

Honestly, can parties trust the mediation process?

I am fascinated to read that this week a US judge ruled that documents produced as part of a mediation were not able to be accessed by one mediation party's spouse.

Ms Jamie McCourt claims that her partner, Mr Frank McCourt massively understated the value of an asset (the LA Dodgers team) when reaching a divorce settlement with her, and that the true value is revealed in the papers produced as part of a confidential mediation concerning the sale of the Dodgers baseball team.

On my reading of reports of the proceedings* (see for example <http://www.bloomberg.com/news/2013-04-15/la-dodgers-secret-deal-can-t-be-used-in-divorce-judge.html>) the judge has ruled that the mediation confidentiality prevails despite the allegation (and strong possibility) of fraud to the extent of US\$1.5B.

The report states: *"This is my order and I am enforcing it because it was an essential ingredient in the success" in ending the Dodgers' bankruptcy, US Bankruptcy Court Judge Kevin Gross said.*

"The Dodgers left bankruptcy last year after Frank McCourt sold the team for a record \$2 billion to a group..."

"...After the team was sold, Jamie McCourt filed court papers saying her \$131 million divorce settlement was based on fraud and asked that it be set aside. In her request, McCourt, who is an attorney, said Frank McCourt declared under penalty of perjury in August, 2001 that the fair market value of their assets was less than \$300 million."

The decision is interesting as, here in Australia, courts appear anxious that mediators and lawyers act honestly and candidly in mediation. As an example, you could look at a matter involving leading barrister Mullins and his instructing solicitor Garrett. Mullins was and is a highly respected lawyer, but knowingly allowed a wrong assessment of a party's circumstances to go uncorrected during mediation. The other party relied on that wrong calculation in reaching agreement. Professional misconduct findings were subsequently made. An excellent review of the issues can be found in Associate Professor Bobette Wolksi's article:
http://www.mulr.com.au/issues/36_2/36_2_10.pdf.

As Professor Wolksi states: *"If Mullins and Garrett had followed the rules, a revised report would have been provided to the defendant (or one or both of them would have withdrawn the report, alerting the defendant to the fact that all was not well and leading to an adjournment of the mediation).*

Those circumstances seem similar to those in the McCourt matter, where Ms McCourt seeks access to documents produced on behalf of her former partner in a separate but related mediation as she believes they reveal fraud involved in the process in reaching a divorce settlement.

My concern is that the integrity of mediation processes must be protected and preserved. Confidence in mediation is diminished if it is seen as a process in which diminished professional standards apply, or parties settle disputes on the basis of knowingly wrong information presented by or on behalf of the other party, or mediation confidentiality can be used to enable a party to tell one story in one jurisdiction, and another in mediation.

As a side issue, what is less surprising - and consistent with much political discourse in Australia where we currently have our first female Prime Minister and first female Governor General - is the misogynistic comments posted by readers of the Bloomberg article regarding appearance and character of the applicant, Ms Jamie McCourt, and the description in other US media of Mr McCourt's new dinner date as "a very hot young woman".

*As an Australian lawyer mediator I have not been able to access the PACER system to view the judgement.

The case is In re Los Angeles Dodgers LLC, 11-12010, U.S. Bankruptcy Court, District of Delaware (Wilmington).

<http://www.bloomberg.com/news/2013-04-15/la-dodgers-secret-deal-can-t-be-used-in-divorce-judge.html>