



THE DEVELOPMENT OF PRIVILEGED COMMUNICATION RULE UNDER THE MALAYSIAN EVIDENCE ACT 1950

Mohamad Ismail Mohamad Yunus

Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia
ismailmy@iiu.edu.my

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Abstract

It is observed that if there is a civil dispute between the parties, they may try to settle it outside court, for example, by using the process of alternative dispute resolution. When there is actual cause of action between the parties, the settlement might be done through negotiations. If such negotiation settlement fails, they might bring the matter to the court and if any party wants to admit the damaging statements made during the negotiation, these statements or communications are privileged as “without prejudice communication” under s. 23 of the Malaysian Evidence Act 1950. The issue is whether the law requires some changes and new mechanism to adapt ‘without prejudice’ privilege at present. Is the rule absolute? What are the exceptions that have been ruled out by the Court which can be considered as the limitations of the rule? The objective of this paper is to discuss the matters.

Keywords: *Outside Court , Negotiation*

A. Introduction

There are 2 ways to resolve disputes by violence, namely through the Path of War and the Path of Non-War.¹ The purpose of negotiation settlement which is also known as Alternative Dispute Resolution (ADR) is one of the means to resolve a dispute in civil matters outside the court. Slow and complicated dispute resolution is detrimental to justice seekers in all aspects, especially in the business world, it will result in a high cost economy, and can drain the company's potential and resources.² But, in the situation that the negotiations are going through, the parties are to agree on the terms of any admissions or concessions made by either party during the negotiation which cannot be used in court. The legal provision provided in s. 17 of the Malaysian Evidence Act 1950, an admission is a statement, oral documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the

¹ Sugiadnyana, Putu Radyati, Dewa Gede Sudika Mangku, and Ni Putu Rai Yuliantini. “Penyatuan Sengketa Pulau Batu Puteh Di Selat Johor Antara Singapura Dengan Malaysia Dalam Perspektif Hukum Internasional.” *Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha* 6, no. 2 (2020): 542–59. <https://ejournal.undiksha.ac.id/index.php/jkh/article/view/28102>.

² Riza, Faisal, and Rachmad Abduh. “Alternatif Penyelesaian Sengketa Secara Arbitrase Melalui Pemanfaatan Teknologi Informasi.” *DE LEGA LATA: Jurnal Ilmu Hukum* 4, no. 1 (2019): 77–86. <https://doi.org/10.30596/dll.v4i1.3171>.

persons and under circumstances hereinafter mentioned.³ This provision covers circumstances which involve parties in a proceeding making a statement either oral or written form of the facts relevant to the case.⁴

These types of dispute resolution methods only are applicable in civil matters. The problems may occur when the negotiation between the lawyer and the parties involved, extrinsic evidence or outside facts that may be important to the case or fact in the issue to the case. The admission in the court which can be crucial points as it may be accepted as a proof in accordance with s. 21 of the Evidence Act 1950.

Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:

1. *an admission may be proved by or on behalf of the person making it when it is of a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32*
2. *an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when that state of mind or body existed and is accompanied by conduct rendering its falsehood improbable*
3. *an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.*

Hence, there will be certain aspects of a matters to be discussed on whether the statement can be admitted in court as evidence or not under the Malaysian Evidence Act 1950.

Generally, “without prejudice” rule is inadmissible as evidence because the purpose of this rule is to encourage the parties to communicate freely without hiding the facts to settle their disputes without a fear of whatever they said could be turned against them. “Without prejudice” rules are usually used by the parties who are during negotiating a settlement. In the event where the negotiations fall through, any admissions or concessions made by the parties during that negotiation cannot be used in court. This privilege applies to a settlement of disputes between the parties. This includes (e-mails, letters, fax, transmission, courier) in which this document was prepared and will be used during negotiation.⁵

The common law historically derived that the “without prejudice” rule in the case of *Field v. Commissioner for Railways*,⁶ as a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties during negotiations to settle litigation. The purpose is to enable parties engaged to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put into evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered.⁷

It was further elaborated in the leading case of *Rush & Tompkins Ltd v. Greater London Council and Another*,⁸ where the House of Lords decided that.

