

## CIVIL MEDIATION COUNCIL GUIDANCE NOTE No 1

### MEDIATION CONFIDENTIALITY - 8<sup>th</sup> JULY 2009

The courts are developing the law relating to mediation confidentiality and so-called mediation privilege on a case-by-case basis. Mr Justice Ramsey's recent judgment in *Farm Assist (No 2)* has aroused widespread interest among mediators. Articles by Michel Kallipetis QC and Bill Wood QC are at [www.themediator magazine.co.uk](http://www.themediator magazine.co.uk) and an article by Tony Allen is on the CEDR website at [www.cedr.com](http://www.cedr.com). Sir Henry Brooke, CMC Chairman, has written a short summary of the effect of this judgment, which is on the CMC website at [www.civilmediation.org](http://www.civilmediation.org).

There are the following practical lessons to be learned from this judgment:

1. Mediation agreements should continue to specify that the mediation proceedings are conducted on a "without prejudice" basis.

*Note: "Without prejudice" privilege is a privilege of the parties, not the mediator. The parties may both/all agree to waive this privilege, or it may be overridden in exceptional circumstances. The exceptions include cases of dispute as to whether an agreement has been reached at the mediation and cases of serious misconduct, eg fraud, duress etc.*

2. Mediation agreements should continue to make it clear that what is said during mediation proceedings will be confidential.

*Note: This contractual confidentiality extends to the mediator, who can seek to maintain it even if the parties are willing to waive it.*

3. Mediation agreements should not restrict the circumstances in which a mediator cannot be compelled to give evidence in court.

*Note: The CEDR Model Agreement now provides that "the parties will not call the Mediator as a witness nor require [him/her] to produce in evidence any record or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process."*

*In Farm Assist (No 2) the language of the agreement referred only to litigation or arbitration in relation to the dispute. The judge held that this wording was not wide enough to cover a different dispute - as to whether duress had been deployed by one of the parties during the mediation.*

According to the law stated in this judgment, a court may override a claim to contractual confidentiality if it considers it necessary to do so in the interests of justice. There is an ongoing debate as to whether, even if a mediator is ordered to give evidence, he/she may rely on a so-called mediation privilege and decline to give evidence about "confessional exchanges" he/she had with either party. Such an approach has recently received authoritative support. (Sir Michael Briggs, "Mediation Privilege?", *New Law Journal*, 3<sup>rd</sup> and 10<sup>th</sup> April 2009)

In reviewing their mediation agreements mediators and mediation providers may wish to consider a term requiring a party who seeks to call a mediator to give evidence to indemnify the mediator in respect of any costs he or she incurs in dealing with the application and even to provide for mediators to be paid at their hourly rate for the time spent dealing with such applications or giving evidence.