POINT OF PRACTICE: WITHOUT PREJUDICE PRIVILEGE

CIVIL WATCH – BLOG POST

As part of Goldsmith Chambers' Civil Watch series, we have invited members of our Civil Team to write blog posts on their recent experiences within the Civil Courts.

In this post, Oliver Newman looks at the operation of without prejudice privilege in pre-litigation correspondence.

1. All of us will be familiar with without prejudice privilege, letters sent with the explicit header "without prejudice save as to costs" making offers to settle which are privileged from disclosure before the trial court, until the issue of costs arises. In this context it is a well understood, and commonly used tool.

2. However, matters become more complicated when what is under consideration is not correspondence between legal professionals but rather between lay people where no explicit privilege is invoked. In short, what is the line between an admission of liability which can be relied upon in court and an offer to settle protected by without prejudice privilege?

3. I recently had to consider this point in an adverse possession case being appealed to the Upper Tribunal (Lands Chamber), where the Appellant was challenging the First Instance Judge's decision to exclude as privileged correspondence where the Respondent's had made offers to pay for land which they would later assert they believed they had previously purchased.

4. The first important point to consider is that without prejudice privilege is *not* limited to where it has been explicitly invoked by way of a header or the like. The court will instead consider the nature, timing and content of the correspondence rather than the form. This has resulted in some academic discussion about what without prejudice privilege *is* and how it is formed. There has been some suggestion that it is a result of a tacit agreement between the parties as to the status of the communications, but that runs up against the fact that a single letter, without a reply, can attract the privilege.

5. The best way of thinking about it, rather than resulting from any particular relationship between the parties, is that it is a rule imposed by the courts due to the public interest in its existence. *Phipson on Evidence, 19th Edition* §24.13 describes the policy behind it as follows:

"It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should … be encouraged fully and frankly to put their cards on the table … the public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability."

6. As such, it is quite distinct from legal professional privilege which relies on a particular relationship between the parties for it to come into being.

7. Were it applies, it will operate to render inadmissible evidence of what was said and/or done in the course of negotiations genuinely aimed at settlement *Rush & Tompkins Ltd v GLC [1989]* AC1280, is not limited to correspondence in the course of negotiations with the other party to those negotiations but also extends to statements made to other parties within the same litigation and it is not limited to admissions made against a party's interest, and so the whole of the negotiation will normally be inadmissible *Unilever plc v The Proctor & Gamble Co [2000]* 1 WLR 2436.

8. In short, A is not entitled to rely on correspondence between B and C if C is a party to the same litigation, even if A was not involved in the negotiation and irrespective of whether settlement was achieved between B and C. The court will also be reluctant to 'salami slice' correspondence, admitting some sections and not others. It is likely that where correspondence deals with attempts at settlement, even if at other points it deals with other matters, the whole thing will be inadmissible. Per Lord Hope in *Ofulue v Bossert* [2009] 1 AC 990 (HL) Lord Hope noted that without prejudice privilege is *"not a situation in which arguments that resort to procedural or linguistic technicalities are appropriate."*

9. The principles of the rule can be summarised as follows:

- It operates to render inadmissible statements made in a genuine attempt at settlement
- It does not rely on any particular formalities, it does not require the correspondence to be marked as 'without prejudice'
- It operates as a wide blanket over all parties to a particular piece of litigation, it cannot be avoided by the party seeking the correspondence admitted saying that they were not a party to the particular negotiation
- Its scope is wide and attempts to 'cut out' or exempt particular statements from otherwise privileged material are likely to fail

10. So, where is the line to be drawn in practice between an admissible admission of wrongdoing and a statement made in an attempt at settlement?

11. In *Framlington Group Ltd v Axa Framlington Group Ltd* [2007] EWCA Civ 502 the Court of Appeal held that the relevant question was whether the parties contemplated or might reasonably have contemplated that litigation would follow if they could not agree [34]:

> "The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."

12. In *Bradford & Bingley Plc v Rashid [2006] 1 WLR 2006* Lord Mance referenced the judgement of Lord Griffiths in *Rush & Tompkins*, holding that [81]:

> "The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded)… The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)."

13. In short, was the dispute at a point where the parties either did or would have reasonably considered instructing lawyers or issuing proceedings if their discussions failed to reach a satisfactory conclusion? Explicit threats to take someone to court or instruct solicitors will of course be highly probative but so will be consideration of the other options available. Was this a discussion about how much the cost of something was, or a situation where only a mandatory injunction would solve the problem? Would resolution require possession proceedings?

14. The rule does however have some exceptions, largely grounded by similar public policy considerations to those behind the rule itself. They were summarised in *Univever* as follows:

- When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those conclusions are admissible;
- To show that an agreement apparently concluded between the parties should be set aside on the grounds or misrepresentation, fraud or undue influence;

- A clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel;
- If the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety;
- In order to explain delay or apparent acquiescence; and
- The exception for an offer expressly made 'without prejudice except as to costs'.

15. Effectively, there are exceptions where the rule might work to prevent the enforcement of agreements freely entered into and where it would otherwise act as a shield preventing the proving of unfair or unlawful activity.

16. What this means in practice is that great care should be taken when advising clients as to the admissibility of seemingly case-winning admissions made before the involvement of lawyers. Considerations of the timeline is likely to be key. While lay clients may take great support from such seeming admissions, much of the time they will be inadmissible. The exceptions are relatively narrow and distinct.

17. In the case in the Upper Tribunal, the Judge looked very carefully at the correspondence and concluded that as the Appellant knew about the adverse possession over at least part of the land at the time of the correspondence, it would or should have been clear that if negotiations failed then the only possible next step would be possession proceedings, it was covered by without prejudice privilege.

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