

## Court of Appeal underscores sanctity of “without prejudice” privilege

In the recent case of *Minister of Education v Reidy McKenzie Limited* [2016] NZCA 326, the Court of Appeal has rejected efforts by the Minister of Education (the Minister) to rely on financial accounts acquired by her in the course of settlement negotiations with Reidy McKenzie Limited (RML).

### Why is this significant?

The decision reassures parties involved in litigation that the “without prejudice” rule will cloak all communications made during mediations or other negotiations, unless confidentiality is waived (implicitly or explicitly) or exceptional circumstances arise.

### *Minister of Education v Reidy McKenzie Limited*

In a judgment delivered on 12 July, Justices Simon France, Winkelmann and Woolford dismissed an appeal by the Minister against a ruling of the High Court by Faire J in 2015.

The case involves liquidation proceedings issued by the Minister against RML, alleging that RML is insolvent and unable to pay its debts.

“In support of her application, the Minister wishes to rely on financial accounts of the respondent which, it is agreed, disclose balance sheet insolvency for the periods to which they relate. The Minister acquired the financial accounts in the course of settlement negotiations with [RML] in relation to separate proceedings”, stated Simon France J, writing for the Court.

The Minister’s appeal was based on an argument that the privilege had been

waived, or that the privilege did not extend to liquidation proceedings.

The Minister argued that RML’s disclosure of the accounts was akin to an “act of bankruptcy”, to which without prejudice privilege does not apply.

However, the Court found that RML’s use of the documents was not a waiver of privilege nor was there any good reason why the “act of bankruptcy” exception should be extended.

### Convincing circumstances needed

First, the accounts in issue were irrelevant to the merits of the separate proceedings (leaky schools proceedings) in which they had been disclosed.

Second, while the accounts had been referred to in memoranda filed to keep the Court abreast of settlement discussions, they were “unnecessary detail”. It was not as if the accounts had been put in issue – relied upon by RML in the proceedings.

Rather, they were simply proffered by RML to assist the Minister to decide whether she would be was ‘throwing good money after bad’ to continue with her proceedings against RML.

Third, RML had not used the accounts in a manner which made its claim to privilege inconsistent or unfair; if anything, Simon France J said, “any unfairness here lies with the Minister’s attempted use of the documents in other proceedings.”

On the act of bankruptcy exception, the Court rejected the Minister’s arguments.

While the exception for acts of bankruptcy is long-standing, no

“legitimate parallel exists between an act of bankruptcy as required by the Insolvency Act and the provision of accounts that disclose, for the period they deal with, balance sheet insolvency.”

This is because the key feature of the case relied on by the Minister, *Re Daintrey* an 1893 decision of the English Court, was that there was *no dispute*. A debtor wrote on a purportedly without prejudice basis to the creditor suggesting a compromise and indicated that if there was no compromise the debtor would suspend payments. The debt was not disputed, so the Court held, the letter was itself an act of bankruptcy to which the “without prejudice” rule has no application.

Moreover, the Court of Appeal said, there is no corporate equivalent to an act of bankruptcy – the accounts are just helpful evidence of RML’s financial position at a certain time/s, nothing more.

### Conclusion

For those involved in mediations and other settlement negotiations, the Court’s comments will be reassuring. In delivering the Court’s judgment, Simon France J made it clear that the existing list of exceptions, while not closed, would only be extended in “convincing circumstances...The public policy rationale underpinning the privilege is one of significant weight.”

Such reassurances are critical. As the Court said, “Care is needed before an important tool in facilitating private settlement of disputes is further limited.”

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