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LEGAL FORUM

Negotiation Strategy Privilege

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Introduction

One of the most important procedural aspects of litigation is the process of discovery. The law requires full, fair and frank disclosure of all relevant documentation in proceedings brought before a court to ensure litigation runs smoothly and with limited risks of surprise. The recent decision of the Employment Court in *NZALPA v Air Nelson Ltd* [1998] 3 ERNZ 332 confirmed that negotiation strategy privilege is a legitimate ground for not disclosing relevant material in Employment Court proceedings. However the Court in this particular case limited the scope of the privilege. This paper discusses the public interest in recognising negotiation strategy as a class of privilege, the effect of limiting the scope of the privilege, definitional difficulties and whether the privilege would sit easily with good faith bargaining principles.

Background

The plaintiffs in the proceedings were airline pilots employed by Air Nelson Limited, the defendant. The pilots had each authorised the New Zealand Air Line Pilots' Association (another plaintiff in the action) to represent them in negotiations for a collective employment contract. Negotiations commenced in November 1996 and continued during 1997. Following an informal meeting on 4 March 1998, a formal negotiation meeting was held on 15 March 1998 in Nelson. The negotiations continued throughout Sunday 15 March 1998 and at or about midnight, according to the plaintiffs agreement was reached.

On 17 March 1998 the New Zealand Air Line Pilots' Association was advised that the Company did not accept that a settlement had been reached on 15 March 1998. The Association maintained that in its view the company was attempting to renege on the settlement reached and advised that it was putting the terms of the settlement to the pilots it represented for ratification. The pilots ratified the provisional settlement of 15 March 1998 and forwarded a copy of a collective employment contract to the Company. The Company refused to enter into a collective employment contract with the pilots.

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The proceedings

The pilots initiated proceedings in the Employment Court seeking a declaration that the parties reached a provisional settlement of a collective employment contract on 15 March 1998 which, subject to ratification, was to form the terms of a collective employment contract with effect from 1 March 1998. The pilots also sought an order that the Company specifically perform the terms of the provisional settlement reached on 15 March 1998 and execute and provide the pilots with an executed copy of the collective employment contract.

As the parties prepared for the substantive hearing the defendant claimed negotiation strategy privilege in relation to over one hundred relevant documents. The defendant claimed that these documents were not discoverable because of the importance they assumed in terms of the Company's negotiation strategies. The pilots commenced an interlocutory action applying for an order of production and inspection of the documents.

Negotiation strategy as a class of public interest privilege

The first time negotiation strategy was recognised as a class of public interest privilege was in *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 88. Colgan J held that it was in the public interest for documents which disclose negotiation strategy to be privileged from production prior to the conclusion of negotiations. The privilege was applied because of the interest to the public in ensuring parties negotiating and settling employment contracts are able to do so without the difficulty of prior disclosure of their negotiation strategies and the public interest in ensuring the trust and confidence necessary in the negotiation and performance of CECs is maintained. Colgan J stated at p.89:

> The "public interest" referred to in reg 52(3)(c) is not the interest of the whole community in all matters, but is clearly intended to be the interests of more than the immediate parties to a particular dispute. The public interest is that of the public or community engaged in bargaining about, negotiating, and settling employment contracts. Such persons have a justified and legitimate interest in their strategies, as evidenced in documents between themselves and between them and their bargaining agents and advisers, being privileged from disclosure in litigation before contracts are settled or negotiations otherwise concluded.

Colgan J made a clear distinction between situations where negotiations are ongoing (as was the case in *Julian*) where the privilege may apply, and those where negotiations have concluded. His Honour acknowledged the risk that, as a result of concealment of documents, the Court is hampered in its search for the truth, and the outcome of the case could be affected. The Court considered the ambit of the privilege at p.90:

> I do not think, however, that such protections should be afforded beyond the conclusion of the negotiations, whether that be by settlement of a contract or by any other effective end of the bargaining relationship. One has to go no further than the successor to one of the judgments cited to me and referred to in my judgment of 26 July, *Unkovich v Air NZ Ltd* [1993] 1 ERNZ 526, to realise that employment contract negotiation strategy documents

> were vital to the Court's determination in that case of the issues of justification for dismissals effected when those negotiations foundered. Applications under s.57 Employment Contracts Act 1991 concerning the manner in which employment contracts are entered into must almost inevitably depend for their just decision at least substantially upon disclosure and inspection of such documents. To conclude, in a principled way, that there could be no disclosure of such documents in litigation arising out of or otherwise concerning, concluded negotiations would be to deprive parties of the opportunity to have their cases determined justly. I would not, therefore, allow for public interest privilege other than where the negotiations are still unresolved, whether by settlement of a contract, by the ending of the employment relationship, or otherwise.

