Litigation & Arbitration Group

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Client Alert

Without prejudice privilege: recent case law

25 June 2020

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In two recent judgments, the English courts addressed issues relating to the admissibility of without prejudice communications (demonstrating that the protection from disclosure of these communications is not absolute, but subject to exceptions). In Berkeley Square Holdings v Lancer Property Asset Management Ltd[1], the Court considered the admissibility of without prejudice communications to defend against allegations of fraud (deciding that such communications were indeed admissible). This is the first reported English case where this 'fraud' exception to the inadmissibility rule has been applied. In Motorola Solutions Inc v Hytera Communications Corporation Ltd[2], the Court found that without prejudice statements made during settlement negotiations were admissible in support of an application for a freezing order.

Berkeley Square Holdings

Background

In Berkeley Square Holdings, the claimants brought an action against the defendants for fraud, alleging that the defendants had fraudulently conspired to increase certain fees which they had charged to the claimants for managing various properties and to pay those fees to a consultancy company.

The defendants denied the allegations and argued that the claimants had been aware of the payments and had agreed to the increased fees and that these arrangements had been highlighted in a prior mediation.

Without prejudice mediation statements – exceptions?

The claimants sought to strike out the parts of the defendants' defence which relied on a position statement provided during a mediation on the basis that those statements were covered by without prejudice privilege and were, therefore, inadmissible. The defendants argued that the statements fell within one or more of the exceptions to the inadmissibility rule.

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1 [2020] EWHC 1015 (Ch).
2 [2020] EWHC 980 (Comm).

As Mr Justice Roth noted, the protection of without prejudice communications is not absolute[3]. There can be "*a variety of reasons when the justice of the case requires*"[4] without prejudice material to be disclosed and there are, accordingly, several important exceptions. These exceptions include where:

(i) the issue is whether the without prejudice communications have resulted in a concluded settlement agreement or as evidence to assist in the interpretation of a settlement agreement;
(ii) a concluded agreement should be set aside for undue influence, fraud or misrepresentation;
(iii) a statement has been made by a party which is intended to be relied upon by the other party and that other party does, in fact, act in reliance on that statement;
(iv) the communications would, if not admitted, act as a 'cloak' for perjury, blackmail or other 'unambiguous impropriety';
(v) the communications could provide evidence of delay or apparent acquiescence (for example, in the context of an application to strike out proceedings for want of prosecution);
(vi) the communications go to the reasonableness of a party's mitigation of its loss through the negotiation and conclusion of a settlement (known as the "Muller" exception (see further, below)); or
(vii) the parties agree that correspondence, which would usually be without prejudice, could be put before the court on the issue of costs (e.g. correspondence marked "without prejudice save as to costs").

In Berkeley Square Holdings, the Court found that the defendants' statements made in a without prejudice mediation paper were admissible on the basis of the misrepresentation / fraud exception, as they were to be used to rebut allegations of fraud or as a "*small and principled extension of* [that exception] *in the interests of justice*"[5]. The Judge noted that if one "*can use the antecedent negotiations to prove a misrepresentation and thereby rescind an agreement, it is illogical to say that you cannot use them to disprove a misrepresentation and thereby uphold an agreement*"[6].

In this case, the mediation statements were clearly relevant to the facts as both sides knew them at the time (and, in particular, the claimants' awareness of the fee increases and relevant payments). This did not offend the general principle allowing parties to negotiate freely (and for without prejudice discussions to remain protected from disclosure). The Judge also considered that it was relevant that the defendants were seeking to put forward evidence of what they, and not the claimants, had said during the mediation.

Further exceptions

In addition to the fraud exception, the defendants sought to rely on two further exceptions:

- The Muller exception: The Judge noted that the defendants' statements would have been admissible, if required, under the exception set out in Muller and another v Linsley and another[7]. The claimants could not argue that they were ignorant as to key facts in dispute and at the same time seek to exclude evidence demonstrating that they had in fact been informed of those facts.

