# THE 'WITHOUT PREJUDICE' PRIVILEGE – A RECENT CAUTIONARY TALE

The scope of the 'without prejudice' privilege is an issue that can cause consternation amongst the most experienced lawyers. The privilege has developed to enable litigants to explore settlement of their dispute without affecting their legal rights; it does not, however, extend to all statements or communications made in furtherance of a compromise in the litigation.

In early February, the Supreme Court of New South Wales was called upon to decide, amongst other things, whether communications between parties to a design and construct contract were admissible in the proceedings or whether the communications were subject to the 'without prejudice' privilege (*Hera Resources Pty Ltd v Gekko Systems Pty Ltd* [2019] NSWSC 37).

## The application for ruling

The application for ruling was made in advance of trial and under s 192A of the Evidence Act 1995 (NSW) (Evidence Act). Section 192A provides:

> ***Where a question arises in any proceedings, being a question about:***
> ***(a) the admissibility or use of evidence proposed to be adduced, or***
> ***(b) …***
> ***(c) …***
> ***the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.***

The documents over which the dispute arose were a letter from the defendant to the plaintiff dated 26 October 2016 and an expert report prepared for the defendant and provided with the letter. The defendant submitted that the letter was privileged from production under s 131 of the Evidence Act and that the report was privileged under either s 131 or under s 118 or s 119.

Section 131 codifies the 'without prejudice' privilege. It provides that evidence is not to be adduced of:

> ***(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or***
> ***(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.***

Sections 118 and 119 codify client legal privilege (advice and litigation privilege, respectively).

## Background to the dispute

The design and construct contract between the parties contained a dispute procedure which commenced by service of a notice of dispute. The escalation clause then provided for a conference between the parties' managing directors, mediation, and then a choice of arbitration or litigation.

The plaintiff had identified a number of defects in the plant, which was the subject of the contract, in a letter to the plaintiff in early May 2015. The defendant's response was marked 'without prejudice' and sought further information and a site visit. The plaintiff provided some information in an 'open' letter. The defendant responded in a document called a 'Technical Note', again marked as 'without prejudice', and sent this under cover of an email offering:

> ***… to meet on a without prejudice basis but we would need to have received all potential defects notices prior to such meeting …***

Once again, consistent with its earlier letters, the plaintiff commented on the Technical Note in an 'open' letter, observing that the letter served as a notice of dispute under the contract. Some further correspondence then passed between the parties; this correspondence is not disclosed in the judgement.

Almost a year later the plaintiff sent a 'without prejudice' letter to the defendant offering 'to have a final without prejudice meeting with the Managing Director of [the defendant] in an effort to reach an amicable resolution of the dispute, provided such a meeting takes place by Friday 17th June'. This was followed by discussions between the parties. The plaintiff then sent another 'without prejudice' letter to the defendant; the defendant responded by email marked 'without prejudice'. Both letters deal with the role of the insurer and in broad terms express a desire to continue settlement discussions. There are no settlement offers or statements of compromise in this correspondence.

The plaintiff responded confirming its right to commence litigation or arbitration.

The defendant then sent the letter and the report that are the subject of this decision. The letter was sent in response to the plaintiff's first letter in the new dialogue. It was marked 'without prejudice' and enclosed a copy of the report. The letter 'took issue with [the plaintiff's claims]', but concluded with the words:

> ***[the defendant] is prepared to conduct a without prejudice meeting with [the plaintiff] to discuss the possible resolution of the Area 15 dispute.***

The plaintiff's response was not marked 'without prejudice'. It set out the steps taken by the parties in furtherance of the dispute and the settlement discussions since June 2016, but did not contain any settlement offer or compromise. Around six weeks later, the defendant made a without prejudice offer.

## Consideration

His Honour referenced ss 118, 119 and 122 of the Evidence Act, noting the circumstances in the Act when client legal privilege can be lost. His Honour then turned to s 131 of the Evidence Act, which is entitled 'Exclusion of evidence of settlement negotiations', observing:

***As s131(1) makes clear, in order to attract the privilege, a communication or document must be made or prepared "in connection with an attempt to negotiate a settlement". The connection must be a direct one. An indirect connection is not sufficient. However, it is not necessary that the communication itself make an offer or that it be directed at achieving a compromise. It is sufficient if the communication or document is directed at arranging or bringing about a settlement: see Galafassi v Kelly [2014] NSWSC 190 at [115] ff per Gleeson JA. It is not necessary that the communication or document be described as "without prejudice", nor is it conclusive if it is. However, the fact that the parties have described a communication as "without prejudice" is some evidence that it is made in connection with an attempt to settle a dispute: id at [122].***

## Was the report subject to client legal privilege?

His Honour rejected the submission that the report was protected from disclosure by client legal privilege. There were two reasons for this. First, his Honour found that the report had not been prepared for the dominant purpose of obtaining legal advice: '[a]t least a substantial purpose of the report was to provide an answer to [the plaintiff's] claim'. This finding was based on statements in communications between the parties. Secondly, his Honour found that the defendant waived any privilege in it by providing it to the plaintiff under cover of the letter.

## Were the letter and the report covered by the 'without prejudice' privilege?

His Honour was not persuaded that the documents were protected by this privilege, finding that:

***there is not sufficiently close connection between the 26 October Letter and the OMC Report and any attempt to negotiate a settlement of the dispute for the letter and report to attract the privilege conferred by s 131 of the Act.***

In particular, his Honour noted that the letter and the report:

***were not themselves directed at an attempt to negotiate a settlement of the dispute even though they provided context in which settlement discussions could occur and settlement offers could be evaluated.***

His Honour also had regard to the fact that the letter and report were not provided 'as part of some process agreed between the parties to negotiate a settlement'. His Honour's view was that the information in the letter and the report 'was exchanged as a means of crystallising the dispute and providing the context in which discussion could occur'.

As to the fact that the defendant had expressly marked the letter as 'without prejudice', his Honour confirmed that this did not alter the position. A reference to 'without prejudice' discussions in the letter was also of no import when determining whether the letter and report were actually covered by the 'without prejudice' privilege.

## The ruling

The Court ruled that both the letter and report were admissible and could be relied on by the plaintiff at trial.

## Observations

This decision is a warning of the need for clear (and parallel) communications where parties are both exchanging information about a dispute and discussing a potential settlement. It is all too easy to send one email or one letter addressing all issues relevant to a dispute and its resolution. However, where parties are communicating both under the privilege and by express 'open' letters, the prudent course is to send separate communications. Had the parties in this case adopted that approach, aspects of the letter, which was the subject of the ruling, may have been protected. The earlier decision of *Gladio Pty Ltd v Buckworth*, cited by his Honour (and referred to above) reinforces this message.

As to the report, whilst it is difficult to see how it might be protected by the 'without prejudice' privilege, there are circumstances in which it might have been commissioned and provided to the other party whilst attracting and preserving protection under the litigation privilege. Here, that was not the case.

This decision makes it clear that the 'without prejudice' privilege (amongst others) will always be based on the purpose and content of any particular communication. The words 'without prejudice' will not protect a document from disclosure or render it inadmissible.


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