The decision in *Julian* was applied and the claim of privilege upheld in *Ivamy v NZ Fire Service Commission* [1995] 1 ERNZ 724. That case involved an alleged breach of s.12 of the Employment Contracts Act where the employees had indicated a desire to be represented by a bargaining agent and the employer sought to deal with its employees directly. Goddard CJ stated at p.758 that:

> In the present case the anomalous situation may well exist that if, at the end of this judgment, I find for the plaintiffs - at any rate, if I find for them on certain bases - then I should probably have disallowed the privilege. On the other hand, it would have been unfortunate and possibly damaging to have done so and then found that the defendant had been acting lawfully, or unlawfully but honestly and reasonably, for then its whole strategy may have been given away. The balancing exercise is a difficult one, but on this occasion I came down on the side of the objection to production because a greater harm could have ensued to the defendant by an unwarranted disclosure than would be likely to be sustained by the plaintiffs by the suppression from them of documents they may have been entitled to see.

The Employment Court decision in *NZALPA v Air Nelson Ltd*

Legal argument

The Court had to deal with the situation of whether the privilege should apply when the issue is whether or not the negotiations had resulted in a concluded settlement. The decision in *Julian* and applied in *Ivamy* made a clear distinction between situations where negotiations are ongoing and those where negotiations have concluded. The present circumstances were not covered. Here, the defendant alleged that there was no concluded settlement as there were matters that had not been agreed and therefore negotiations were ongoing. The defendant argued further that should the Court ultimately find that there was no settlement of the CEC then great harm would have been caused by revealing its negotiation strategies. The harm, the defendant submitted would be greater than that likely to be sustained by the plaintiffs if the documents were not disclosed.

The plaintiffs argued that in order for the privilege to be upheld the test is whether the public interest in protecting the information "clearly outweighs" the need for the Court to have the relevant facts and relied on *R v Secord*: [1992]3*NZLR* 570:

> Where the public interest in protecting the information clearly outweighs the need for the Court to know all the relevant factors, the judge will not allow it to be adduced.

Since the interest is confined to situations where negotiations are ongoing, the plaintiffs contended that it was only applicable if the Court determined that there was no contract. The plaintiff's claimed that the documents should not be withheld from production based on a speculative outcome as the primary interest of the Court is to determine the truth. There is also some circularity in arguing that the public interest depends upon the outcome of the case, when the outcome itself may be affected by the documents which are said to be privileged.

The plaintiffs also submitted that an analogy could be drawn with the legal principles relating to without prejudice communications. The without prejudice rule is based on the notion that parties should be encouraged to settle their disputes without litigation and the parties should not be discouraged by the knowledge that anything said in without prejudice negotiations may be held against them.[5] The privilege, however, is said not to apply when there is an issue of whether a settlement was reached during such communications. (See *Rush & Tompkins Ltd v Greater London Council & Another* [1988] 3 ALL ER 737). The defendant argued that without prejudice communications were different in that both parties have knowledge of what the communications are, whereas the contents of the documents before the court were not known to the plaintiff.

The ruling by His Honour Travis J

The Court began by reviewing the decisions in *Julian* and *Ivamy*. His Honour acknowledged the unique set of facts and the fact that the previous decisions of the Court were not directly on point. His Honour traversed the Court's role of examining documents to determine the balance between upholding the privilege or not based on whether there will be a greater harm to the defendant by having to disclose than to the plaintiffs in being deprived of the documents. This was the approach taken by the Court in *Julian* and *Ivamy*. His Honour distinguished this from the present case where one party adopts the position that no privilege exists and all documents should be disclosed and the other party maintains the privilege applies and all documents should remain immune from production. Inspection by the Court in these circumstances would not be necessary.

Travis J then considered the analogy to without prejudice communications. His Honour referred to the New Zealand decision in *Allison v KPMG Peat Marwick* [1994] 8 PRNZ 128 in which evidence from without prejudice communications was used as evidence in Court to resolve an issue about whether a compromise had been reached during communications. In addition, reference was made to the Employment Court decision in

Van der Sluis v Health Waikato Ltd (Unreported, 28 February 1995, AEC 10/95) where evidence of a without prejudice offer was admitted to show the threat it made if not accepted. His Honour concluded that the cases demonstrate that the negotiation strategy privilege, by analogy, may be subject to proper exceptions, and he held in favour of disclosure. The Court in this particular case limited the scope of the privilege. However his Honour accepted the submission of the defendant that the vast majority of documents were of marginal relevance and confined disclosure to documents which directly bear on the question whether a settlement was reached.

Future implications

In establishing an exception to negotiation strategy the Court's decision must be kept in perspective. The ruling does not amount to an opening up of strategy documents during ongoing negotiations. The decision is confined to cases where there is a dispute about whether there was a settlement. While such disputes do happen, they are not commonplace amongst the many employment contracts settled each year.

