Check your privilege in settlement discussions – WP or not WP, that is the question

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Legal privilege is currently a fast-moving area in common law jurisdictions, including the Cayman Islands. This month, the Cayman Islands Grand Court handed down a judgment on without prejudice (or "**WP**") privilege (*Balls v Shewraj and Saxon Motor & General Insurance Company Ltd*, The Hon. Justice Carter (Actg.), unreported 2 March 2020 ("**Saxon**")). This follows in the wake of a recent decision of the English Court of Appeal (*BGC Brokers LP and others v Tradition (UK) Limited and* others [2019] EWCA Civ 1937) considering the same subject matter (and of persuasive authority here).

This article: (i) starts with a reminder on the principles of WP privilege; (ii) examines the recent Cayman *Saxon* decision; (iii) briefly summarises the English *BGC v Tradition* decision; and (iv) sets out some practical points for parties involved in settlement discussions to keep in mind.

(i) What is WP privilege?

By way of a reminder, WP privilege attaches to written or oral communications made for the purpose of a genuine attempt to compromise a dispute between parties. The effect of this rule is that such communications are generally not admissible in evidence.

The policy behind this has been explained in *Cutts v Head* [1984] Ch 290 at 306, where Oliver LJ explained that "*parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations... may be used to their prejudice in the course of the proceedings*". So the rule is aimed at encouraging the parties to "*fully and frankly put their cards on the table*", because any statements or offers made by one of the parties in settlement negotiations cannot (in normal circumstances) be later brought before the court as an admission on the question of liability.

(ii) What happened in *Saxon*?

Saxon, was a personal injury matter relating to a road traffic accident. The Plaintiff was the person injured in the accident, the First Defendant was another driver, and the Second Defendant was the insurance company of the First Defendant.

Facts of Saxon and the application in question

The Plaintiff in *Saxon* had sworn an affidavit which said that the issue of liability was confirmed as having been accepted by the Defendants, and then exhibited to that affidavit some communications between the Plaintiff and the insurance company's independent loss adjustor.

The Defendants then applied under the Grand Court Rules Order 41, rule 6 for the Plaintiff's affidavit to be struck out on the ground that it was *'scandalous, irrelevant or otherwise oppressive*', on the basis that the affidavit introduced communications expressly marked 'without prejudice', and which the Defendants said was subject to privilege applicable to settlement negotiations (ie WP).

In the relevant communications, the Plaintiff had enquired whether the loss adjustor could confirm that liability for the matter was not in dispute, and the loss adjustor had replied by saying that there was no need to discuss responsibility for the crash and that there only needed to be a discussion on the extent of the Plaintiff's injuries and the value of the claim (ie on quantum rather than on liability).

Key issues in Saxon

There are four issues of particular note in this case relevant to WP privilege: 1. whether there was a concluded agreement on liability such that WP privilege no longer applied; 2. some interesting points that arose out of the fact there had been a related settlement between the same parties in this case; 3. an estoppel argument raised by the Plaintiff; and 4. a reminder on the nature of the WP label.

1. Whether there was a concluded Agreement on liability –

a. This was the main substantive point considered in the decision.

b. The Cayman Islands Court was referred to *Walker v Wilshire**[1]*** where LJ Lindley remarked that if a letter is sent making an offer marked WP, but the terms in the letter are then accepted, a complete contract is established and the letter, although written without prejudice "*operates to alter the old state of things and [*establish a new state]". So such a communication would go from being covered by WP privilege to being not WP. The policy for this is that a party would be unable to enforce the terms of an agreement if the terms could not be disclosed because they were subject to WP privilege.

c. Justice Carter in *Saxon* also looked at the English Court of Appeal *Tomlin**[2]*** decision, where there was correspondence from the insurers all marked WP, including some letters where the

insurance company's claims manager had referred to an agreement to deal with the claimant's claim on a 50/50 basis as an 'agreement'. The Court in *Tomlin* said that there was "*no suggestion that it* [the relevant communication] *was merely a step in an eventual settlement to be reached*". So the Court held that: (a) the letters were admissible because it was impossible to decide whether there was a concluded agreement without looking at the correspondence; (b) there was a definite and binding agreement on a 50/50 basis; and (c) the Plaintiff in that case was therefore entitled to seek damages based on that concluded agreement.

d. In *Saxon*, the Plaintiff had contended that the communication in question (that is, the discussions between the Plaintiff and the loss adjustor) demonstrated a concluded agreement on the issue of liability such that any ensuing negotiations would only concern quantum. The presence of a binding argument was alleged by the Plaintiff, so Justice Carter[3] said that the first task of the Court was actually to examine the relevant email exchanges to ascertain, on an objective basis, whether there was a concluded agreement or whether the parties were still involved in negotiations that were genuinely aimed at settlement of the Plaintiff's claims.

e. Then, having considered that correspondence, Justice Carter said[4] that the significant difference between the *Saxon* and *Tomlin*, is that the Plaintiff in *Saxon* could not point to a positive acceptance of liability, and so Justice Carter held that the communications between the loss adjustor and the Plaintiff were "*genuinely aimed at settlement with a view to the Plaintiff's claim being settled without the need for court action*", and were not a concluded agreement on liability.

f. The Judge[5] went on to say that although there was no direct response to the Plaintiff's enquiry of whether liability was admitted, that omission was not an unequivocal admission of liability, and it was not unreasonable for the loss adjustor to leave liability aside and seek further information on the quantum. So this did not display evidence of a binding agreement on liability. Therefore, it did not undermine the Defendants' assertion of WP privilege.

