PRACTICAL LAW
DISPUTE RESOLUTION BLOG

APRIL 8, 2020

Privilege, confidentiality and settlement agreements

Three recent cases underline the challenges of maintaining confidentiality in *settlement* agreements and remind practitioners that this remains an area where neither the intentions of the parties settling, nor the language they use to do so, will be afforded the primacy one might usually expect.

by **James Bickford Smith**
Barrister
at Littleton Chambers

BGC Brokers LP and others v Tradition (UK) Ltd and others

In *BGC Brokers LP and others v Traditions UK Ltd and others*, the Court of Appeal dismissed the claimants' second appeal of a master's decision that:

- The claimants were not entitled to refuse co-defendants inspection of the full terms of a settlement agreement with another defendant.
- Those terms included otherwise *privileged* communications between the claimants' lawyers, the settling defendant, and his lawyers.

The context of that decision can be summarised as follows:

- The claimants brought an action with pleaded causes of action including for breach of confidence against parties alleged to have first *disclosed* and then used the claimants' confidential information about the performance and remuneration of teams of employees.
- After *injunctive relief* was granted, the third defendant attended interviews with the claimants' solicitors and his legal representatives corresponded with them. A settlement was subsequently reached between the third defendant and the claimants.
- The claimants intended to call the third defendant as a *witness*. Accordingly, the interest to remaining co-defendants of the content of the interviews and other communications was obvious.

These communications had been conducted on an expressly "*without prejudice* and confidential basis". Even without that label, it is clear that they would have been subject to both "without prejudice" privilege and, in some cases, *litigation privilege*.

At that stage, it might be thought that the adage, "once privileged, always privileged", should have assisted the claimants to keep these privileged communications privileged after settlement. Here, however, the claimants ran into the following difficulties:

- Irrespective of how it is labelled, a settlement agreement will not be protected from disclosure if legally relevant, absent an exceptional order of the court. As will be seen from our second case, those circumstances do not include a court having approved an order annexing a settlement agreement that describes itself as being confidential.
- The settlement agreement with the third defendant scheduled and referred to the privileged communications.

As such, the question became whether the claimants could maintain a claim to privilege over the previously privileged communications (referred to as "the Antecedent Communications" in the judgment) given the terms of the settlement agreement. The relevant terms were identified by Arnold LJ. The key clause was that:

> "[The third defendant] warrants and represents as per Clause 3 that he has provided full and frank disclosure of the supply of Confidential Information by him to [a co-defendant] and/or [another co-defendant] and/or Related Parties as set out in (a) his two affidavits appended to this Agreement at Schedule 1 (short form) and Schedule 1A (long form) (the 'Two Affidavits')…
>
> (b) the interviews conducted on a 'without prejudice' basis on 12 October 2017 and 18 October 2017 (notes of which are at Schedule 4),
>
> (c) the emails sent on a 'without prejudice' basis on 16 October 2016 and 17 October 2017 (copies of which are at Schedule 5),
>
> (d) copies of the WhatsApp messages exhibited to the witness statement and/or
>
> (e) the information in respect of Mr Ruddell set out in an email from CC to BLP sent at 17:09 on 25 October 2017 (together, the 'Disclosures').
>
> For the avoidance of doubt, the Disclosures which are without prejudice (which does not include the Two Affidavits) will retain without prejudice privilege save that BGC and/or [the Third Defendant] will be able to waive the without prejudice privilege at its sole discretion in order to protect its position in the event that BGC considers or asserts that [the Third Defendant] has breached a term of this Agreement."
>
> (Paragraph 4.)

The concluding sentence made it plain that the agreement between the claimants and the third defendant was that the antecedent communications should remain without prejudice, subject to a right of waiver unilaterally conferred on the claimants. Yet that agreement was of scant or no

relevance to the question of whether without prejudice communications remained privileged against third parties. In *multi-party* cases, the question of what agreement the claimant and the settling defendant reach as to the nature of their communications is far less relevant than in two-party cases because the claim to privilege must be founded on public policy alone, rather than on any express or implied agreement: *Muller v Linsley & Mortimer*. As such, insofar as the settlement agreement purported to maintain previous privilege, its labelling and agreement was never going to be determinative against third parties.

