



No prejudice

Tim Akkouch and Emily Gillett discuss *Bradford & Bingley v Rashid* and 'without prejudice'

IN *BRADFORD & BINGLEY PLC V RASHID*

[2006] UKHL 37, the House of Lords, overruling the Court of Appeal, held that letters sent by a mortgagor to his mortgagee, which referred to an "outstanding" amount were not privileged and constituted an admission of liability for the purposes of s 29(5) of the Limitation Act 1980 (the 1980 Act), even though they did not refer to any specific sum of money owed by the mortgagor to his mortgagee.

Background

The appellant, Bradford & Bingley (B), had the benefit of a legal mortgage over Mr Rashid's (R) home. R fell behind with the payments, the last being made in January 1991. By October 1991, B had obtained a possession order and sold the property. However, a shortfall of approximately £15,500 remained, for which R was personally liable. In 2001, B entered into correspondence with R seeking repayment. The case turned on the status of two letters written on behalf of R forming part of this exchange. The first of these two letters stated that R was "not in a position to repay the outstanding balance, owed to [B]" but that he would "start to repay" when his finances were in order once again. B asked R for his proposals for repayment, in response to which those acting for R wrote a second letter stating, "[R] is

willing to pay approximately £500 towards the outstanding amount as a final settlement". None of the correspondence was expressly marked "without prejudice".

In June 2003, B issued proceedings to recover the £15,500 plus statutory interest. As his sole defence, R contended that the claim was statute-barred under s 20 of the 1980 Act. The period of 12 years from the date of the last payment on account (3 January 1991) had already expired for the recovery of the principal sum secured by the mortgage. Similarly the six-year limitation period in respect of the interest claim had also elapsed. In response, B argued that the statements in the letters, which were sent before the expiry of the 12-year period, amounted to acknowledgments under s 29(5) of the 1980 Act.

At first instance, the deputy district judge held that the second letter was written without prejudice and was inadmissible. However, he found that the first letter did not benefit from any without prejudice protection and was admissible as a good acknowledgment under s 29(5) of the 1980 Act. Consequently he gave judgment for B. On appeal, HHJ Hawkesworth QC found that both of the letters were written without prejudice and were inadmissible. On further appeal, the Court of Appeal ([2005] EWCA Civ 1080) unanimously upheld the judgment of HHJ Hawkesworth

QC, finding that both letters benefited from without prejudice protection.

House of Lords' decision

Their Lordships were unanimous in deciding that the statements contained in the two letters were not caught by the 'without prejudice' principle and that they amounted to acknowledgments for the purposes of s 29(5) of the 1980 Act. However, their Lordships disagreed as to the reasoning that led them to the former conclusion.

(a) Were the statements caught by the 'without prejudice' rule?

Four of their Lordships took the view that the statements contained in the two letters were not protected by 'without prejudice' privilege (Lords Hope (at [33]), Walker (at [39]), Brown (at [73]), and Mance (at [80])). They reasoned that as R had readily accepted liability to make the repayment to B, there was no dispute regarding liability which could be compromised. Nor was there any dispute as to the quantum of that liability, as at no point did R contest the outstanding amount that he owed to B. The only negotiations between the parties related to "when and to what extent [R] could meet the liability" he had readily admitted (per Lord Brown at [76]).

Lord Hoffmann disagreed with the reason-

ing of the other Law Lords. His preferred solution was that “the without prejudice rule, so far as is it based on public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgment for the purposes of s 29(5)” (at [16]). Lord Hoffmann considered the matter to be analogous to the hearsay rule, drawing a distinction between “adducing a statement as evidence of something expressly or impliedly asserted in the statement and simply as evidence that the statement was made...” (at [17]). He held that it would be inadmissible to adduce the statement for the former purpose, but not for the latter. This approach however was rejected by Lords Hope (at [35]), Walker (at [42]), and Brown (at [66]), on the basis that it would be rather “complicated” and “unreal” to adduce a statement that a debt is due for the purpose of proving that such a statement was made rather than for proving that the statement was true or false (per Lord Walker at [42]).

(b) Were the statements acknowledgments?

