

**Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd [2020] NSWCA 25**

**FACTS**

Duffy Kennedy Pty Ltd (DK) and Galileo Miranda Nominee Pty Ltd (Galileo) were involved in a construction dispute regarding residential towers. During the dispute, a "without prejudice" meeting occurred involving the principal's representative (RCP). DK argued that RCP relied on statements made in the meeting to conclude that DK had failed to comply with a show cause notice, leading to the issuance of a "take out" notice. DK contended that this reliance violated the principle of without prejudice privilege.

**ISSUE**

Was RCP precluded from considering information disclosed during a "without prejudice" meeting that did not result in a settlement?

**FINDING**

The NSW Court of Appeal dismissed DK's appeal, finding that without prejudice privilege does not apply to non-curial procedures and RCP's reliance on the meeting's content was valid. The court's key observations were:

**1. Without Prejudice Privilege Limited to Evidence in Legal Proceedings:**

The court clarified that the privilege is a rule of evidence, not a substantive right, and does not extend to contractual decision-making. White JA explained:

*"The rule that without prejudice communications are privileged is simply a rule of evidence. It applies only in curial proceedings to prevent the admission of evidence...It does not apply to a non-curial procedure such as that under clause 24.2"* (para. 251)(241202 1747 Duffy Kenne...).

**2. Privilege Does Not Preclude Use of Information:**

Public policy underpinning without prejudice privilege does not prevent parties from using disclosed information for non-litigious purposes. The court stated:

*"It has never been suggested...that the privilege is based upon an implied agreement that if the negotiations do not result in an agreement for settlement of the dispute, the parties will make no use of what has been disclosed"* (para. 175)

*"Such an implication would be inconsistent with the policy that supports the privilege, which is to encourage the negotiated settlement of disputes"* (para. 176)

**IMPACT**

This decision demonstrates the need for contract managers and legal professionals to manage information carefully because sensitive disclosures during negotiations must be strategic, deliberate and well-considered.

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