

# PROTECTION OF ADMISSIONS IN SETTLEMENT DISCUSSIONS

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Settlement discussions regarding disputes are protected from disclosure by 'without prejudice' privilege. The rule applies to exclude from being given in evidence all negotiations genuinely aimed at settlement, whether oral or in writing. It also protects against disclosure of admissions made by one party during the course of the settlement discussions. The privilege is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.

In the recent decision in *Sang Kook Suh and anr v Mace (UK) Limited*, the Court of Appeal has confirmed that admissions made in a meeting with the other side's lawyer should not have been disclosed to the court during trial. The decision illustrates the breadth of 'without prejudice' privilege and the English court's wide application of the rule.

## Background

The case related to forfeiture of a lease by the Defendant, Mace (UK) Limited, of restaurant premises it had leased to the Claimants, Mr and Mrs Suh. Mr and Mrs Suh claimed against Mace for wrongful forfeiture of the lease. A key issue in the case was whether there had been rent arrears justifying the forfeiture.

While the proceedings were ongoing, Mr and Mrs Suh separated. Mrs Suh subsequently met with Mace's lawyer to discuss the case; she was not separately represented at that meeting. During the course of that meeting Mrs Suh admitted that there had been rent arrears. Mace sought to submit in the proceedings its lawyer's statement setting out her discussion with Mrs Suh as evidence of its right to forfeit the lease. Initially, Mace made an application for directions concerning this evidence, but did not specifically refer to the possibility that the evidence might be privileged. Mr and Mrs Suh's advisers did not immediately raise a privilege argument, instead arguing that the matter would best be determined by the trial judge at the beginning of trial. However, at trial Mrs Suh sought to rely on the 'without prejudice' rule to argue that Mace should not be entitled to admit evidence in relation to her meeting with Mace's lawyer and sought to retract the admission.

Mace argued that Mrs Suh should not be entitled to rely on 'without prejudice' privilege because:

- (a) the purpose of her meeting with Mace's lawyer was not to negotiate a settlement; Mrs Suh had visited Mace's lawyer to find out what was happening on the case rather to discuss a settlement of it;
- (b) even if the meeting was prima facie without prejudice, the cloak of privilege should be denied because it was being used for perjury or unambiguous impropriety; and

(c) any such privilege was waived by the Claimants' actions in the proceedings in not initially raising the privilege argument when Mace sought to introduce the evidence.

## Decision

At first instance, the judge held that the meeting between Mrs Suh and Mace's lawyer was not a without prejudice meeting. He found that it was not for the purpose of a genuine attempt to compromise a dispute between the parties.

The Court of Appeal reached the opposite conclusion and held that Mrs Suh was entitled to rely on 'without prejudice' privilege and ordered that Mrs Suh's admissions were inadmissible, effectively requiring a re-trial.

### First objection - application of 'without prejudice' privilege

The Court of Appeal held that the true question is whether the discussions were or ought to have been seen by both parties as "negotiations genuinely aimed at settlement". The discussions must be regarded objectively and in the round. The court asked itself what else could it be said the discussions were about? The court found that the only sensible purpose for the meeting must have been to seek some kind of solution to the litigation for Mrs Suh. The court also held that "[t]here is no justification for salami slicing the interviews into parts that were open and parts that were without prejudice".

### Second objection – privilege being abused

In relation to Mace's second objection, the court held that 'without prejudice' privilege could be denied where, for example, the person seeking privilege protection was, during the conversation in question, threatening the other party that he would give perjured evidence or seeking to blackmail the other party unless he agreed to the proposed settlement.

In the present case all Mrs Suh had done was later denied the admissions she had allegedly made in the meeting with Mace's lawyer. The court held that was not an attempt to use the exclusion of the evidence as a cloak for perjury, blackmail or other unambiguous impropriety.

### Third objection – waiver of privilege

Finally, the court rejected Mace's third objection that 'without prejudice' privilege had been waived. The court repeated the test for waiver of without prejudice privilege set out by Hoffmann LJ in *Forster v. Friedland* (unreported 10th November 1992):

"The fact that a party cannot or does not claim privilege from production does not necessarily mean that the document will be admissible. In the nature of things without prejudice communications will usually be within the knowledge of, and if in writing in the possession of, both parties. They are nevertheless inadmissible unless their exclusion is waived by both parties..." (emphasis added).

The court held that the question of waiver does not turn on whether the Claimants knew of the existence of the without prejudice privilege when they conducted themselves as they did; waiver is concerned with justice and the protection of the privilege itself and so needs to be

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assessed on a case-by-case. In the present case, the court held that the Claimants were merely responding to Mace's application to introduce new evidence and the fact that they did not immediately raise the argument that the evidence was protected by without prejudice privilege should not be held against them.

### Conclusion

This case demonstrates that the English courts will not be persuaded easily to lift the protection offered by 'without prejudice' privilege.

The court's ruling that the parties' discussions should be considered in the round and not be dissected into privileged and non-privileged parts is encouraging as it avoids satellite disputes. Practically, parties should seek to agree at the start of their discussion whether or not they are speaking on a 'without prejudice' basis as it minimises the risk of argument or disclosure at a later stage.

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