- Estoppel: Conversely, if it had been required to rely on the estoppel exception (whereby a party should not be allowed to make a statement on a without prejudice basis with the intention that the other party should rely on it, but subsequently prevent that other party from adducing that statement as evidence of its reliance to its detriment), the defendants' statements would not have been admissible. In this case, the defendants wanted to rely on their own statements and the claimants' silence as evidence of their ratification of those statements. The Judge found that this would have

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3 See Unilever Plc v Procter & Gamble Co [2000] 1 W.L.R. 2436; Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] UKSC 44.
4 See Rush & Tompkins Ltd v Greater London Council and others [1988] UKHL 7.
5 *Id* at paragraphs 59-62.
6 *Id* at paragraph 52.
7 [1994] EWCA Civ 39.

gone beyond the scope of the estoppel exception and would require negotiating parties to address every statement made by the other side so as not to be taken to agree with it by their silence (thus compromising parties' efforts to engage in constructive negotiations on a without prejudice basis)[8].

Motorola Solutions Inc

Summary

In Motorola Solutions, the Court granted a freezing injunction to preserve a defendant's UK assets for the purposes of enforcing a US judgment obtained by the claimant. Before the US judgment had been obtained, the parties had engaged in settlement discussions. In the course of these discussions, the defendant had made threats about how it would deal with its overseas assets if it lost the US proceedings (including that it would move them to jurisdictions where enforcement would be problematic). The Court held that these statements (despite having been made in the context of without prejudice discussions) should be admitted as evidence of the risk of dissipation in support of the claimant's application for a freezing order.

Background

The claimant, a developer and manufacturer of digital radio products, had obtained judgment in the US against the defendant (which provided digital radio products, based in China and the US) for intellectual property theft[9]. Concerned about the defendant dissipating its assets, the claimant applied for a worldwide disclosure order and domestic freezing injunction against the defendant.

In support of its application, the claimant sought to adduce evidence from two meetings which the parties had attended to discuss settlement. During these meetings, the defendant had stated that it would remove assets from enforcement-friendly jurisdictions in the event of an unfavourable judgment in the US. The defendant claimed that this evidence was not admissible, as it was covered by without prejudice privilege.

The freezing order

The claimant's evidence regarding the statements made at the settlement meetings was admissible as it fell within the "*unambiguous impropriety*" exception to the general rule protecting the disclosure of such communications, given the threat of dissipation to frustrate a judgment[10]. In doing so, the Judge considered previous Court of Appeal authority which held that to "*remove assets so as to deprive a successful claimant of the fruits of a judgment, does come within the concept of 'unambiguous impropriety*'"[11].

Mr Justice Jacobs found that there was a "*plausible evidential basis for Motorola's case as to what was said at the meeting*"[12]. The question which the court was required to consider was whether the statement would, if proven, pass the relevant threshold of what is permissible in settlement of "*hard-fought commercial litigation*"[13]. The Judge found that it did.

Comment

These recent decisions emphasise the evolving balance between the need to protect without prejudice communications on the one hand (so as to allow parties to freely negotiate and settle their disputes), and parties' ability to adduce evidence of such communications, (in cases where, for example, they need to raise a defence against allegations of fraud or prevent other parties from dissipating their assets). The courts' approach remains consistent with the principle that the without prejudice rule is not absolute. Care

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8 *Id* at paragraphs 59-62.

9 The claimant was granted compensation of US$345.7 million and punitive damages of US$418.8 million (although the enforcement of the judgment was affected by the COVID pandemic).

10 Dora v Simper [1999] 3 WLUK 273.

11 [1999] 3 WLUK 273.

12 [2020] EWHC 980 (Comm) at paragraph 65.

13 Boreh v Republic of Djibouti [2015] EWHC 769 (Comm) at paragraph 132 per Flaux J.

should therefore be taken by parties entering into such negotiations, as materials and/or statements produced during such meetings may become admissible.

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