PRIVILEGE BRIEFING SERIES

LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS

Settlement negotiations: does what's said in the room stay in the room?

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How careful do you need to be about what you say in settlement negotiations? Can what you say be used against you in the event you don't settle? What if something you say is misconstrued?

In general, what is said in settlement negotiations does not have to be disclosed to the court in the event that the dispute does not settle. This is known as the "without prejudice" rule or privilege, and the rationale behind it is simple: there is a public interest in the settlement of litigation and parties to a dispute should be able to speak freely and frankly without fear that something they say could later be used against them.

There are some limited exceptions to this rule, but these are very narrowly interpreted by the courts. The Chief Justice, when sitting on the High Court, previously stated:

"The overriding principle is that a very heavy weight indeed needs to be attached to without prejudice privilege. The only circumstances where, therefore, evidence of without prejudice negotiations can be admitted is where... it can be clearly shown that greater damage to the interests of justice would be affected by non-admission than by disclosure".

The unambiguous impropriety exception

One exception is the "unambiguous impropriety" exception, i.e. a party may be allowed to give evidence of what his/her opponent said during settlement negotiations if the exclusion of that evidence would act as a cloak for some "unambiguous impropriety". However, it does not appear that this exception has ever been successfully invoked in Ireland, and in the few English cases where it has been applied, there was no dispute as to what was said, either because the statement was recorded or because it was in writing.

The most recent discussion of the exception is that contained in a decision of the UK Court of Appeal in an interesting case involving Motorola Solutions Inc and Hytera Communications.

Motorola v Hytera: what happened?

Briefly, Motorola successfully sued Hytera in the US for theft of its trade secrets and was awarded over $700 million in damages by the US court. Motorola then obtained a freezing order from the English High Court, claiming that there was a real risk that Hytera would dissipate its assets in order to avoid enforcement of the US judgment.

The evidence that Motorola relied on to get the freezing order was a statement made by Hytera's then Chief Financial Officer at a without prejudice settlement meeting to the effect that if Motorola obtained a judgment in the US proceedings which was "unacceptable" to Hytera, it would take steps to limit Motorola's ability to enforce a judgment in western jurisdictions by concentrating its assets in China and other jurisdictions where enforcement would be more difficult. This was said to have been described by Hytera as its "retreat to China" strategy.

Hytera said that this statement had been misconstrued, and that it did not evidence a plan to avoid enforcement of the judgment, but merely reflected the commercial reality that if a substantial judgment were to be enforced against its business and revenue around the world, it would inevitably have to retreat to its key markets in China and elsewhere.

English High Court applies good arguable case test

Notwithstanding this, the English High Court found that there was a "good arguable case" that the statement was indeed made in the manner alleged by Motorola, and further that a threat to deal with assets in order to frustrate a

judgment amounted to "unambiguous impropriety". The judge admitted the statement into evidence and used it as the foundation for granting the freezing order.

UK Court of Appeal refocuses on "unambiguous" impropriety

However, in an appeal brought by Hytera, the UK Court of Appeal found that the "good arguable case" test was too low a udgment amounted to "unambiguous impropriety". The judge admitted the statement into evidence and used it as the foundation for granting the freezing order.

UK Court of Appeal refocuses on "unambiguous" impropriety

However, in an appeal brought by Hytera, the UK Court of Appeal found that the "good arguable case" test was too low a threshold and it set aside the freezing order.

The judge said that if all that was needed to be shown was a good arguable case, parties engaging in settlement discussions would need to exercise care not to say anything that might be misconstrued; they would need a careful record of what had been said; and there would be scope for manoeuvring to obtain an advantage in litigation at the expense of frank discussion with a view to settlement. This, the judge said, was contrary to the policy of promoting settlement that the without prejudice rule exists to support.

The Court stated that the question the High Court should have asked was whether the evidence established an unambiguous impropriety. The Court acknowledged that this may mean that where there is a credible dispute about what was said (or what was meant by what was said) a court cannot be satisfied that there has been an unambiguous impropriety and therefore cannot admit the evidence, but it said that this is simply the result of applying the test which has consistently and for good reason been held to apply.

So it was by no means clear on the evidence that Hytera's proposed "retreat to China" strategy was in any way improper and that it would be unfortunate if parties could not discuss potential problems of enforcement at settlement discussions for fear of what they say being interpreted as a threat to move assets improperly.

Comment

The decision is a welcome confirmation that statements made during settlement negotiations are privileged, and that the courts jealously guard any incursion into the without prejudice rule and will carefully scrutinise any evidence put forward in an effort to lift the privilege. Parties considering their approach to settlement can take comfort that, save for exceptional circumstances, what's said in the room will stay in the room.

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