though litigants had a duty to pursue litigation, once commenced, even after they had agreed or were in the process of agreeing settlement terms, if there was an issue in the case whose resolution would be of value as a precedent to the legal profession or others.

These artificial constraints on the use of mediation have now largely fallen away, though some strived pertinaciously to maintain a hold, if now only a tenuous hold. One of these is the objection to the use of mediation in revenue cases. A relic of this attitude may be found in Article 1 of the EU Directive on Mediation which aims at promoting the use of mediation in cross-border disputes in civil and commercial disputes. Article 1 excludes from the scope of the Directive disputes about revenue, customs and administrative matters. There may be special considerations to be taken into account in the resolution of disputes by mediation of revenue, customs and administrative matters (as we shall seek to explain), but that can in no way preclude the use of mediation.

Governing principles

We wish to consider, as a matter of principle, the scope for mediation in revenue and other cases.

As a matter of principle, mediation is an available (though not necessarily the appropriate) method of resolving a dispute or one or more issue (whether of law or of fact) in that dispute in any case where, as a matter of law, such a dispute or issue can lawfully be settled by agreement between the parties. Mediation is only a process designed to facilitate such a settlement. There is no mystery or magic or other vitiating feature present in mediation, but not present in other processes. There are disputes which can be settled only if the agreement concluded by the parties' representatives is approved by a third party, e.g. by the court in case of a party subject to a disability. An agreement conditional on such approval may be the outcome of mediation in the same way as negotiations between the parties or their solicitors without recourse to a mediator.

There are however a number of special features which need to be taken into account in the settlement of public law disputes (and this includes revenue disputes) which are absent in settling private law disputes.

- (1) In the case of private law disputes the general rule is that the parties are free to settle on any terms they think fit. That is not the case in public law disputes. The public body (e.g. HMRC) has public duties which

govern all that it does. Neither through direct negotiation nor through mediation can the public body reach a settlement which infringes such duty.

- (2) A private law litigant may enter into a settlement which (without infringing his rights) directly or indirectly prejudices or is calculated to prejudice a third party. For example a private school may admit a pupil ahead of other more highly qualified competitors. But a public body such as HMRC must take into account the impact of its treatment of one taxpayer on other taxpayers and taxpayers as a whole and the impact of what it does on the overall fairness of the tax system.
- (3) A private law litigant can take a different stance with different defendants facing identical claims. But that is not the position of a public body and in particular HMRC. Public law requires a fair and uniform approach with no preference for one taxpayer over another. Accordingly, in a revenue mediation, HMRC can and indeed should have regard to this principle of fairness and make clear what practice it follows with taxpayers and justify any departure.
- (4) The private litigant can enter into a settlement which bears no relationship to the underlying merits of the dispute. The position is the same where recourse is made to mediation. Indeed there are those mediators who hold the professed belief that an examination of the merits has little or no part in the process. But generally this cannot be the position of a public body in a public law dispute. In such a dispute, the underlying merits must have the same relevance as in the case of direct negotiations between the parties' solicitors. Recourse to mediation should not change the rules or materially affect the outcome. One taxpayer should not be faced with a different outcome from another taxpayer because one, but not the other, had recourse to mediation.
- (5) The parties to a private law dispute can negotiate in private, keep the dispute and the argument private and the terms of settlement confidential. The public body (and in particular HMRC) must however consider how far the public interest justifies and, on occasion, requires public disclosure of the underlying dispute, the issues and the terms of settlement. Public confidence in the revenue system and public concern regarding preferential treatment of favoured taxpayers may be important considerations.

In short, there is ample scope for mediation in the Revenue field. There are a number of special considerations to be taken into account in settling revenue disputes. We have endeavoured to identify a number. As they are special considerations in considering and agreeing settlement terms, they must likewise be considerations in the mind of those conducting a revenue mediation. They are not obstacles peculiar to the use of mediation. In revenue mediations, as in revenue settlements generally, the

merits have a very significant part to play. The mediator and the advocates must understand the underlying legal principles and issues. For this reason there must be a real demand and need for revenue practitioners both as mediators and as representatives in the mediation process.

