

Myth

In England and Wales the courts are entitled to investigate what happens at mediations to a degree that many colleagues, certainly those in California, find very surprising.

Ordinary negotiations attract without prejudice privilege.- clear policy that nobody should be inhibited from making compromise proposals by the fear that their offer will later be exploited as a concession. That does not seal away information permanently and for all purposes of course.

Mediated negotiations enjoy no additional protection. The presence of a mediator makes no difference to the law's approach to these matters.

At a quick glance the position is the same in among other places Australia and New York. So as and when issues arise which are collateral to the issues at the heart of the mediated dispute then the court will allow evidence to be called and disclosure be given. For example so as to Investigate,

- The meaning of the settlement agreement where specific terms were used in the course of negotiation
- Duress or fraud in the conduct of the negotiations
- Negligence by one of the professionals involved
- The reasonableness of the settlement reached where the paying party seeks to recover the damages from a third party.

In June of this year in *Berkeley Square Properties* injustice would surely have been done if a party had been found guilty of fraud when the fraud allegation could be readily answered by referring to statements made at a mediation. Of course the Claimant sought to exclude it as inadmissible but the court rightly took the view that the interests of justice required disclosure.

The cases in which this will arise are relatively few. The English approach has not dampened the parties' enthusiasm for going to mediation or their frankness in discussing matters when they get there. Businesspeople know that all of the confidentiality agreements they reach with their staff, their business partners and their advisors are vulnerable to be over-ridden if a legal issue subsequently arises and the confidential matters are plainly relevant.

In an even smaller numbers of cases the mediator may need to give evidence. It is hard to see why we should not do so? Other professionals such as doctors and nurses are regularly called away from their far more important duties to give evidence. Why would we think we're too special to assist in the same way. There may be situations, rare of course, in which only our evidence can prevent an injustice taking place.

Bill

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