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Insights

MEDIATION AND THE LIMITS OF WITHOUT PREJUDICE PRIVILEGE

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Mediation is a common way to resolve disputes and one of its advantages is that any discussions are undertaken on a without prejudice basis, so that parties can speak freely. Indeed, the without prejudice privilege that attaches to settlement discussions is an established principle of English law.

The recent decision in Pentagon v Cadman Ltd considered the extent to which this privilege applied in context of mediation. While the aim of this rule is to protect discussions from being disclosed, it is important to recognise that it is subject to a number of exceptions, as established in previous decisions including Unilever plc v The Proctor & Gamble Co and Oceanbulk Shipping v TMT.

In this insight we consider the English court's approach to without prejudice privilege in the context of communications made during a mediation and the broadening exceptions that apply to it.

BACKGROUND

The parties were in dispute about losses caused by a fire to the property owned by the defendant.

In an attempt to resolve the dispute amicably, the parties agreed to take part in a mediation. During the mediation, there was a proposal that the property would be purchased by a third party which was part of the claimant's group of companies and the discussions at the mediation then primarily focused on the sale price and terms and whether a personal guarantee would be provided. It was also agreed that the purchaser will enter the contract to purchase as soon as reasonably practicable, and it was expressly represented to the claimants that the property could be sold by the defendant. This was the subject of a settlement agreement entered into following the mediation.

The claimants later discovered that the defendant was not in fact the legal owner of the property. Instead, the property was owned by three individuals as trustees of a related pension fund. The claimants brought a claim seeking damages for breach of the settlement agreement and/or misrepresentation.

MEDIATION AND THE EXCEPTIONS TO WITHOUT PREJUDICE PRIVILEGE

The issue for the Court was whether and to what extent it could determine the claim by looking at what was discussed, on a without prejudice basis, during the mediation.

The judge decided that he could reach a decision based on non-privileged documents, but he also considered the extent to which the evidence of what occurred in the mediation could be relied on in the Court under one of the limited exceptions allowing evidence of without prejudice communications. In that context he considered two of the recognised exceptions.

First, he looked at whether the exception that allows a settlement agreement to be set aside for misrepresentation, fraud or undue influence should extend to negligent misrepresentation. The judge's view was that this exception would in fact extend to negligent misrepresentation. Further, he noted that it is difficult to see any relevant difference between negligent and fraudulent misrepresentation in the context of rescission (setting aside a settlement agreement). He noted that rescission is available to all three kinds of misrepresentation (fraudulent, negligent, and innocent); therefore, it cannot make a difference whether the remedy claimed is damages or rescission. On this basis, the without prejudice rule exception which admits evidence to show that a settlement agreement should be set aside for misrepresentation, fraud or undue influence should extend to negligent misrepresentation.

Second, he considered the exception that allows without prejudice communications that form part of factual matrix or surrounding circumstances to be considered when interpreting contractual words should also apply where the facts are relevant to whether a contractual term can be implied. This was the issue decided by the Supreme Court in Oceanbulk, and the judge considered whether the same principle would apply when considering whether terms should be implied. In his view, although interpretation and implication are different, they both draw on the same evidential context: the surrounding circumstances known to both parties at the time of the contract and commercial common sense. On that basis, he proposed what he described as a "very modest extension" of this exception to implication.

DOES "MEDIATION PRIVILEGE" EXIST?

The judge also considered the possible existence of what some ADR commentators refer to as "mediation privilege" being a different type of privilege going beyond without prejudice privilege. Although the judge did not need to decide the issue in this case, he did not think that "mediation privilege" exists. He noted the recent case of Churchill v Merthyr Tydfil BC, where the Court of Appeal held that the Court has the power to compel parties to alternative dispute resolution, and the Court's power to further the Overriding Objective by "promoting or using alternative dispute resolution". However, he was of the view this to compelling parties to mediate did not justify a new and more enhanced form of without prejudice privilege.

The judge also noted that in the context of mediation, settlement agreements are often drafted at the end of a day-long mediation, and that they record what the parties understood and are often

initially drafted in manuscript and signed there and then. In those circumstances, the evidential context of the agreement is more important than it would be in a complex commercial contract negotiated over a period of weeks in granular detail. Contextual interpretation may well be appropriate for settlement agreements signed at a mediation where agreements are drafted quickly with little opportunity for detailed consideration.

KEY TAKEAWAYS

The “without prejudice” rule plays an important part in dispute related communications but it is not always easy to identify what is a without prejudice communication as discussed in our insight, "Without prejudice privilege – guidance from the Privy Council". The effects of referring to without prejudice material can be serious. For example, in a recent adjudication case it rendered an adjudicator’s decision unenforceable as discussed in our insight, "Adjudication decision rendered unenforceable due to inadmissible without prejudice material".

As with any agreement, this case is a useful reminder that whatever may have been discussed and raised during negotiations, it is only the final executed agreement that will govern the parties’ rights and obligations. If the agreement is intended to reflect any conditions or assumptions, these need to be expressly included and be drafted sufficiently clearly, to reduce the scope for any uncertainty that may lead to later disputes.

In addition, parties who negotiate on a without prejudice basis assume that this means that they can speak freely and that what they say will not be raised in any court proceedings or other formal dispute resolution proceedings. This is generally the case, but there are a number of exceptions, and this case demonstrates how such without prejudice discussions may end up being considered before the court, if they may assist resolve an issue of interpretation. Nonetheless, it is still important to be clear on whether discussions seeking settlement are on a without prejudice basis, and avoiding ambiguities or uncertainties as to what the settlement agreement records will help ensure that the settlement does bring finality to the dispute.

This article was written with trainee solicitor Caroline Cwiertnia.

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