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2017: Without Prejudice: A Primer & Update

Judges prefer to be on the golf course rather than listening to barristers

1. THE LAW OF PRIVILEGE

1.1. The Without Prejudice Rule is a sub-set of the law of privilege. This comes in two parts:

a) Legal professional privilege which enables litigants to obtain legal advice and assistance in the confidence that those communications are protected from production or disclosure.

b) The Without Prejudice Rule enables parties to a dispute to communicate freely *for the purposes of facilitating a settlement*, without being at risk of having those communications produced and disclosed and used against them, thereby potentially undermining their case in the event that a settlement is not reached (Cutts v Head [1994] Ch 290).

1.2. There is a public policy justification for this rule – that parties should be encouraged as far as possible to settle their disputes and to fully and frankly put their cards on the table in order to do so.

1.3. It is however important to note that this is not some technical rule of evidence. Privilege is a substantive legal right and has been recognised as such by the courts and once privilege is established, creates an absolute right to withhold the document and without a balancing act having to be performed by the court (qlthough of course, there are certain categories of exception).

1.4. In general terms, the Without Prejudice Rule operates to exclude ***genuinely*** without prejudice communications from evidence in the current or subsequent proceedings between the parties to the dispute and between different parties to the dispute (e.g. in tripartite litigation).

1.5. It also excludes those communications from evidence in subsequent proceedings between the same parties relating to a different dispute, provided it is connected to the same subject matter as the original dispute.

KEY REQUIREMENTS

2. There are the following key aspects of the Without Prejudice rule, some of which will be discussed further.

2.1. It applies to oral and written communications. It should be remembered that negotiations may be conducted in writing (on paper or by email) and orally (by telephone or in a meeting, such as a mediation).

2.2. The communication must be a genuine attempt to compromise a dispute. Merely setting out your case or criticizing the other side's case is not sufficient. In other words, if there is not a genuine offer, then it doesn't get cloaked in *"without prejudice"* protection.

2.3. There does not need to be litigation on foot or a threat of litigation. The crucial question is whether, in the course of negotiation, the parties contemplated, or might reasonably have contemplated, litigation if they could not agree terms (Framlington v Barnetson [2007] EWCA Civ 502). But there must be a genuine dispute – reasonably cohate and definable issues, not simply a number of reciprocal differences and grievances.

2.4. The entirety of the communications are protected – the court will not dissect them.

2.5. Merely marking something 'Without Prejudice' is not determinative. It is the substance that counts and this is assessed objectively.

2.6. It may be important to distinguish between the label 'Without Prejudice' and the label 'Without Prejudice Save As To Costs'

3. When does the Rule apply?

3.1. As a general rule, it is good practice to label genuinely without prejudice communications with a label such as 'Without Prejudice'.

3.2. The starting point is that there must be a bona fide attempt to resolve a dispute. If not, then the without prejudice rule is not engaged, even if the label 'Without Prejudice' is attached to the correspondence. Similarly failing to mark a letter Without Prejudice does not mean that it is not entitled to that marking.

3.3. A party who makes an offer in correspondence and intends the correspondence to be open is best advised to say so clearly.

3.4. Merely explaining for example a reason for late payment is inadequate;

3.5. An offer to pay in instalments with interest only at the rate applicable under the late payment of commercial debts is not entitled to without prejudice marking as it only offers what the claimant is entitled to.

3.6. Even a letter offering to pay a lower sum than the amount claimed in a debt claim was held not to be without prejudice, even though it bore the label 'Without Prejudice' (Bradford & Bingley v Rashid [2006] 4 All ER 705). The House of Lords in that case concluded that the Without Prejudice Rule has no application to apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability.

3.7. This does mean that where the sum remains disputed however then a letter offering to pay a lower sum than the amount claimed in a debt claim is without prejudice because it seeks to establish the liability that remains in dispute.

3.8. The reason for adding a marking is to state that the writer considers the content of the communication to be without prejudice. This allows the recipient to immediately challenge it, and avoids one party assuming it is an open letter whilst the other considers it without prejudice. Should the point ever be contested in court, the court will take into account the substance of the communications, and will assess this objectively, the fact that one or both parties intended the communications to be without prejudice is a relevant factor, but carries little real weight. Likewise, by not using the label, the court may start from the position that it is for the party claiming privilege to demonstrate that the communication is in fact privileged. Equally, the Court may conclude that a lack of challenge to a letter marked Without Prejudice or a lack of marking is evidence that it was the parties' intention that the correspondence should be capable of being referred to subsequently.

4. Continuing Cover

4.1. A response to a without prejudice letter is however also entitled to without prejudice status. Where one party makes a without prejudice offer, the privilege extends to the response to the offer as well as to the offer itself, whatever the response may be (e.g. counter-offer, request for more information, etc.). In addition, the court will not dissect correspondence or communications in order to determine which parts of it may or may not be privileged. If part is without prejudice, then all is without prejudice (subject to certain limited exceptions).

5. Labelling
   5.1. It is open to the parties to agree as a matter of contract that the ambit of the Without Prejudice Rule should be extended, perhaps to cover communications that do not concern a dispute. However, there has to be a clear agreement that this is what they have decided to do. In the case of Avonwick v Webinvest [2014] EWCA Civ 1436, the court concluded that there was no such evidence because the communications were headed 'Without Prejudice Subject to Contract', which suggested that a binding agreement had not been made.

