

## Settling Disputes: Lay the Cards on the Table or Play Them Close to the Chest?

*State Bank of New South Wales Limited v Lewis Yee*, unreported, Supreme Court of NSW, O'Keefe CJ, Comm. D., 22 February 1994.

It is generally cost-effective for disputes to be resolved without having to go to court. Protection in the form of attaching privilege to pre-trial negotiations and preventing the Court obtaining knowledge of the processes and result of any attempted settlement is often desirable. The recent decision by the Commercial Division of the New South Wales Supreme Court in the *State Bank of New South Wales Limited v Lewis Yee* erodes this privilege.

While acknowledging that documents written in the course of negotiations for the settlement of an action and marked "without prejudice" are privileged, O'Keefe CJ held that two documents marked "without prejudice" relating to negotiations for settlement in a different dispute were not privileged.

The basis for denying the documents' privileged status (and thereby making them available for the record) revolved around the fact that the parties to the documents were not the parties to the litigation. The Court held that the privilege of "without prejudice" correspondence only extends to documents:

- "reasonably incidental" to the dispute; and
- in respect of the particular dispute before the Court.

This policy decision appears to emphasise the public interest in full disclosure and availability of relevant material at the expense of protecting genuine negotiations from being admissible in Court hearings.

*State Bank of New South Wales Limited v Lewis Yee* broadens disclosure requirements to include communications between one of the parties to the litigation and a stranger to that litigation, which were previously believed to be protected by privilege and the "without prejudice" label. These documents include offers of relief, offers of payment, offers of compromise or admissions made for the purpose of settling disputes.

Nevertheless a potential consequence of this decision is that negotiations may be discouraged if a cloak of protection is not offered. Similarly it may lead to negotiations not being recorded. Imprecision and failure to maintain written records would be a recipe for disaster in difficult negotiations.

*State Bank of New South Wales Limited v Lewis Yee* does not diminish the importance of attempting settlement of disputes in the building and construction industry. Nevertheless it is a warning that privileged communications of negotiations between litigants may later be discovered in ancillary or future disputes.

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