Mediations in practice in revenue cases

Moving on from principles to more practical considerations, it has become widely acknowledged that mediation can be used in the context of the resolution of tax disputes. So we are next going to explain what mediation might entail in practice.

Mediation has been defined by the Centre for Effective Dispute Resolution – CEDR – as:

“a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”

This is a definition which has been widely adopted, including by the UK Ministry of Justice and Her Majesty’s court services. Nevertheless, it still leaves people wondering exactly what a mediation entails. As mediation is a consensual and voluntary process, the parties to a dispute can, essentially, structure the process as they wish – i.e. as they can agree.

Forms of mediation

Mediations usually take one of three forms with the first being more common than the second and third. In the first form of mediation, the mediator is what is called a “facilitator”: his role is to assist, in a neutral manner, in the reaching of resolution between the parties. In the second form of mediation, the mediator has more of an evaluative role and may be asked to give a view as to the merits of one or more of the issues between the parties. Instinctively, we consider that this sort of mediation is less suitable in tax disputes to which the government is a party, but it is a form which, we understand, may be piloted. We shall say more about this later. In the third form, med-arb, the mediation is a prelude to arbitration, if and to the extent that the mediation does not lead to a complete resolution of matters. Again, this is a less obvious form of mediation or ADR for a revenue authority to enter into.

There is discussion about arbitration as a form of ADR in tax, but it seems to us to be inappropriate when there is a tribunal system in place. The first and second forms can, to an extent, be combined. For example, the parties to a facilitative mediation can ask the mediator for an evaluation on specific points in the absence of agreement; and mediation agreements often provide for this as one of their terms.

Benefits of mediation

The benefits of mediation are generally regarded as:

1. Savings, in terms of:

- time
- costs
- risks
- pride/face
- stress
- relationships

2. and benefits, in terms of process of:

- choice
- control
- certainty
- confidentiality
- creativity
- finality.

Timing

A mediation can take place at any stage during the life of a dispute. It can take place even at an appeal stage of a dispute. But many of the benefits (e.g. costs savings) of mediation will be maximised, the earlier in a dispute that resolution is reached. That said, a dispute has to have “ripened” to a sufficiently advanced extent, so that issues are defined and understood, before realistic attempts at resolution can be made.

One would hope that, in tax cases, issues are generally well-defined by the time at which an appealable decision is made. This is because of the way in which the assessment and review procedures operate. But even so disputes evolve as cases progress.

The new tribunal rules provide for ADR and we are aware of a number of cases now in which the tribunal has asked whether the possibilities for ADR have been explored at directions’ stages. Notwithstanding this, timing of mediation is a flexible matter.

Terms of mediation agreements

Because mediations are consensual, the terms of mediation agreements can be flexible, though – perhaps inevitably – the procedure has developed in such a way that broadly standard terms are usually used. Many of the mediation providers will have draft mediation agreements on their websites. The terms for a mediation are sometimes referred to as “ground rules” or protocols. There is no one correct set of ground rules: different approaches are or can be appropriate in different circumstances. Ground rules are important because they shape how the process will be conducted. They can also start to educate the parties about their ability to agree on

matters at an early stage in discussions: though we have experience of difficulty in agreeing the simplest matters.

The setting of terms or ground rules is important because people will tend to have more trust in a process which seems to treat parties equally and fairly. The ground rules may cover things like the behaviour of the parties, the mediator and others involved, the methods or processes to be used and the substance of the discussions. Matters involving behaviour may, for example, be as simple as requiring people to talk one at a time. Matters involving process might involve choice of venue, choice of mediator, rules as to attendees, written submissions, confidentiality and, potentially importantly in the tax or revenue context, rules as to publication or disclosure of outcomes.