“The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence “without prejudice” to make clear beyond doubt that in the event

³ Lee, M. *Whether Evidence of Negotiation can be admitted as evidence under the Evidence Act 1950, with regards to only Civil Admission.*

⁴ Pinsler, J. (1992). *Communications in the course of Settlement Negotiations and the Rule of Privilege.* Malayan Law Journal Articles 1 MLJ xxv.

⁵ Mohamad Ismail, Mohamad Yunus. (2022). *The Eyes of The Laws.* Kuala Lumpur. Anaasa Publication.293.

⁶ [1957] 99 CLR 285.

⁷ Ibid.

⁸ [1989] 1 AC 1280.

of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase “without prejudice” and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should not be resolved by a linguistic approach to the meaning of the phrase “without prejudice”.⁹

This rule was later adopted into the Malaysian legal system in which it is settled law that letters written “without prejudice” are inadmissible. This can be seen in the case of *Malayan Banking Bhd v. Foo See Moi*,¹⁰ the judge Chang Min Tat FJ stated that “It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached.”¹¹

Novelty the article, it provides a clear indication as regarding “without prejudice” rule as has been discussed in the Judicial precedent of the Common law and later into the Malaysian legal system it gives rise to a provision enumerating “without prejudice” in Evidence Act 1950.¹²

The rules of “without prejudice” are enumerated in s.23 of the Evidence Act 1950. The rule of “without prejudice” is a privilege applied to any communication between parties which aimed at negotiating a settlement. This also includes any documents (e-mails, courier, or any medium of communication) prepared and sent out during the process of negotiations. Nonetheless, this rule does not directly apply to protect or privilege documents which are marked as “without prejudice”. The court will determine what shall be protected in regard to “without prejudice” privilege and the exceptions provided under this section.¹³

B. Discussion

1. Without Prejudice Rule

Section 23 of Evidence Act 1950, in civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given. In the event of a negotiations fall through and there are any admissions or concessions made by the parties along the way is to be said inadmissible in the court. The form of communication that amounts to “without prejudice” are covered in form of i.e., emails, letter, courier, etc. Citing the case of *Rush & Tompkins Ltd v. Great London Council*,¹⁴ “The rule is founded on the public policy of encouraging litigants to settle their differences. It is settled law that letters written “without prejudice” are inadmissible in evidence of negotiations attempted. This is an order.”¹⁵

A Malaysian case did support the same rule where it was stated in *Lim Tjoen Kong v. AB Chew Investment Pte Ltd.*,¹⁶ where in this case the court held that,

“Section 23 is based on common law, and it is to protect from disclosure, hence the evidence are not admissible.”¹⁷

⁹ Ibid.

¹⁰ [1981] 1 LNS 95.

¹¹ Ibid.

¹² Omar, H., Marimuthu, S. B, & Mahali, M. (2018). *Law of Evidence in Malaysia*. Selangor: Sweet & Maxwell Asia.

¹³ Mohamad Ismail, Mohamad Yunus. (2022). *The Eyes of The Laws*. Kuala Lumpur. Anaasa Publication.294.

¹⁴ [1989] 1 AC 1280.

¹⁵ Ibid.

¹⁶ [1989] 3 MLJ 328.

¹⁷ Ibid.

Furthermore, s. 23 of Evidence Act 1950 provides the exception to the general rule as stated under s. 17 of the Evidence Act 1950 in which in the case of *Malayan Banking v. Foo See Moi*,¹⁸ where the court held,

*“It is settled law that the letters written “without prejudice” are inadmissible in evidence of the negotiations attempted. In order to not to fetter but to enlarge the scope of negotiating attempted, so that a solution acceptable to both sides can be more easily reached.”*¹⁹

Section 23 of Evidence Act 1950 can further be elaborated into two limbs which is discussed in *Mariwu Industrial Co (S) Pte. Ltd v. Dextra Asia Co Ltd & Anor*. *“The words in s. 23 contemplate 2 different situations that invoke the underlying rationales of the “without prejudice” rule. The first situation is where there is an express condition that any admission made by either party in the context of negotiations to settle a dispute is not to be “given”, i.e. admissible in evidence against the party making the admission. The situation applies to all communications made expressly without prejudice. The second situation is where an admission is made under circumstances from which the court can infer the parties agreed together that evidence of it should be given. This situation will cover cases where even though a statement is not expressly made “without prejudice” the law holds that it is made without prejudice because it was made in the course of negotiation to settle a dispute.”*²⁰

