

Case Bulletin: 2019/01

“Without Prejudice” Privilege

Generally speaking, Hong Kong courts encourage settlement of disputes without resorting to litigation. The rules of evidence provide that written or oral communications, which are made for the purpose of a genuine attempt to compromise a dispute between parties, are generally not admissible in evidence. The rule is often referred to as the “without prejudice” privilege (“**WP Privilege**”). For a claim of WP Privilege to succeed, the party claiming it must show the existence of four elements at the time of the communications concerned: (i) a dispute existed between the parties, (ii) a *bona fide* attempt to settle the dispute between the parties, (iii) legal proceedings that were contemplated or might reasonably have been contemplated, and (iv) an intention to uphold the WP Privilege. The principle was revisited in *Yu Man Fung Alice (于文鳳) v Chiau Sing Chi Stephen (周星馳)* [2019] HKCFI 1549 (“*Yu v Chiau*”).

I. Background

1. In *Yu v Chiau*, the Plaintiff (“**P**”) and the Defendant (“**D**”), a famous film actor and director, were involved in a romantic relationship.
2. P pleaded that D orally agreed to pay her a 10% share of net profits made on all successful investments recommended by her, and on her advice, D successfully bid a property at the Peak and re-developed it into four houses. Two of them were sold, while the other two were allocated to the co-developers, D and Mr Hu.
3. D admitted that some payments were made to P, but denied the existence of any legally binding agreement. He insisted that the payments were made

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by way of gifts, alternatively, no profit was made as the house that he decided to keep was not sold.

4. The judgment considered D’s application to strike out or expunge certain paragraphs in the pleadings and witness statements on the basis that they were communications protected by WP Privilege.

II. Key Points

1. When legal proceedings are on foot, whether or not a dispute is in respect of those proceedings is normally clear-cut. Less so is whether in the context of pre-action communications. The case reminded us that not all disagreements are qualified as a “dispute” when claiming WP Privilege, for instance where the only elements of communications are to negotiate the how and the when an agreed liability should be discharged¹ may not deserve the protection afforded to WP Privilege.
2. In relation to striking out a pleading, the “*plain and obvious*” test set out in *Redifusion Simulation Ltd v Link Miles Ltd* [1992] FSR 195 is applicable. The court also accepts that the same test should be adopted in determining whether the evidence should be expunged in the context of WP Privilege.
3. In deciding whether the parties contemplated or might reasonably have contemplated litigation, the question will be determined objectively having regard to all the circumstances, and the applicable test is what a reasonable person in the position of the recipient of the communication, with its knowledge of all the relevant circumstances as at the date the communication was made, would have understood the purpose or intent.
4. The judge expressed a technical concern that should the issue be left to the trial judge as suggested by P, and upon reading the pleadings and evidence in issue, if the trial judge will find them to be inadmissible and protected by the WP Privilege, the trial judge may have to be recused from trying the case, which will be undesirable from a case management perspective.
5. In passing, the judge mentioned that in case of doubt, the use of the words

¹ *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWHC 3322 (Ch) at §19

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“without prejudice” stamped on a document may assist the court in determining the issue, but the court will look at substance over form.

III. Findings

Looking at the totality of evidence, the judge found that it was a plain and obvious case that there was a dispute, the parties might reasonably have contemplated litigation, the contemporaneous communications were made in an attempt to further negotiations to settle their dispute, and the intention to uphold WP Privilege (in other words, there was no intention to disclose the communication) can clearly be inferred. The judge expunged and struck out the disputed paragraphs in the evidence and pleadings.

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