In general, mediation is a wholly confidential process, and the terms or ground rules reflect this. But where it is a tax authority that may be involved, there may be policy reasons (such as horizontal equity between taxpayers) that make some disclosure or publication of an outcome desirable or even necessary. This might undermine the confidential basis of mediation to an extent and is one of the areas to which a lot of thought needs to be given. Where policy issues form part of the subject under negotiation, it is likely to be important that the process is, to some extent, accountable and open to scrutiny. However, these considerations are likely to be at odds with creative and open discussion of matters in a mediation, and this may also tie in with matters concerning legal professional privilege. So mediation in the tax context raises some potentially unique issues. And we envisage that dealing with these will be conducted very much on an evolutionary basis and developed as experience is gained.

Suitability of and availability of mediation in tax disputes

We have already commented on the suitability of tax disputes to mediation as a matter of general principle. More specifically, s.24 of the Tribunals Courts and Enforcement Act 2007 makes express provision for mediation (as follows) and also provides that members of tribunals may act as mediators:

“(1) A person exercising power to make Tribunal Procedure Rules or give practice directions must, when making provision in relation to mediation, have regard to the following principles –

- (a) mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties;
- (b) where parties to proceedings fail to mediate, or where mediations between parties to proceedings fails to resolve disputed matters, the failure is not to affect the outcome of the proceedings.

(2) Practice directions may provide for members to act as mediators in relation to disputed matters in a case that is the subject of proceedings.”

“Members” are judges or members of the FTT or UT and “proceedings” means proceedings before those tribunals. So there is provision for the sort of judicial

mediation that exists in the employment tribunal arena. Recent studies in relation to this arena suggest that this form of mediation is less successful than independent mediation with independent external mediators; and there may be lessons to be learnt from that.

More specifically in the tax context, Regulation 3 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009/273 provides that:

“3. Alternative dispute resolution and arbitration

- (1) The Tribunal should seek, where appropriate –
 - (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
 - (b) if the parties wish, and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.
- (2) Part 1 of the Arbitration Act 1996 does not apply to proceedings before the Tribunal.”

So the Statute and Statutory Instruments certainly provide for the possibility of ADR and mediation with the parties’ consent.

HMRC has made clear that it wishes to consider the use of mediation in suitable cases. HMRC has said that it does not consider mediation or other forms of ADR to be inconsistent with its published Litigation and Settlement Strategy (“LSS”). So, provided the taxpayer and HMRC are willing, in a particular case, to consider mediation, it is a procedure which is, indeed, open to the taxpayer.

Suitability of tax cases perhaps raises some difficult issues. Clearly, the most suitable tax cases for mediation are those which are substantially fact dependent and where matters of principle are not or not absolutely central to the dispute. That said, HMRC has adopted a policy of being relatively open-minded about the types of cases in which mediation may be suitable and is keen, in principle, to pilot a variety of types of cases. Cases that seem obviously suitable for mediation are in our view cases like transfer pricing matters, cases involving the correct computation of profits for tax, NICs and VAT purposes, cases involving technical non-tax matters such as whether certain items of equipment constitute plant or machinery for capital allowance purposes, cases concerned with whether a company is an investment company and cases concerning whether the conditions for reliefs are factually met. There may also be scope for mediation in cases following from European law decisions and the application of principles which have been set down to particular facts patterns. In addition, mediation may be an appropriate way to deal with individual issues in complex cases. Avoidance scheme cases are unlikely to be suitable for mediation on grounds of public policy. There has, we believe, been a bit of uncertainty as to where HMRC stands on this but our understanding is that the current view in that avoidance scheme cases are unsuitable for mediation. Less suitable cases are in our view cases

involving pure points of law, where ADR raises potentially more difficult public policy issues.

The benefits of a different approach

We have already touched on some of the benefits of mediation above in terms of cost and time saving etc. But more widely, ADR approaches such as mediation can:

- facilitate communication between the parties;
- focus the parties' attention on the reality of the issues;
- (through the role of the independent party) help the parties overcome emotional hurdles, overcome deadlock and move forward positively;
- give the parties the opportunity to understand the other's case;
- provide the opportunity to reality test each party's case;
- provide a potentially wide scope of solutions for the parties to explore;
- help the parties to move off positional negotiating stances and concentrate on resolution

On the other hand, unsuccessful mediation can cause parties to become more entrenched moving forwards.

