

## Insights

# HONG KONG COURT CONFIRMS THE POSITION ON WITHOUT PREJUDICE COMMUNICATIONS IN POON LOI TAK V POON LOI CHEUNG DESMOND [2019] HKCFI 3003

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The court recently considered the without prejudice privilege rule in the context of a family dispute in *Poon Loi Tak v Poon Loi Cheung Desmond* [2019] HKCFI 3003 and reconfirmed Hong Kong's position on the inadmissibility of communications made in a genuine attempt to settle as evidence in court.

## Background

The Plaintiff and Defendant, two of six siblings, engaged in: (1) pre-meeting telephone conversations; (2) in-person meetings; and (3) post-meeting WhatsApp conversations in an attempt to settle a dispute over their late father's estate. A draft settlement proposal was discussed and drawn up but no agreement was reached. The Plaintiff secretly had recorded the in-person meetings and sought to rely on the transcripts from these meetings when the parties ultimately resorted to litigation.

## Judgment

The Defendant successfully applied to have the transcripts removed from the Plaintiff's list of documents and certain parts of the Plaintiff's witness statement excluded on the ground that the contents made reference to discussions which took place on a without prejudice basis.

The court held that the pre-meeting telephone conversations clearly were intended to promote negotiations with a view to resolve the dispute and the WhatsApp conversations were a continuation of the in-person meetings, all of which were protected by without prejudice privilege. The court stated that it is not essential for correspondence expressly to be marked "without prejudice" if it is clear from the surrounding circumstances that the parties genuinely were seeking to settle. If the communications were of that character, it matters not that no settlement was reached.

The judgment helpfully summarised the relevant legal principles and confirmed that the correct approach is to determine whether:

1. there was an existing dispute between the parties;
2. legal proceedings had commenced or were contemplated;
3. the communication was made in a genuine attempt to further negotiations to settle the dispute;  
and
4. the communication was made with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties<sup>1</sup>.

The court made it clear that parties cannot “cherry pick” from communications, because it would be both impractical and unprincipled to allow parties to dissect from a wide range of discussions. Here, the Plaintiff acknowledged that he had omitted a great deal of other matters that had been discussed which he did not think were relevant. The court stressed that the Plaintiff’s personal belief that there was no room for negotiation is irrelevant. It would be contrary to public policy if parties could avoid the application of without prejudice privilege simply by asserting that they were not open to negotiation despite attending meetings clearly aimed at settling.

The court had little difficulty in rejecting the Plaintiff’s argument that the without prejudice privilege should not apply. The court emphasised that limited exceptions apply only in the clearest cases of an abuse of a privileged occasion amounting to fraud or perjury. Mere inconsistency between a party’s position in negotiations and in litigation, as suggested by the Plaintiff, is insufficient.

## **Key takeaways**

The judgment is welcomed and is a strong endorsement of the public policy rationale behind without prejudice privilege.

With disputes arising from the current pandemic and the backlog from the recent re-opening of the Hong Kong courts, parties are encouraged to take a collaborative approach and engage in without prejudice negotiations without resorting to formal proceedings. In practice, without prejudice conversations may take place on a daily basis and in potentially different circumstances. As highlighted by this judgment, parties should be wary of oral or “informal” discussions, in particular where the dispute is in its early stages. The relevant test is not whether proceedings had commenced, but rather, whether they had commenced or were contemplated. It also is sufficient that there was a genuine attempt to negotiate even if no actual offer or concession was made.

Although the courts tend to favour substance over form, it remains best practice to make a written note of all discussions and expressly mark communications “without prejudice”. This is to make it absolutely clear that in the event that the negotiations are unsuccessful, they should not be referred to at the subsequent trial.

<sup>1</sup>*Re Jinro (HK) International Ltd* [2002] 4 HKC 90, per Kwan J, at §13

## RELATED PRACTICE AREAS

- Litigation & Dispute Resolution

## MEET THE TEAM



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