The two situations in the aforesaid case are, firstly, in instances where there is an express condition that any admission made by either party in the context of negotiations to settle a dispute is not to be “given”. Secondly, in situations where an admission is made under circumstances from which the court can infer that the parties agreed together that evidence should not be given. In these situations, the court may infer where Malik Ishak J. in the case of *Dusun Desaru Sdn Bhd v. Wang Ah Yu*,²¹ stated *“That for a negotiation “without prejudice” to be privileged from disclosure, two common features must be present before these privileged communications to be activated. First, some individuals must be in dispute and that dispute led them to negotiate with one another and second, the communication between the parties must obtain suggested terms that would finally led to the settlement of the dispute.”*²²

It is clear from the two situations the court will infer that the agreed parties together are individuals which must be in dispute and that dispute led to the negotiation between them and Second observation is the negotiation must suggest a settlement to the dispute between the aggravating parties.²³

2. The Exceptions to “without prejudice” rule

The rule of “without prejudice” is not absolute in nature. There will be instances where the “without prejudice” documents could be admissible in court. Firstly, the court has a duty to look into the negotiations and determine whether the claim for privilege has been made by either party. This can be seen in the case of *Wong Nget Thau v. Tay Choo Foo*,²⁴ where the issue arose in this case is *“Whether “without prejudice” communications of the letter from the plaintiffs to the defendant, were to be automatically treated as privileged and inadmissible?”* It was held that, document headed 'without prejudice' does not automatically render it privileged from admission in evidence. The Court must consider whether the letter was part of a genuine attempt to settle a dispute. As no dispute existed at the time of the letter, it could not be said to have been written to settle a dispute or during negotiation and was therefore admissible. The

¹⁸ [1981] 1 LNS 95.

¹⁹ Ibid.

²⁰ *Mariwu Industrial Co (S) Pte. Ltd v. Dextra Asia Co Ltd & Anor*.

²¹ [1999] 2 CLJ 749.

²² Ibid.

²³ Anonymous. (2010, August 17). Exclusion of Evidence of Settlement Negotiations.

²⁴ [1994] 3 MLJ 723.

letter was said to be admissible as evidence since there was a conclusion and an agreement as to the purchase price of the shares.²⁵

Second exception is in proving a statement that was made by other party to the suit, where in the case of *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd.*,²⁶ whether the letters marked “without prejudice” were admissible and whether respondent was able to pay the said debt? In this case the petitioner filed a claim of debt for goods sold and delivered to the respondent company. The petitioner sought final judgment and subsequently filed a petition for the winding-up of the respondent on the ground that the respondent was unable to pay the said debt. The respondent then applied for the petition to be struck out on the basis that firstly, there was no judgment debt against the respondent and secondly that the petitioner, since it is not a creditor, has no *locus standi* to apply for a winding-up order. The suit was dismissed because of a settlement between the parties, *vide* respondent's letter dated 13 January 1990. It was held that; The “without prejudice” letters are admissible to see if there is a bona fide dispute or if a settlement had been arrived at between the parties and the evidence shows that the parties had arrived at a settlement in relation to the said debt.²⁷

Third, “without prejudice” can be regarded as admissible in cases where the parties have consented to the usage or waiver of it. In this situation if the parties seek to adduce evidence “without prejudice” negotiations and the other party is entitled to object or allow it to be admitted, as there is a waiver of privilege. Hence, the negotiations of “without prejudice” must be consented by both parties to the proceedings otherwise it will not be admissible as evidence in court.²⁸ Illustrating the case of *Dusun Desaru Sdn Bhd v. Wong An Yu*,²⁹ the first party in this case has tender the documents marked as “without prejudice” to be presented in the court as evidence and the second party does not make any objection regarding the documents. It was held that since there is no objection from the parties in the case, that would constitute the agreement of the parties to admit the documents as evidence. Hence, the documents are contended to be admissible before the Court.

