

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-004917

BETWEEN **BAVERSTOCK DEVELOPMENTS**
 Plaintiff

AND **HOUSING NEW ZEALAND LIMITED**
 Defendant

Hearing: 19 November 2009

Appearances: P F Chambers for Plaintiff
 M A Gilbert SC /A Ho for Defendant

Judgment: 19 November 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

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[1] Included in the evidence adduced by the plaintiff in support of its application for summary judgment is a letter from the defendant dated 7 October 2009. That letter which is headed “without prejudice” commences with the words “I refer to our recent discussions concerning the possibility of entering into a settlement on the Baverstock Development”. The letter goes on to set forth indicative terms of settlement. That offer has not been accepted by the plaintiff. The plaintiff seeks to adduce the offer contained in the letter in support of its application for summary judgment on the basis that such offer is an admission by the defendant of liability.

[2] The defendant objects to the production of this letter claiming the letter to be privileged pursuant to s 57 Evidence Act 2006. In answer to that objection it is submitted on behalf of the plaintiff that the privilege cannot be claimed because the defendant is using the procedure for a dishonest purpose and must be disallowed pursuant to s 67 Evidence Act 2006. It is claimed on behalf of the plaintiff that the defendant is using the settlement to try and reduce the amount it has to pay the plaintiff.

[3] S 57(1) of the Evidence Act 2006 sets forth the circumstances under which privilege can be claimed in respect of communications entered into in an attempt to settle a dispute. The section provides that a person who is a party to a dispute of a kind for which relief may be given in civil proceedings has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was a) intended to be confidential and b) was made in connection with an attempt to settle the dispute between the persons.

[4] It must be accepted in these proceedings that the defendant is a party to a dispute for which relief may be given in a civil proceedings. The communication is headed “without prejudice” and prima facie that would convey an intention on the part of the person writing the letter for the letter to be confidential. I accept that simply commencing a letter with the word “without prejudice” does not automatically create a privilege but it is clearly a pre-condition to the privilege that

the communication was intended to be confidential. If the communication doesn't satisfy the other requirements then of course the privilege cannot be claimed. The other requirement is that it was made in an attempt to settle a dispute between the parties and prima facie it is clear that the letter was made with that intention.

[5] I accept that if there was a dishonest purpose then the Court pursuant to s67 must disallow the claim. But in the circumstances of this case I cannot detect any dishonest purpose. This was a genuine attempt as far as I can see by the defendant to negotiate a settlement of a civil dispute. The law encourages parties to a dispute to enter into negotiations on the basis that communications of those negotiations will be privileged if the negotiations do not result in the dispute being settled. I am satisfied that the communication in this case does qualify for such privilege.

[6] I observe that Mr Rodda, who was the other party to the communication acknowledges discussions with the writer of the letter but says that those discussions were not for the purpose of settlement. He says he had the discussions with the writer of the letter to seek payment of what the plaintiff believes is owing to it by the defendant. That may very well be the reasons why he entered into those discussions but that doesn't mean that those discussions are not discussions for the purposes of settling the dispute. What it means is that he wanted payment of the full amount to settle the dispute. Quite often people commence discussions in an attempt to settle on the basis that they are seeking full payment but accept less.

[7] So far as the plaintiff's allegation that there was a dishonest purpose is concerned that really is a matter which will be determined by the outcome of these proceedings. If indeed the plaintiff is correct and the defendant has no defence then the plaintiff will be entitled to summary judgment. That however will not be determined by the contents of this letter. On the other hand if the defendant establishes that it has a defence then I can see nothing in the letter which binds the defendant to some acknowledgment that it is waiving its defence.

[8] Consequently, even if I accept the letter, I by no means consider it would go as far as the plaintiff claims namely that it is an acknowledgement by the defendant that it has no defence. In the circumstances therefore I consider the public policy

requirement embodied in s 57 Evidence Act 2006 that people who enter into genuine negotiations with a view to settling proceedings on the basis that communications they make during those negotiations will be confidential if the matter does not settle requires that I disallow the production of the letter. Accordingly I direct that the letter should not be admitted.

Associate Judge Robinson