The House readily accepted that the statements constituted acknowledgments, affirming that an acknowledgment must merely be an admission of a legal liability on the part of a debtor or his agent to pay that which the claimant seeks to recover. “But,” as Lord Hope put it (at [21]), “his acknowledgment need not identify the amount of the debt... [His] acknowledgment will be sufficient if the amount for which he accepts legal liability can be ascertained by extrinsic evidence.”

Analysis

Relevant policy objectives

Their Lordships’ reasoning grappled with the public policies underlying, on the one hand, ‘without prejudice’ privilege, and on the other hand, s 29(5). Indeed, the Court of Appeal came in for trenchant criticism for not having taken the latter into consideration. Lord Brown, for instance, thought that the Court of Appeal’s stance would lead to “a very substantial enlargement of [the] scope” of without prejudice privilege (at [72]). Rather, without prejudice protection must be tempered by consideration of the public policy underlying s 29(5), namely that “a debtor who acknowledges his debt, and so induces his creditor not to have immediate resort to litigation, should not be able to claim that the debt is statute-barred because the creditor held his hand” (per Lord Walker at [38]).

Thus, thought the majority, where there was no dispute between B and R as to R’s liability to pay the debt, the public policy rationale

underlying the without prejudice rule did not extend protection to communications discussing the repayment of that admitted liability. Discussions as to how repayment was to be effected did not amount to a compromise, but merely constituted a concession granted by B. Lord Mance went further still, commenting that “even if [R] had been offering a lesser sum on a basis which could, if accepted, have precluded [B] from pursuing the admitted larger debt... there would still have been no relevant dispute about his indebtedness, and the without prejudice rule would still have no application” (at [83]).

Where quantum remains in dispute

However, in cases where the quantum remains in dispute, Lord Brown, with whom Lord Walker agreed (at [43]), was of the opinion that negotiations seeking to resolve this issue “should qualify for without prejudice protection”, notwithstanding the fact that they contained an acknowledgment under s 29(5) of the 1980 Act (at [75]). He considered that, where negotiations as to quantum existed, “the policy underlying the without prejudice rule seems... to outweigh the countervailing policy reason for lengthening the period in which the creditor must issue proceedings” (also at [75]). Lord Mance adopted similar reasoning, noting that for without prejudice privilege to apply “there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)” (at [81]). Thus not all acknowledgments will fall beyond the protective reach of without prejudice privilege.

Therefore, if a legal adviser does not wish his communications to a mortgagee (or other creditor) to have the effect of constituting an acknowledgment, he should dispute liability or quantum in some manner. No doubt prudent legal advisers will raise such a dispute, even where it cannot realistically be argued, in an attempt to circumvent the House of Lords’ decision. Ironically, their Lordships’ decision may go some way to frustrating the policy of without prejudice communications – that of allowing parties to speak openly

with a view to reaching a settlement – because practitioners will be concerned about the limitation consequences of their actions. Their Lordships would no doubt say that without prejudice communications must concern “real” disputes, although the obvious difficulty in defining this term was noted by Lord Hoffmann (at [15]).

Use of the without prejudice ‘shibboleth’

The letters in question in *Rashid* were not headed ‘without prejudice’. Would the result have been different had this ‘shibboleth’ been used? Lord Mance thought not, robustly stating that he was “unable to agree with... Lord Brown’s statement in para 63 that ‘generally speaking’ communications marked ‘without prejudice’ will ‘attract the privilege even without the public policy justification of encouraging parties to negotiate and settle their disputes out of court’. It is not open to a party or parties to extend at will the reach of the without prejudice rule or of the ‘privilege’ it affords as regards admissibility or disclosure” (at [87]). Lord Mance’s approach certainly prevents the House of Lords’ decision from being circumvented by the inclusion of the words ‘without prejudice’, and is therefore likely to be followed in subsequent cases. That said, a debtor’s legal advisers would be foolish not to head any correspondence seeking concessions from a creditor with the words ‘without prejudice’.

In summary, while the House of Lords’ decision succeeds in balancing the competing policy objectives of without prejudice privilege and acknowledgment, it remains to be seen whether legal advisers will be successful in circumventing their decision by raising bogus disputes as to liability and quantum. Creditors, at least for now, may still be “distracted by the sound of time’s winged chariot” (per Lord Hoffmann at [3]).

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