Special considerations in the tax context

Against the backdrop of those benefits or perceived benefits, mediation has been particularly successful in commercial or contractual disputes, in family law disputes, in probate disputes and in the employment arena. The tax field is (for the most part) unlike these fields because one party to the dispute will invariably be HMRC – Government or the State. And HMRC has not only the relationship with the particular taxpayer to consider, but it has wider duties to the general body of taxpayers; and HMRC must operate consistently and in accordance with principles of public policy. So principles such as horizontal equity between taxpayers are relevant considerations.

Other important factors concern the extent to which HMRC has authority to negotiate using a mediator, and whether that may constrain HMRC and make mediation less useful to the taxpayer. Fact-heavy cases are unlikely to give rise to difficulties as a result of HMRC's special position. Other sorts of cases could, however, raise issues. We have, for example, heard it suggested that if a point of principle was mediated and the agreement was that the case should be compromised at a discount of 40% of the full tax claimed, the same discount should be given to all taxpayers with the same issue. A particular taxpayer may not be happy with this

policy, however, because it might feel that it would have negotiated differently and secured a more favourable deal. And there is something very uncomfortable about the suggestion that one taxpayer will be treated in accordance with the *mediated* outcome of another taxpayer's problem rather than in accordance with the binding decision of a tribunal or court or his own negotiated resolution of matters.

Further, it seems unlikely that there would often be multi-party mediations to deal with groups of similar cases because of commercial sensitivities. That said, multi-party mediation is an established concept, though it is not usually a "one against all" situation. This sort of issue also relates to matters of confidentiality. If the outcome of one mediated dispute were to be applied in another, the effect could be that the confidentiality of the process would, to some extent at least, be comprised. This could affect the willingness of taxpayers either to engage in mediation or to engage on the most open and fruitful basis. On the other hand, a failure to resolve a matter and consequent litigation is likely to lead to far greater loss of confidentiality so there is a balancing to be done.

Another tax area requiring special thought in the mediation context is where double tax treaties are involved, and competent authority procedures are invoked. The problem is that mediation could effectively limit the ability of the United Kingdom to act in its capacity as competent authority. But there is experience of this in the USA, where – apparently – the US competent authority will attempt to obtain correlative adjustments based on the mediation agreement, but will take no actions that modify or amend the mediations; so potential hurdles like these can, in appropriate circumstances, and with appropriate will, be overcome.

Another factor which may make mediation with HMRC different is that, in contractual disputes, the outcome of mediation may govern matters going forward as well as an historic dispute. But HMRC will not be willing or able to enter into settlements which could conflict with its future duties and obligations or with future amendments to the law, in the way that parties to commercial disputes may be willing or able to regulate their future conduct or affairs as part of the overall settlement of a dispute. Nevertheless, HMRC certainly considers that mediation may help to improve relationships for the future, so there may be a degree to which the benefits of flexibility provided by mediation are unavailable in the tax context though we would hope not to such an extent as to make the process unattractive.

The choice of mediator

Choice of mediator is very important, because trust is key in mediation. A mediator must be able to gain the trust of the disputing parties. Some trust may be generated from the mediator's organisation, or from his personal reputation. Most importantly, however, trust will be built from the mediator's behaviour during the particular mediation process.

An important issue in the context of choice of mediator is whether the candidate has or needs to have the relevant expertise. In the USA, where tax mediation has been fashionable for about 15 years, the state seems to prefer mediators with relevant

expertise. On the other hand, however, the state acknowledges that the cases which are most suitable for mediation are the fact-heavy cases, so that the significance of technical tax expertise should not be overstated. In some cases, some other relevant expertise may be helpful: in a case involving – for example – plant and machinery, expertise in construction methods or process could be more helpful than technical tax expertise. In other cases, a solid understanding of the structure and foundation principles of UK tax would help.

