WATSON FARLEY
&
WILLIAMS

UK: EMPLOYMENT INSIGHT IN-DEPTH

WITHOUT PREJUDICE-UNAMBIGUOUS IMPROPRIETY

FEBRUARY 2018

FOR MORE INFORMATION PLEASE CONTACT:

ANNA ROBINSON
SENIOR ASSOCIATE
+44 20 7814 8086
AROBINSON@WFW.COM

Labelling a communication "without prejudice" is not a blanket protection for the writer. The without prejudice rule will usually prevent written or oral statements made in a genuine attempt to resolve a dispute from being put before the court as evidence against the party making the admission. However, simply saying something is "without prejudice" or marking a document "without prejudice" does not mean that it is protected from disclosure.

In the case of *Unilever Plc v Procter & Gamble Company* it was held that evidence of what a party said or wrote in without prejudice negotiations can be put as evidence in proceedings "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety". The unambiguous impropriety exception to the without prejudice rule will only apply in the "clearest cases of abuse of a privileged occasion".

What constitutes unambiguous impropriety was considered in 2016 by the Court of Appeal ("CA") in the case of *Ferster v Ferster* in the context of acrimonious litigation between three brothers regarding their respective interests in an online gaming business. Acting through the company, two brothers brought a variety of claims against the third. A mediation took place during which the two brothers offered to sell their shares to the third but no price could be agreed. Over the next few months the parties, through their legal advisers, remained in contact with the mediator and further offers were exchanged. Lawyers for the two brothers then sent an email to the third – Jonathan - claiming to have uncovered wrong-doing on his part.

They went on to say that, unless he agreed, within 48 hours, to pay an increased sum (being more than £2m in excess of what they had previously sought by way of settlement) for their shares, they would bring committal and other criminal proceedings against him, ruin his reputation and make it impossible for him to operate a business in the online industry in the future. Those threats were exacerbated by threats made against the brother's partner, who was not a party to the proceedings.

"SIMPLY SAYING SOMETHING IS 'WITHOUT PREJUDICE' DOES NOT MEAN THAT IT IS PROTECTED FROM DISCLOSURE"

The CA held that the content of the email amounted to improper threats and thus fell within the unambiguous impropriety exception to the without prejudice privilege. The CA offered some useful guidance as to what amounts to unambiguous impropriety and also identified the factors the court had taken into account in this case.

Relevant factors included:

- The threats went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action;
- The threats extended to their brother's family who were not party to the proceeding;
- It was unnecessary to determine whether the brothers had a genuine belief in the substance of the allegations made because the impropriety arose from the nature of the threats made;
- The purpose of the threats was to obtain a financial advantage which ought to have accrued to the benefit of the company; and
- The "settlement offer" made no attempt to connect the wrongdoing alleged to have been committed by Jonathan to the increased demand.

The CA rejected the suggestions that it should be inferred that the email was proper because it had been composed by a reputable firm of solicitors and passed on by the mediator.

This may be contrasted, however, with the position where there are inconsistencies between the case a party puts forward in court pleadings and what has previously been said in without prejudice negotiations. These were the facts in the case of *Savings & Investment Bank Ltd v Fincken* and in reaching its decision, the CA acknowledged that there is a tension between two powerful public interests – the importance of parties being able to negotiate freely under the cloak of without prejudice discussions, and the discouragement of perjury. However, the CA could not agree with the view of Counsel for the bank that the mere possibility of future perjury by F was sufficient to destroy the privilege. Although it was difficult for the CA to ignore an admission which appeared to incriminate F in lying in a sworn document, the public interest in favour of the protection of privilege outweighed the public interest in the discouragement of perjury.

This point was also explored in *Berry Trade Ltd & Another v Moussavi*. There the claimant sought to rely on evidence in the form of statements alleged to have been made by one of the defendants during three sets of without prejudice settlement negotiations between the parties and their representatives. The claimant argued that the admissions made to one defendant during those negotiations demonstrated that subsequent statements in a defence and a counterclaim were dishonest. The claimant sought permission to rely on those admissions on the grounds that they came within the unambiguous impropriety exception. The CA held that a mere inconsistency was insufficient to be an unambiguous impropriety.

Although there had been inconsistency between the pleadings and the negotiations, the requirement of unambiguous impropriety and a clear case of abuse of privilege had not been met.

In the latest case on the scope of the "unambiguous impropriety" exception, *Martin v McDevitt and Community Legal Services*, the Employment Appeal Tribunal ("EAT") held that, when considering whether the exception applies, the issue is not whether the words used in that correspondence are ambiguous or unambiguous: it is whether they are unambiguously improper.

"THE ISSUE IS NOT WHETHER THE WORDS USED IN THAT CORRESPONDENCE ARE AMBIGUOUS OR UNAMBIGUOUS: IT IS WHETHER THEY ARE UNAMBIGUOUSLY IMPROPER"

By way of example the EAT gave three examples of what a company may do when conducting settlement negotiations:

- draw attention to the fact that an employment tribunal hearing is in public and that the press may be there;
- draw attention to the fact that the press may be notified that the case is to be heard; and
- state that the respondent will take the position that the claims are spurious.

Such matters will not therefore amount to unambiguous impropriety and may be used in without prejudice correspondence. The EAT also said it might not be acceptable, to state that steps would be taken which could, or would, affect future employment chances, and damage a putative political career. However, the EAT did not go so far as to say that such would amount to unambiguous impropriety.

Conclusion

There have been a number of attempts to water down what conduct amounts to unambiguous impropriety, but the latest decision makes it clear that the actions taken have to be sufficiently serious to disapply the without prejudice rule. In particular, previous inconsistent statements have not been held to be serious enough to come within the exception.

Publication code number: EUROPE/61480630v2 Watson Farley & Williams 2018

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its Affiliated Entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member or partner in an Affiliated Entity, or an employee or consultant with equivalent standing and qualification. The transactions and matters referred to in this document represent the experience of our lawyers. This publication is produced by Watson Farley & Williams. It provides a summary of the legal issues, but is not intended to give specific legal advice. The situation described may not apply to your circumstances. If you require advice or have questions or comments on its subject, please speak to your usual contact at Watson Farley & Williams.
This publication constitutes attorney advertising.