Fourthly, “without prejudice” can be admissible when the parties take action after the conclusion of the agreement. When the party has arrived at an agreeable settlement, they may tender the negotiated terms that have been agreed by them in court. This can be seen in the case of *Malayan Banking Bhd v. Foo See Moi*,³⁰ the respondent delayed in the payment of the sum and the Appellant claimed the full payment on appeal. The issue was whether the letters written without prejudice can be admissible when the agreement has been concluded. It was held that the court was in the opinion that it is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted for the solution to both sides can be more easily reached. The judge in this case clearly stated that “but it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement”. Therefore, it is admissible to be used as evidence in Court.³¹

3. The Development

There are numerous exceptions provided to the “without prejudice communication” rule in recent case law. In the case of *MKC Corporate & Business Advisory Sdn Bhd v. Cubic Electronics Sdn Bhd & Ors.*,³² the three without prejudice letters written by the first defendant

²⁵ Ibid.

²⁶ [2005] 6 MLJ 625

²⁷ Ibid.

²⁸ Ho, H. (2003). *The Nature and Scope of the Without Prejudice Rule*. Singapore Academy of Law Journal, 15(Part 2), 419-427.

²⁹ [1999] 5 MLJ 449.

³⁰ [1981] 2 MLJ 17.

³¹ Ibid.

³² [2015] 11 MLJ 775.

is a proposal by them to the plaintiff to replace the tenancy agreement with a new agreement with less area tenanted to the plaintiff. Similar proposal was repeated thrice and was rejected by the plaintiff. There was no negotiation to replace the agreement, to begin with.³³

The negotiations are only on the issue of when full vacant possession can be delivered. Negotiation is the initial process as an attempt to reach an agreement between one party and another.³⁴ Arbitration as a means for the disputing parties to discuss their settlement without the involvement of a third party as a mediator, so that there is no standard procedure, but the procedures and mechanisms are left to the agreement of the disputing parties.³⁵ These letters show the first defendant had deceit the plaintiff into believing that the tenancy agreement still exists and valid as late as 18 March 2011. It was stated by Hadhariah Syed Ismail J. in this case agrees that s. 23 of Evidence Act 1950 is not absolute and sets several exceptions for without prejudice communication as follows.

1. Letters containing a threat is admissible to prove that a threat was made.
2. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made.
3. Evidence of the negotiations is also admissible to show that an agreement concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence; and
4. One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail, or other unambiguous impropriety. It was held that the first defendant cannot use the without prejudice label to hide what they wrote when they have deceit the plaintiff. Therefore, letters are admissible as evidence.³⁶

C. Conclusion

It can be concluded that the applicability of the ‘without prejudice’ privilege is only in civil cases. In a jurisdiction where this privilege has been recognised, they opt the same concept where it does not apply to criminal matters. On the other hand, the country where it does not recognise the ‘without prejudice’ privilege has its own alternatives to deal with criminal matters apart from negotiations settlement. The different in nature in dealing with the criminal cases and a civil suit may become the biggest challenge in trying to adapt the privilege. The plea bargaining which has being used in solving criminal matters may be the only suitable way up until now. However, the plea bargaining is a part of Alternative Dispute Resolution (ADR), not a kind like settlement negotiations in s. 23 that governs the ‘without prejudice’ privilege. Lastly, the law requires some changes and new mechanism to adapt ‘without prejudice’ privilege in the future, especially to be applied in criminal matters.

³³ Ibid.

³⁴ Parmitasari, Indah. “Peran Penting Negosiasi Dalam Suatu Kontrak.” *Literasi Hukum* 3, no. 2 (2019): 50–63. <https://core.ac.uk/download/pdf/270149730.pdf>.

³⁵ Haerani, Ruslan. “Tinjauan Yuridis Perjanjian Perdamaian Dalam Penyelesaian Sengketa Di Pengadilan Melalui Proses Negosiasi.” *Unizar Law Review (ULR)* 3, no. 1 (2020).

³⁶ Mohd Danuri, Mohd Suhaimi, Mohd Ishan, Zahira Mustaffa, Nur Emma, Jaafar, Mohd Salleh. (2016). A Revisit On The Current Practice Of Dispute Resolution And ADR In The Malaysian Construction Industry. Vol 16 No 1.

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