Temperament is also important. To an extent it goes hand in hand with trust, but sometimes a particularly firm, albeit impartial approach is required. We understand that, in Latin America, parties frequently choose to use so called “insider participants” i.e. mediators who are insiders vis à vis one of the parties to a dispute. Insider participants need, however, to have stellar reputations for honesty and fairness with both sides. We would question the use of insider participants in the context of mediations where one party is government and there is the wider interest of the general body of taxpayers to be considered. Independence is likely to be considerably the preference for all sorts of policy and commercially sensitive reasons.

The mediator’s role

In an evaluative mediation, the mediator will attempt to give a non-binding view of the issue between the parties. In a facilitative mediation, the mediator’s role is to assist the parties in reaching a resolution of their dispute. To some extent he does this through management of the process. So at the beginning of the mediation he will usually give the parties an opportunity to have their say and will then try to get them to focus on the key issues and identify areas of agreement and disagreement in the breakout sessions (or caucuses). The mediator will usually try to conduct the process in order to try and address the issues in a dispute in the most logical and constructive way.

Mediators can use various strategies. They may start with simple issues as a way of getting agreement on these, or they may home straight in on the big issues in order to try and remove the biggest obstacle to resolution, thereby making the remaining stages of the process seem straightforward. A mediator will often encourage the parties to list all options for resolution open to them. A mediator will also use strategies such as reality testing, to force parties to be realistic about their approach. They may also ask the parties to conduct a cost/benefit analysis. One thing that parties need to remember is that the usual arrangement is that the parties can say whatever they want to the mediator in the break-out room, and this must be kept confidential from the other side. Of course, parties can request that a mediator discloses specific matters to the other side. Another approach is for the ground rules to provide that everything is for disclosure unless specifically kept confidential. This would not be our preference as a matter of default but it is for consideration. In most cases the mediator will use deadlines to attempt to force the parties to take steps towards negotiation.

Another development in mediation is for there to be pre-meetings between the

mediator and the professional advisers only. This is to try to encourage progress and to limit the so-called “eleventh hour effect”, which refers to the parties waiting until the last hours of a session to make concessions, hoping that the other will blink first. We are not convinced by this development. It is normally the parties, rather than the advisers, who need the persuasion to settle which the process generates. In addition, these pre-meetings can be used as an attempt by one party to seek to lay down pre-conditions for the all-party mediation; this can be counter-productive and take away from the flexibility of the process.

The outcome of mediation

Disputes may settle in whole, in part or not at all. A mediation which fails, however, is not inevitably wasted. Despite the fact that mediation is a wholly *without prejudice* process, it can be useful as a means of making parties considerably more informed as to the issues on which to concentrate in the formal litigation process. It can be an intelligence-gathering exercise. It may be apparent from points that one party has asked the mediator to put to the other as its strengths, what points that party implicitly acknowledges are its weaknesses. Some issues may be dropped, narrowing the dispute for the formal litigation process.

In commercial contexts, mediation may govern forward relationships as well an historic dispute. In a tax context, however, as we have mentioned, this is less likely to be possible because of policy considerations. We are all aware of forward tax agreements and the Fayed case. But it may, nevertheless, help relationships going forward. One thing that we think is important to emphasise is that mediation is not necessarily a soft option, and we think that this could be particularly true in tax cases. Some types of taxpayer will see the light in the context of reality testing and HMRC may similarly see the light on, for example, commercial matters that are behind a tax dispute. There are mediations that settle on a 100% basis for one or other party.

Disclosure

One of the considerable attractions for some parties to mediation and, in the present context, taxpayers, will be the confidential nature of the process and of the outcome. In tax cases, however, there may be a need for a degree of accountability and the requirement for horizontal equity between taxpayers may mean that the process cannot be as confidential in all respects as in ordinary commercial contexts. We think that this is one of the potentially difficult areas in tax mediations, particularly if matters involving questions of law and policy or elements of such are the subject matter of the mediation. Consideration of this kind may mean that taxpayers may have to be prepared to agree to limited loss of confidentiality. To some extent, the requirements for accountability and disclosure will have to be the subject of an evolutionary approach as HMRC pilots the use of mediation. It is likely that various standardised “general rules” or protocol relating to these issues will, over time, be added to the broadly standard forms of mediation agreement in tax cases.

