

How confidential are mediations?

Paul Jammy explores a recent UK judgement into confidentiality provisions.

Case note: Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2) [2009] EWHC 1102 (TCC).

Many business people and lawyers distrust mediation. Something about the idea of sitting down with "the enemy" in a frank and open exchange, shortly before you square off in court, just doesn't feel right.

To counter this unease, advocates of mediation have stressed the security of the process: if it works, everyone's happy; if it doesn't, the confidentiality of the proceedings is ensured, and no-one is any the worse for it.

But a recent judgment in the United Kingdom serves as a useful reminder to Australian lawyers that this assurance is not absolute. What goes on behind the closed doors of a mediation will not always be protected from disclosure.

The dispute in *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2) [2009] EWHC 1102 (TCC)* concerned whether a settlement reached during mediation proceedings had been entered into under economic duress. In court proceedings, some six years after the mediation, the High Court was asked to decide whether the mediator could be compelled to give evidence of what transpired during the mediation, including in her private conversations with the parties.

The parties had, with the Court's leave, written jointly to the mediator, asking whether she had any notes, documents or recollection of the proceedings. Her reply was that she had none, and that as she conducted about 50 mediations per year, she had no useful recollection of this one. Undeterred by this response, the defendant sought to take a witness statement from the mediator. The mediator referred to the mediation agreement, in which the parties undertook not to call her as a witness, and declined to assist unless ordered to do so. When the defendant subsequently served a witness summons, the mediator sought to have it set aside. There was no doubt that the parties had agreed in advance that the mediation would be confidential. Although the privilege and confidentiality attaching to "without prejudice" communications and the mediation as such has been seen as inviolable, courts may limit the extent to which this applies.

Parties can, of course, waive privilege – and in the *Farm Assist* case they had done so. That left the question of whether there was a further obligation of confidentiality arising from the mediation agreement. The Court accepted that to protect the integrity of the mediation process, it was necessary to recognise a duty of confidentiality owed also to the mediator. There may be other applicable privileges, but these, the Court held, could be waived by the parties.

Having recognised that a confidentiality agreement is generally enforceable by the mediator, the Court went on to hold that there may be times when this confidentiality must yield to the interests of justice. The circumstances of the *Farm Assist* dispute was one such time. Two of the factors driving this conclusion were the lack of objection by the parties, and the fact that the

evidence sought concerned the mediation proceedings themselves, and not the underlying dispute, which is what the confidentiality clause in the mediation agreement was concerned with.

In Australia, there are legislative provisions (Commonwealth and State) which govern, and generally protect, the confidentiality of mediations. But there is a debate about how far that protection should extend. The tension that arises is between giving parties to a mediation the confidence to participate freely in the process knowing that information disclosed is protected, and preventing the sterilisation of information disclosed in the mediation as evidence in subsequent litigation even though the other party may have known about or been able to find out about it independently of the mediation.

In *Williamson v Schmidt* [1998] 2 Qd R 317 the Queensland Supreme Court preferred the view that such evidence was admissible, although communications that were of a "without prejudice" nature, such as the attitude of a party to negotiations, would not be admissible. In passing, the Court suggested that, as with any other agreement, an agreement reached in a mediation could be sued on, and that evidence relevant to the conclusion of the agreement would then be admissible. This statement, although *obiter*, would suggest an approach consistent with that taken by the UK High Court in *Farm Assist*.

None of this means that lawyers should advise against mediations, or that business people should avoid them. Nor does it mean that participants in mediation must assume that they cannot talk in confidence. Confidentiality in mediations will remain the general rule. But as with most rules, one should always be alive to the possibility of exceptions.

About Paul Jammy

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"It therefore will still be the position that no English mediator will have had to give evidence at a trial about what happened during mediation. But the fact that the judge considered that she could have been required to do so raises important questions which are worthy of detailed consideration."

Civil Mediation Council guidance note: Mediation confidentiality – 8 July 2009. [Click here >>](#)