

Unambiguous impropriety exception to mediation privilege

The importance of protecting without prejudice communications has recently been emphasised by our Court of Appeal (see: *Court of Appeal underscores sanctity of “without prejudice” privilege*), but clear cases of abuse of the privilege will not be protected. *Ferster v Ferster and others* [2016] EWCA Civ 717, in which the UK Court of Appeal held that the without prejudice rule had no application in circumstances of “unambiguous impropriety”, illustrates the point.

**Stuart Dalzell, partner, and Danielle Thorne, solicitor, discuss the case and implications below.*

The Brothers Ferster

Three brothers, Jonathan Ferster, Stuart Ferster and Warren Ferster, were all equal shareholders in a company called ITC. In the first of what the Court described as “hotly contested proceedings”, Stuart and Warren procured ITC to sue Jonathan for, among other things, breach of fiduciary duties owed to ITC.

In response, Jonathan applied for relief under the unfair prejudice provisions of the UK Companies Act – the equivalent of the minority oppression provisions of the NZ Companies Act.

Subsequently, a mediation took place between the parties. Offers appear to have been exchanged, but no settlement was achieved.

An email was then sent on behalf of Stuart and Warren, via the mediator, revising their offer to sell their shares to

Jonathan. The offer was made “without prejudice” but was on the basis that:

- “we have become aware of further wrongdoings by Jonathan”
- “Jonathan is in very serious trouble”
- The “very serious trouble” would also “have implications for” Jonathan’s family “by reason of Jonathan’s actions”;
- Acceptance of the offer would obviate “the need of further steps such as committal proceedings”.

The email also stated that “if Jonathan has misled [his own solicitors] and sworn false evidence... Jonathan will face charges of perjury, perverting the course of justice and contempt of court and is likely to be imprisoned.”

The question for the court was whether the content of the email could be referred to in Jonathan’s oppression application, despite the fact that the email was made in the context of a mediation.

Unambiguous impropriety

As the Court identified, the case law on ‘unambiguous propriety’ is clear that this exception should be applied only in the clearest cases of abuse of privilege.

The critical question was whether the threats unambiguously exceeded what was permissible in settlement of hard-fought commercial litigation.

Stuart and Warren argued that they were just pointing out to Jonathan that by accepting their offer for shares, Jonathan would assume full control of ITC and could discontinue the company’s action. There was nothing improper about that, they argued.

However, Floyd LJ accepted Jonathan’s submissions, holding that the threat identified by the judge was

not concerned with what would happen if Jonathan accepted the increased offer: it was concerned with what would happen if he did *not*.

“Stuart and Warren were making it clear that, if the offer was not accepted, they would use their control of ITC to take the steps identified in the email. Whilst those steps might be steps which it might be proper for ITC to take if it had a genuine belief in some basis for them, it was wrong for them to be used as a lever to enable Warren and Stuart to get more for their shares.”

That, Floyd LJ said, went far beyond what was reasonable in pursuit of civil proceedings. This was for several reasons, including the threat was of criminal action; the threats involved Jonathan’s family; the threats were of immediate publicity being given to the allegations; and the threats were made for the purpose of obtaining an immediate financial advantage. It was not necessary that the threats amounted to the crime of blackmail, but there was a good argument they did.

Conclusion

Ferster, and the recent NZ Court of Appeal decision in *Reidy McKenzie*, both indicate that, while the courts ought not disregard lightly the use of the ‘without prejudice’ label, they can and will set the label aside in appropriate cases where dishonesty is involved and improper advantage is being taken of the privilege.