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The High Court reassures that without prejudice privilege will cloak all communications made during mediations and other negotiations, unless confidentiality is waived (implicitly or explicitly) or exceptional circumstances arise.

Hall and another v Pertemps Group Ltd and another [2005] All ER (D) 15 (Nov)

Mr Hall and others launched an action against the defendants for the return of documents, breach of confidentiality and remuneration. This was subsequently stayed whilst the parties explored settlement at a mediation. Following the mediation, the defendants began a separate claim alleging that, in breach of the mediation agreement, Mr Hall had indicated to a third party that he had been threatened by the defendants at, or shortly after, the mediation.

The Court was asked to determine whether, in considering the appropriate costs order, the alleged threats could be taken into account. The defendants did not consider that they should, maintaining that they were made during without prejudice discussions and as such were covered by without prejudice privilege.

The Court's decision

The Court began by reaffirming the rationale for maintaining without prejudice privilege: public policy encourages parties to speak freely when attempting to settle disputes and there is an implied agreement between two parties that certain information, once disclosed, should not be relied upon by the other party in open court. It is considered that this protection encourages parties to make concessions they would not ordinarily make in open discussion for fear of inviting a tactical disadvantage, which may in turn facilitate the settlement of an otherwise intractable dispute. Case law makes it clear that this privilege will only bite where the discussion or correspondence in question represents a genuine attempt to settle a dispute; merely labelling a letter or set of discussions “without prejudice” will not be enough.

It was often the case that parties would try to rely on admissions apparently made during without prejudice discussions in the course of the underlying dispute itself. Previous decisions have severely limited the circumstances in which without prejudice privilege can be disregarded in this way¹. In general a court will still look behind without prejudice privilege in cases of :-

- perjury;
- blackmail; or
- unambiguous impropriety².

These circumstances limit the possibility of a court inquiring behind the protection. In fact the more the events to which the protection relates are relevant to the underlying dispute, the more likely they are to be covered by without prejudice privilege.

¹ In *Unilever plc v Proctor and Gamble Co* (2000) 1 WLR 2436, the court set out eight circumstances in which without prejudice privilege may be disregarded, including where this is required to explain a delay or apparent acquiescence; where there is an issue as to whether a settlement agreement had been concluded, and where the rule is being used to cloak “perjury, blackmail or unambiguous impropriety”.

² In *Berry Trade Ltd and another v Moussavi and others* [2003] All ER (D) 315 (May) and *Savings & Investment Bank Ltd. v Fincken* [2003] EWCA Civ 1630 the court indicated that only very clear cases of an abuse of privileged discussions would constitute an “unambiguous impropriety” such that without prejudice privilege should be set aside.

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Consequently, the Court in *Pertemps* made it clear that the claimants could not have asked the court to take into account the threats allegedly made at the mediation when assessing costs, were it not for the fact that they had been referred to in satellite litigation. The Court found that the pleadings in these separate proceedings were public documents thus confidentiality, an essential ingredient of without prejudice privilege, had been lost. The public policy reasons listed above for maintaining privilege in respect of these comments could no longer be said to apply as there had been, “a mutual waiver by both parties of the protection so far as concerned that discrete matter which took place in that discrete meeting”. The Court was not, however, entitled to consider statements made or alleged to have been made at the mediation in so far as these went beyond the facts pleaded in the satellite litigation.

Comment

This case reiterates the sanctity of without prejudice privilege. In so far as there are no exceptional circumstances, any comment made during without prejudice discussions or correspondence will be protected; it should remain off the record and will not impact upon the case when it is conducted in open court. It is clear, however, that should comments made in such negotiations lose their confidentiality a court will be able to take them into account, for example in determining costs. This is a particularly pertinent concern should parties wish to bring separate proceedings under a mediation agreement and careful thought must be given to the content of any pleading supporting or denying any such an action.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts at Linklaters.

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