It followed that the scheduling of the antecedent communications carried considerable risks. The analysis both of Master Davison, and of Moulder J on first appeal, was that the settlement agreement was subject to disclosure in its entirety, including its schedules, the material exhibited to them, and the email that was specifically identified by sender and date.

On further appeal, BGC sought to argue that the settlement agreement was merely referring to the antecedent communications and that, as such, privilege in these had not been waived. While the judgment does not record that argument in detail, it is of course the case that not all documents referred to in a contract will be incorporated into it, and that it is possible to refer (in the strict sense of that word) to without prejudice communications without thereby waiving privilege. Nevertheless, there is a good reason why litigators are wary of doing so: the moment that one restates, adopts or relies on the content of a privileged communication in an open document, then one is running a risk.

Thus, the Court of Appeal were unanimous in finding that the incorporation of the antecedent communications in the settlement agreement dictated that no privilege could be maintained in them. Arnold LJ's reasoning, at paragraphs 16-18, was that:

> "The question is not whether the Antecedent Communications are protected from inspection by without prejudice privilege, but whether the relevant parts of the Settlement Agreement are protected. The fact that the Antecedent Communications are protected does not mean that the relevant parts of the Settlement Agreement are protected, since they are distinct communications.
>
> Counsel for BGC sought to avoid this conclusion by arguing that, as a matter of contractual construction, clause 3.1.1 of the Settlement Agreement showed that the notes and emails referred to as the Disclosures were prior communications and not new communications… I do not accept this argument. In my judgment, this is not an issue of contractual construction, but of the purpose of the relevant communication. Here the relevant communication is the Settlement Agreement. The purpose of that communication was not to negotiate, it was to conclude a settlement of the dispute between BGC and [the third defendant] on the terms set out in the Settlement Agreement. It was therefore not covered by without prejudice privilege. Furthermore, the fact that the 25 October 2017 email became incorporated into the terms of the Settlement Agreement meant that that email ceased to be protected by without prejudice privilege, because otherwise it would not be possible (for example) for BGC to sue [the third defendant] for breach of warranty relating to the contents of that email."

Lewison LJ held, at paragraph 35, that:

> "The key point for me is that the Antecedent Communications could not have been used to found a claim against [the third defendant] because they are inadmissible. But the repetition of their information content in the Settlement Agreement radically changed the status of the information. From being incapable of founding any claim against [the third defendant], they became the legal foundation of a potential claim for breach of warranty."

In this reasoning, Lewison LJ joined the master, who had found it to be plain that the purpose of referring to and scheduling the antecedent communications was to permit BGC to bring breach of warranty claims.

Practical lessons

The decision underlines that it is difficult to draft one's way out of the choices that can face those settling after negotiations in which they wish to maintain privilege against third parties. In most cases, the solution to that is simply to say nothing about those negotiations in the settlement agreement. Where, however, a party (usually a claimant) is wary as to the truth of what has been said by another party during those negotiations, or wishes to secure contractual protection for its position, the choices will normally distil to:

- Including warranties as to the accuracy of previous communications from the settling defendant. This preserves rights against the settling defendant should it prove that an account of events was untruthful or incomplete, but it runs a high risk of ensuring that those previous communications will not be privileged as against third parties. Lewison LJ's analysis suggests that that risk will obtain whenever previously privileged communications are incorporated as warranties.
- Not including such warranties, thereby maximising the chances of maintaining privilege but leaving a claimant to fall back on the general law (notably, of misrepresentation) if it turns out that the settling defendant has not been truthful.