Conceptual problems

What was not raised by counsel in the course of the *Air Nelson* case are the definitional difficulties associated with the term negotiation strategy. The Employment Court has not defined the term. Without a clear definition could employers or employees use the privilege as a shield to hide bad faith in the negotiation process? Various texts contain definitions of strategy in negotiations. An example can be found in Trachte-Huber & Huber, *Alternative Dispute Resolution Strategies for Law and Business* (Anderson Publishing Co,) at p.171:

> A strategy is a separate and distinct concept from the negotiator's personal characteristics; a strategy is the negotiator's planned and systematic attempt to move the negotiation process toward a resolution. Negotiation strategy consists of the decisions made regarding the opening bid and subsequent modification of proposals.

Brown and Marriot in *ADR Principles and Practice* (Sweet and Maxwell, 1993) say at p.96:

> strategies refer more specifically to the actual approaches and tactics which a negotiator may employ to achieve a desired end.

The books divide strategies into two main categories. Strategies may be competitive or co-operative (Trachte-Huber & Huber, pp.173–177). Alternative terms are adversarial or problem solving: (Teply, *Legal Negotiation in a Nutshell* (West Publishing Co, 1992, pp.105, 106)). The primary difference is described as the pursuit of individual gain (adversarial) as opposed to a focus on the opportunities for joint, rather than individual gain (problem solving), (Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (West Publishing Co, 1992, pp.21, 22)).

A feature of these definitions is that strategy is a term used to describe the way parties conduct negotiations. There is nothing mysterious or secret about negotiation strategy. Once the parties have put their strategies into effect in negotiations, it is hard to see where the need for secrecy lies. Evidence of what the parties planned to do is likely to be of probative value where there is a dispute about what they did do. It is submitted that to use such a term as negotiation strategy as a ground of privilege has the potential to create problems and anomalies and could be a misnomer. It is also questionable whether documents in respect of which privilege may be claimed fit within the definitions contained in the texts.

It is also necessary to note that recognising new classes of privilege goes against recent trends in judicial decision making. In New Zealand in the case of *M v L* (CA, 15 October 1998, 248/97 & CA 247/97) the Court of Appeal refused to accept that a common law class of privilege should be recognised or created for "counselling notes". The Court referred to the recent tide of legal history against recognising new classes of privilege and the definitional difficulties with the term counselling notes.

Good faith bargaining and negotiation strategy privilege

The concept of negotiation strategy privilege does not appear to conform with good faith bargaining principles. New Zealand at present does not have any legislation which provides for good faith bargaining. However, if the Employment Contracts Act is repealed and replaced by the Workplace Relations Bill, the Bill proposes to recognise good faith bargaining. The Employment Court will regulate good faith bargaining between employer and employees. In the United States the question whether the obligation to bargain in good faith has been met requires an assessment of the employers' or the employees' state of mind. Many instances of bad faith are inferred objectively by conduct or as a result of disclosure of information.

In certain circumstances a failure to disclose relevant information may breach the good faith bargaining criteria. In the US Supreme Court in *NLRB v Truitt Manufacturing Co* [1956] 351 US 149, 100 L.Ed 1027, the employer claimed that it was unable to pay a wage increase and subsequently refused to provide information regarding its financial position. It was held that an asserted inability to pay an increase in wages requires some sort of proof of its accuracy. Also the Court held that a refusal to substantiate a claim of inability to pay may support a finding of a failure to bargain in good faith. In contrast negotiation strategy privilege in New Zealand can operate in a way that conceals what is on the negotiators' minds during negotiations and allows the parties to refuse to disclose certain documents. If good faith bargaining is formally introduced in this country the privilege of negotiation strategy could obstruct the Court in its role to determine whether the parties have satisfied the requirement to bargain in good faith. Also, in its present state the privilege appears to allow the parties in negotiations to use the cloak of privilege to justify non disclosure of

information. However, the American experience suggests that open and informed discussions are more likely to bring forth a collective agreement than negotiation based on ignorance and deception. (See *John S Swift Co v NLRB* [1962] 302 F 2d 342).

In the *Air Nelson* case the defendant claimed that there was no agreement. The documents which were withheld from production may have revealed its state of mind in this regard. Under the principle formulated by Travis J it is debatable whether financial records would be directly relevant to the issue of whether a settlement was reached on the final day of negotiations. However, the right to inspect the employers financial statements could be important in terms of credibility. Employees should be given the opportunity in litigation to disprove claims by employers that parameters in negotiations have been exceeded or that an agreement cannot be honoured because of financial inability.

Conclusion

The Court in this particular case limited the scope of negotiation strategy privilege. Documents which directly bear on the question whether a settlement was reached must be disclosed. In so holding the Court recognised the importance of determining whether the parties had entered a CEC. However, without a clear definition of negotiation strategy some uncertainty exists as to which documents are subject to the privilege and which are not. Also, if New Zealand introduces good faith bargaining based on the United States model, then the legal principles relating to the privilege will need to be moulded to accommodate the openness required by the obligations to bargain in good faith.