2. Settlement of a related claim with the same parties – The Plaintiff in *Saxon* had received a damaged vehicle payment from the insurers. The Plaintiff relied on this as being evidence of a concluded agreement on liability, because the release and discharge agreement in respect of that payment (the "**Release**") did not "*contain any statement of non-admission of liability for the crash*", which the Plaintiff said was consistent with liability (but not quantum) having been accepted. The Defendants' submissions on this were that the Release included a statement that *'injury claims* [were] *to be settled separately*', and so excluded any claims arising out of the Plaintiff's injuries and was not conclusive of the Defendants' admitted liability over the entire claim. The Defendants' evidence in response on this point noted that it is common in the industry for insurers to make such a payment, and the sum involved was "*relatively minor and not worth arguing over*", and so was a commercial decision by the insurers. The Judge agreed[6]

that the payment was only a settlement on the separate issue of the vehicle damage, and there was nothing flowing from the Release which the Court could find as a concluded agreement that the Defendants were liable for the Plaintiff's injuries. The Court found that the final phrase of the Release (quoted above) was conclusive on that point.

3. Estoppel - The Plaintiff also made an estoppel argument, ie that it was inequitable for the Defendants later to change their position on liability. This Plaintiff argued that these communications were evidence of a concluded agreement upon the question of liability, and the Plaintiff had suffered detriment by the Defendants having resiled from their representation on liability. The Judge found**[7]** that an estoppel did not arise on the facts of the case, because she had not found there to have been a concluded agreement.

4. Label not conclusive – There was also one email within the string of correspondence which was not marked without prejudice. Justice Carter held[8] that the presence of one such email did not take away from the nature of the communications being an attempt at settlement. It is well established that the labels used for correspondence are not determinative and one must look to the substance of the communications rather than the form.

Therefore, the conclusion in *Saxon**[9]* was that the content of the communications was covered by the WP umbrella and was not admissible and could not be used to establish any admission or partial admission in the case, so the Defendants' application to strike out the relevant parts of the affidavit and exhibit were granted by Justice Carter.

(iii) What happened in *BGC v Tradition*?

Before the English Court of Appeal in *BGC*, WP privilege, amongst other things, was in issue. The *BGC* decision considered the longstanding *Walker v Wilsher* authority that was referred to in *Saxon*, regarding circumstances in which material which was previously WP ceases to be privileged if it forms part of a binding settlement agreement[10]. By way of brief summary, the facts were:

1. The Claimant's solicitors had held some confidential interviews with the Third Defendant (who was an individual), and the interviews were conducted on a WP basis.
2. The Claimant then settled with the Third Defendant, and the two entered into a settlement agreement.
3. The settlement agreement included in its schedules (amongst other things) copies of notes of the interviews of the Third Defendant and certain email exchanges which were all said to be WP.
4. The agreement included express wording purporting to confirm that privilege had not been waived in relation to these communications.
5. The agreement also included warranties given by the Third Defendant that the disclosures

made in the schedules were accurate.

The other defendants to the proceedings (with whom the Claimant had not settled) had been provided with a copy of the settlement agreement where the relevant schedules were redacted on the basis of WP privilege. Those other defendants then applied for inspection of an unredacted copy of the settlement agreement.

The Court of Appeal held that the settlement agreement and its schedules were not subject to WP privilege. If the schedules could not be referred to in subsequent legal proceedings it would impossible for the Claimant to enforce settlement agreement and the warranties given by the Third Defendant. Arnold LJ said[11]:

> "*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.*"

This was not a question of contractual construction, but instead the Court had to look to the purpose of the relevant documents. The settlement agreement in the *BGC* decision (including its schedules) could not have been a communication made for the purpose of a genuine attempt to compromise a dispute between parties, because it was simply recording a settlement that had already been reached by the parties, rather than being one of the steps in ongoing negotiations. This is in contrast to the outcome on the facts in *Saxo*n, where the WP assertion was upheld (in that case the documents in question had not been incorporated into any legally binding settlement agreement and were therefore documents produced in an attempt to reach a compromise).

(iv) Lessons to be learned for parties in settlement discussions

Drawing this all together, below are some points to be kept in mind by any parties to settlement discussions in contentious matters:

- You should be especially careful when settling with one party in multi-party disputes, to ensure that there is no inadvertent waiver of WP, by disclosing communications to other parties with whom there is no dispute on that issue, such that material that would otherwise be protected by WP with one party becomes discoverable.
- The *BGC* case serves as a reaffirmation of the rule that the label of WP on correspondence is not conclusive, and the Courts will look to the substance rather than the form of such communications to assess whether documents are protected by WP.
- In circumstances where there are multiple claims between the same parties, in any settlement of part of the claims, parties should be cautious and ensure they use appropriate language in any release/waiver of claims (or aspects of such claims). As, in fact, the

Defendants were able to do in the *Saxon* case.

- These cases are a helpful reminder that once a communication is incorporated into a binding settlement agreement, any WP privilege is lost.
- You should be cognisant of the estoppel issues which might arise in a settlement context, although in *Saxon* the Plaintiff's argument depended on there being a concluded agreement on liability.

The protection that WP privilege gives is important, but it can be a complicated area to navigate. The Ogier Dispute Resolution team would be happy to assist if you have any questions.

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[1] (1889) 23 QBD 335

[2] Tomlin v Standard Telephones and Cables Ltd [1969] 3 All ER 201

[3] Paragraph 36

[4] Paragraph 43

[5] Paragraph 45

[6] Paragraph 46

[7] Paragraph 48

[8] Paragraph 44

[9] Paragraph 50

[10] Paragraph 14 of *BGC*

[11] Paragraph 18 of *BGC*

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