Prospects for mediation in tax

We believe that mediation could become quite widely used in the tax field in certain types of disputes – in fact-heavy cases. It does not, however, seem that things will change overnight, and this is not due to resistance or reluctance on HMRC’s part, but because there are undoubtedly special considerations where one party to a dispute is not merely a public body but a public body exercising public law functions. So the development of mediation in the tax field is likely to be a relatively slow process. It is, for example, important that taxpayers do not consider that any tax matter can be mediated for a 25% discount: matters will require very considered handling.

Mediation and privilege

An important topic is the extent to which legal professional privilege applies to mediation. Confidentiality and privilege are absolutely key factors in the success of mediation so that parties can be confident that what takes place in a mediation will not become public knowledge or become evidence in proceedings, of whatever kind. There is not a special mediation privilege relating to commercial mediation. At the moment, the protection conferred on mediation stems from the *without prejudice* principle, which renders *without prejudice* documents and negotiations inadmissible in evidence and those documents privileged from disclosure. There are a number of cases involving privilege in mediation which have come before the courts in recent years, and these have generally involved established exceptions to the without prejudice rule, which have been utilised to enable the court to look at what would otherwise be privileged material, both as to documents and other evidence.

For example, one exception to the *without prejudice* rule is the exception to prove the existence of a concluded agreement. In *Brown v. Patel* [2007] EWHC 625 (Ch) the judge decided that the court could look at without prejudice material from a mediation in order to decide whether or not there was a concluded agreement to settle even though he accepted that he might later have to find that the material was inadmissible.

Disclosure of documents in subsequent proceedings may also be ordered on the issue of reasonableness of mitigation. In the mediation context the matter was considered in a case called *Cumbria Waste Management v. Baines Wilson* [2008] EWHC 786 (QB) where no disclosure was ordered and the judge said that:

“Whether on the basis of the WP rule or as an exception to the general rule 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.”

This was a strong decision in 2008 supporting privilege and confidentiality in mediation. The judge in that case also hinted that there may be a category of privilege attaching to the mediator:

“I note that disclosure sought by the defendant is of such wide scope that it would include documents held by the mediator. In my judgement, the court should be very slow to order such disclosure. Mediators should be able to

conduct mediations confident that, in normal circumstances, their papers could not be seen by the parties or others.”

But there is no clear category of privilege for mediators at present.

Many mediation agreements provide that the parties agree not to call the mediator to give evidence, but that contractual agreement is not binding on a court when it is considering calling a mediator to give evidence under, for example, subpoena.

In summary, there is a mixed bag of decisions, some upholding *without prejudice* communications in the context of mediation, others more willing to go behind it. Many commentators consider that specific legislation should be introduced to deal with the position but that has not so far been forthcoming.

We consider that, in broad terms, *without prejudice* privilege will be upheld in the ordinary course, but that, if there is impropriety, or if the reaching of agreement needs to be established, or if there is good reason for applying one of the established exceptions to the without prejudice principle, it will not. The European Union Mediation Directive provides that, in an international mediation, the mediator has a privilege. English law has not yet reached that stage, but, prompted by the Directive, it may take this step forward in domestic mediation: it would be senseless to have different rules in international and domestic mediation.

The Tribunal’s approach to mediation

There are signs of early interest from the tax tribunals.

If the tax tribunals follow – for example – employment tribunals, mediations will become widespread. We will observe the tax tribunal’s approach with interest.

¹ This article is taken from a talk given by Sir Gavin Lightman and Felicity Cullen QC on 8th July 2010.

² Sir Gavin Lightman is a consultant at Winston and Strawn.