

Without prejudice privilege in the spotlight

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The Evidence Act 2006 (the Act) provides for the confidentiality of communications that take place to try to resolve a dispute (s 57). The protection is important as it allows for the free and frank exchange of information and the testing of the strength of the parties' respective cases in an attempt to reach an agreement. Attempts to overturn the privilege are uncommon - and successful attempts even more so. The High Court has recently considered such an application to overturn without prejudice privilege.

The decision in *Waterfall Park Developments Ltd v Hadley* [2022] NZHC 2221 confirms three important points:

- It will be rare that a Court overturns settlement privilege
- It is only in very clear or seriously arguable cases that the Court will find that it is in the interests of justice to overturn settlement privilege
- There must be clear evidence of abuse of the privilege such as dishonesty, fraud or "unambiguous impropriety".

Settlement privilege

Under s 57 of the Act, a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:

- Intended to be confidential
- Made in connection with an attempt to settle or mediate the dispute between the parties.

This is commonly known as settlement or "without prejudice" privilege. S 53 provides that the general effect of having a statutory privilege is the absolute right to refuse to disclose material covered by that privilege to another person, and the ability to prevent another person from doing the same thing.

There are several exceptions to statutory settlement privilege:

- Under s 57, the privilege does not apply to the terms of an agreement settling the dispute, evidence necessary to prove the existence of such an agreement if the fact of such an agreement is in issue in the proceeding; or communications that are expressly stated to be without prejudice save as to costs (and used solely for the purposes of a costs award). Importantly for the purposes of this case, the court may permit a communication or document made or prepared in connection with any settlement negotiations or mediation if the Court considers that the interests of justice in disclosure outweigh the need for the privilege.
- There are several common law exceptions to the without prejudice rule, such as in circumstances of "unambiguous impropriety", misleading the Court, threats, or acts of bankruptcy. None of these are provided for in the Act, but the courts have consistently held that they continue to apply.
- S 67 provides that a judge must disallow a claim of privilege if there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit an offence. This is known as the "dishonest purpose" exception. The threshold for removal of the privilege is high - at common law, what was required was "fraud, sham or trickery".

The High Court decision

Waterfall Park owns land near Arrowtown. Since 2017, it had taken various steps to obtain zone changes and subdivision consent in order to subdivide land for residential development. The defendants own and reside at a rural lifestyle property diagonally adjacent to Waterfall Park's land and opposed several of those steps.

Waterfall Park and the defendants had been involved in several dispute resolution processes relating to subdivision applications, contested zoning change applications, complaints of non-compliant activities, and disputes about encumbrances.

This proceeding was a claim brought by Waterfall Park against the defendants alleging abuse of process and claiming damages of

more than \$7m. Waterfall Park claimed that the defendants' actions during the above proceedings had wrongfully obstructed Waterfall Park's plans to develop its land.

Waterfall Park pleaded that the defendants had at mediation sought a financial benefit from it by way of a "facilitation fee". It alleged that the defendants had taken steps in the Environment Court and High Court proceedings with the predominant purpose of obtaining a financial benefit from Waterfall Park at mediation that would not have been an achievable outcome in any of the proceedings. Because of those actions Waterfall Park claimed that it had lost the opportunity to resolve the issues at mediation, and therefore lost the opportunity to commence development in June 2021. It sought orders allowing it to put into evidence communications and documents from the mediation and the without prejudice settlement negotiations that followed. It claimed that this evidence would establish that the defendants had acted unreasonably at mediation to extract a financial benefit, and the defendants had caused a breakdown in settlement negotiations. The defendants applied to strike out Waterfall Park's claim, or for summary judgment.

The High Court found that the communications and documents Waterfall Park sought to put into evidence were either part of the Environment Court mediation or were obviously intended to be confidential and made in connection with an attempt to settle the dispute. They clearly came within the scope of settlement privilege protected by s 57 of the Act. Privilege therefore attached to them unless Waterfall Park could establish that they came within the dishonest purpose exception. The High Court observed that the exception should only be applied in the clearest cases of abuse of a privileged occasion.

The Court found that the evidence in this proceeding and decisions in the related High Court and Environment Court proceedings showed that at all stages of the proceedings, the defendants were acting to protect their interest in maintaining the open and visual landscape character of their immediate environment. The evidence filed by both parties established that, if the privileged documents and information were admitted, they would indicate that there was a prospect of settlement at mediation. The High Court was not able to conclude that this case met the high threshold of a clear or seriously arguable case that privilege should be disallowed and the application for leave was declined.

Various other claims made by Waterfall Park were struck out. The High Court also found that Waterfall Park's claim against the defendants was collateral litigation brought for the ulterior and predominant purpose of deterring the defendants from exercising the rights they had to be heard in the High Court and Environment Court proceedings. Orders were made in favour of the Hadleys on their claims.

This case demonstrates that the Court will not take attempts to undermine settlement privilege lightly. It reinforces the importance of settlement privilege and demonstrates that it is only in very serious cases that the Court will find it is in the interests of justice to disallow the privilege. It will not be enough to make allegations of dishonesty: parties will need to have clear evidence of dishonesty, fraud or "unambiguous impropriety" before the privilege will be disallowed.

The High Court's decision can be found [here](#).

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