Neither of these choices are easy to market. Few claimants will want to lose privilege in accounts of events provided to them by settling parties. In multi-party litigation, maintaining privilege puts co-defendants in the challenging position of having to prepare *witness statements* when not clear what the settling party has disclosed to the claimant. Conversely, it is unattractive to enter a settlement in reliance on the truthfulness of an account of events presented by a settling defendant, but without any warranty as to its accuracy. The risk of the account emerging as unfounded at *trial* is obvious.

As such, attempts to reconcile two divergent sets of legal principles with "work arounds" will continue to be attractive to parties, and in particular to claimants continuing to proceed against co-defendants. The harsh lesson carried by the rejection of the claim to privilege at all three levels of decision in *BGC Brokers LP and others v Tradition (UK) Ltd and others* is that the courts are unlikely to offer parties much assistance in such attempts. That lesson is reinforced by the decision in the conjoined cases to which we turn.

Zenith Logistics Services (UK) Limited and others v Coury, UUU v BBB

In both cases in *Zenith Logistics Services (UK) Limited and others v Coury, UUU v BBB*, the master had refused to approve settlement agreements which purported to maintain confidentiality in their contents. When the cases came before Warby J, there was considerable

debate over what a court is doing when it makes an order embodying settlement. That is of independent interest to practitioners. The point material to our analysis above, however, is narrower. It lies in Warby's J's finding that where the court approves a *Tomlin order* exhibiting a settlement agreement that describes itself as confidential and not open to inspection by third parties, it is neither ordering nor accepting that the settlement agreement is confidential or not open to inspection by third parties:

> "The only parts of such an order that represent the exercise of judicial power to require, prohibit or allow a party to take any action are the stay of proceedings, and the liberty to apply. The Schedule to such an order does no more than record the terms of settlement, which amount to a contract between the parties. Those terms can only be enforced by means of a subsequent application. It is only at that point, if it arrives, that the Court may need to scrutinise the terms of settlement and adjudicate on their enforceability."
>
> (Paragraph 61.)

It followed from this analysis that the court should not follow the practice of seeking to police Tomlin orders. As noted by the judge, and as some readers will have themselves experienced, some courts do reject or seek to amend Tomlin orders, particularly where they contain draconian confidentiality terms. The judge's conclusion was that this approach was misplaced:

> "I can see no basis in principle or authority for assessing, at the initial stage, the propriety of the label the parties have attached to their "confidential" settlement agreement. The open justice principle is not engaged. And nobody has suggested, nor do I consider it arguable, that the Court should at this initial stage be concerned for any other reason with whether the confidentiality purportedly conferred on the agreement would be enforceable if challenged. In my judgment, it is only if there comes an enforcement stage that the court's coercive powers are invoked, and the open justice principle will be engaged."

As such, and as with the settlement agreement in *BGC v Tradition*, the fact that parties choose to include within the agreement between themselves provisions purporting to maintain privilege or confidentiality is a matter for them and their advisers. So will be the fact that, if and when a third party seeks inspection, those provisions may prove irrelevant.

This decision is logical and the analysis underpinning it exceptionally thorough. Nevertheless, it does entrench the position whereby a series of schedules to issued High Court orders may contain unenforceable provisions. It is likely that cases will ensue where parties make decisions not to disclose settlement agreements on the basis of such provisions, only to find that the confidential settlement they believed had been concluded and approved by the court was in fact one subject to disclosure to third parties in the usual way, should such disclosure obligations arise. Nevertheless, the approach to settlement taken in *Zenith* is far from valueless. By keeping confidential documents in the possession of solicitors, protection should be provided against applications for inspection of the court record, which can potentially be brought by anyone.

Beyond that protection it is not possible to go, unless, as in the companion case of *UUU v BBB*, the parties can make out the exacting tests for non-disclosure orders set out in *JIH v News Group Newspapers Ltd* and subsequent privacy cases. The message from the court is therefore clear: while parties can (within reason) use the labels they wish in their interparty agreements, the court will only make or approve true confidentiality orders if the challenging tests for derogation from open justice are satisfied.