



NEWS

Confidentiality in mediations – when is disclosing material from a mediation in the interests of justice?

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In the second of two articles, [Michael Axe](#) assesses the effect of the High Court's decision in the Farm Assist case on the existing case law relating to disclosure from mediations.

Although the High Court's decision in the May 2009 case of Farm Assist Limited (In Administration) v The Secretary of State for Environment, Food and Rural Affairs (No.2) did not actually make new law, (see our earlier article "Confidentiality in Mediations – when can a Mediator be called to give evidence in Court?") it was a very comprehensive summary and clarification of the existing case law in relation to disclosure of materials from mediations. That decision underlined the message that the Courts will look at contractual confidentiality provisions with a critical eye if the interests of justice require it. The phrase "the interests of justice" is therefore a key factor in considering disclosure from the mediation process, as can be seen from the Courts' approach to disclosure applications.

Applications for disclosure from a party not present at the mediation

The cases below serve to highlight that where the Courts are asked to consider what is in the best interests of justice, their decision will depend heavily on the facts of each individual case and cannot be predicted with ease.

For example, the Farm Assist decision builds upon the decision in the 2008 case of Cumbria Waste Management Limited & Lakeland Waste Management Limited v Baines Wilson, which dealt with a third party's application for disclosure of documents from a previous mediation it had not been a party to. In that case, the Claimants brought a claim against their former solicitors (the Defendants), alleging that the Defendant's negligence had forced the Claimants to settle their substantive claim against the Department for Environment, Food & Rural Affairs (DEFRA) at an earlier mediation on less favourable terms than would otherwise have been the case. The Defendant argued that it should be provided with documents from the mediation to assess whether or not the concessions made by the Claimants at mediation had been caused by the Defendant's earlier negligent work.

The Claimants took a neutral stance in relation to the application (presumably to show they had nothing to hide), but DEFRA opposed the application for disclosure. In that case, the Court ruled that as DEFRA (i.e. one of the parties to the original mediation) had not waived any without prejudice privilege in respect of the mediation (unlike in Farm Assist, where both parties to the mediation had waived privilege), it would not be appropriate in the circumstances for the Court to disregard the contractual confidentiality provisions contained within the Mediation Agreement.

If one was to retrospectively apply the criteria set out in the **Farm Assist** case to this earlier decision, it would appear that the Court was, in effect, not satisfied in the circumstance that it was in the interests of justice to override the confidentiality provisions in the Mediation Agreement where one party to the mediation refused to waive privilege.

However, this is not a complete answer, given the decision in the **relatively similar** 2007 case of **Cattley v Pollard**. In the **Cattley** case, a third party (the Defendant) was **successful in obtaining** disclosure from a previous mediation, even though she had not been a party to it. A **settlement agreement** had been reached at the earlier mediation between the Claimants and the other co-defendants (but not the Defendant), after which the Claimants continued with their claim against the Defendant. The Defendant argued that she needed to establish the basis upon which the settlement with the co-defendants had been reached, to ensure that the Claimants were not attempting to make a "double recovery" or make a tracing claim when they had already elected to sue for damages. The Court agreed that disclosure from the mediation was **necessary** to allow the Defendant to establish her defence.

On the face of it, this appears to be contradictory to the later decision in **Cumbria**. However applying the criteria from **Farm Assist**, it appears that in **Cattley** the Court considered that it was in the interests of justice to override the confidentiality provisions of the Mediation Agreement, **presumably on the basis** that the Defendant was a party to the same proceedings as the co-defendants, even though she had not been present at the mediation itself (which was also the apparent basis upon which the Court **effectively discounted** without prejudice privilege). By contrast, in the **Cumbria** case the Claimants' **claim against the Defendants** had been brought in completely separate Court proceedings from those relating to the **earlier mediation** between the Claimants and DEFRA.

Was a binding settlement concluded?

The decision in **Farm Assist** also expands upon the earlier decision in the 2007 case of **Brown v Rice & Patel**. In that case the Court allowed disclosure of evidence relating to **what happened** at a mediation, in order to determine whether or not a binding oral settlement agreement had been **reached**.

Applying the **Farm Assist** reasoning retrospectively to that decision, it appears that the Court considered that it was in the interests of justice to allow disclosure on that occasion, **on that basis** that the confidentiality provisions in the Mediation Agreement had not been intended to prohibit the Court from determining if a binding settlement had been reached (which was also the justification for excluding without prejudice privilege). This was despite the fact that the Mediation Agreement (like most Mediation Agreements) **required** that any settlement agreement concluded at the mediation had to be made in writing.

The repercussions of the Farm Assist decision

On a practical level, the **Farm Assist** decision may result in mediators seeking to amend their template Mediation Agreements in the future in an attempt to provide themselves with **greater protection**. For example, mediators may seek to extend the prohibition on them being called as a **witness beyond** simply any litigation "in relation to the Dispute" (although the **Farm Assist** decision indicated that any such prohibition would still be subject to the consideration of the interests of justice). Alternatively, mediators may **require** the parties to a Mediation Agreement to indemnify them in respect of their legal costs and **other expenses** in the event that they are called as a witness in any subsequent proceedings.

If there is one clear principle to take from this judgment, it is that the Courts have confirmed that the interests of justice will always take priority over contractual confidentiality provisions and without prejudice privilege.

For further information on this or any other issue relating to ADR or mediation, please contact **Michael Axe** by emailing **Michael** or by calling him on 08450 990045, or speak to your usual contact in the **Commercial Disputes Team**.

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