6. Good Practice;
   6.1. If an initial letter is marked without prejudice, then it would be advisable to ensure all other letters in that chain are similarly marked, unless the negotiation has come to a conclusion, otherwise it may be difficult to discern at which moment the parties intended that without prejudice stopped when a letter should be marked open correspondence to clearly indicate that they are no longer privileged.

7. Without Prejudice and Without Prejudice Save As To Costs
   7.1. There are two principal labels that are used: Without Prejudice and Without Prejudice Save As To Costs. The distinction is important. Only correspondence with the latter label can be referred to when the court considers the question of costs.
   7.2. Alternatively, the content of the communications must make it clear that the body of the text will be brought to the court's attention when costs are decided. This was confirmed in the case of Vestergaard v Bestnet [2014] EWHC 4047 (Ch).

8. Waiver can only be made by both parties
   (Something not readily understood even by solicitors)
   8.1. Without prejudice correspondence attracts joint privilege meaning that it can only be waived with the consent of both parties.
   8.2. This can be done inadvertently, because the effect of waiving privilege in relation to part will generally be to waive privilege in relation to the whole chain of communication.
9. Exceptions
   9.1. There are some exceptions to the Without Prejudice Rule and these largely arise in circumstances where there is unlikely to be any prejudice arising from the disclosure (Unilever v Procter & Gamble [2001] 1 All ER 783). These exceptions are when the communications:
      9.1.1._Demonstrate the fact of a concluded settlement agreement
      9.1.2.Assist as an aid to construing the settlement agreement that was subsequently reached (Oceanbulk Shipping & Trading SA v TMT Asia Limited and others [2010] UKSC 44)
      9.1.3.Provide evidence of grounds to set aside a concluded settlement agreement on the basis of misrepresentation, fraud or undue influence
      9.1.4.Evidence the fact of a delay (usually it is just the existence of the communications that needs to be referred to, not the detail within them). In this context, WP communications may be referred to in interim applications or the mere existence of communication without its contents may be permitted.

9.1.5. evidence of perjury, blackmail or other serious and unambiguous impropriety (see Halfords Media (UK) Limited v Ponomarjovs (October 2015 – Chancery))

9.1.6. Where a clear statement is made in the without prejudice communications, that is relied on by the other party, giving rise to an estoppel

10. Examples

10.1. The Without Prejudice Rule was recently considered by the Court of Appeal in the case of Suh v Mace [2016] EWCA Civ 4. This case concerned commercial premises. The claimants were the tenants and the defendant was the landlord. The landlord changed the locks in an attempt to forfeit the lease. The tenants commenced proceedings against the landlord for breach of covenant and contended that the lease was continuing and there had not been a valid forfeiture. There were two meetings at the landlord's solicitors offices. Mrs Suh, one of the defendant tenants, attended this meeting.

10.1.1. She had no legal representation.

10.1.2. The landlord subsequently alleged that Mrs Suh made a number of admissions that undermined her case and on which the landlord wanted to rely.

10.1.3. These admissions were recorded in notes made at the meeting. For instance, the landlord alleged that one of the tenants had conceded that there was unpaid rent at the time of the alleged forfeiture. The landlord also claimed that this tenant had said that she had not signed certain court documents that bore her signature.

10.1.4. The claimants argued that these statements had not been made, but, in any event, they said that what was said at these meetings was privileged because the meetings were without prejudice because they were settlement meetings.

10.2. The first instance judge concluded that the meetings were not settlement discussions but this was overturned on appeal.

10.2.1. The Court of Appeal decided that it was incorrect to analyse different statements made at different stages of the meeting in order to determine whether they were without prejudice or not. The rule is that a without prejudice meeting is a without prejudice meeting in its entirety. Thus, Vos LJ decided that all the communications at the meetings and the related correspondence were protected by without prejudice privilege.

10.2.2. The House of Lords had previously recommended that a broad view should be taken in assessing whether communications (whether in writing or in a meeting) were without prejudice: Ofulue v Bossert [2009] 1 AC 990 and the Court of Appeal applied the same approach here.

10.2.3. If the Parties wish to make open statements, these should be drafted at the meeting in a joint statement marked "open communication", separate from the meeting minutes which are without prejudice.

10.2.4. Part of the reasoning for this is that it is impractical for the courts to have to dissect communications in this way and, moreover, such an approach undermines the very nature of the privilege because it means that parties can never have confidence that the entirety of the communications are protected.

10.3. Another point that arose in the Suh case was that any privilege would cover up dishonesty in the tenant's statement if she had not in fact signed the statement that bore her signature. However, this argument was rejected because the Court considered that the tenant could not be said to be 'abusing' the privilege as she had no understanding of the without prejudice rule nor was she dishonest in the without prejudice communications themselves.

11. Pitfalls, lessons, and tips

11.1. Rule applies to any negotiation with the genuine intention of settling a dispute

11.2. The label used is not determinative (but a label should be given, provided it is applied with thought and understanding of the rule). Indiscriminate use of labelling or failure to label should be avoided.

11.3. Waiver of Without Prejudice requires both parties to consent (but beware of waiving inadvertently or consenting (impliedly or by non-objection) to the other side's waiver).

11.4. Without Prejudice covers everything and can't be salami sliced into some bits which are privileged and some bits which are not.

11.5. If a letter is received headed 'Without Prejudice', consider whether the label is really needed. If the letter is not a genuine attempt to settle a dispute, then reply to the letter inviting the other side to agree that the letter is not 'Without Prejudice' or to explain why they think it is.

11.6. Before you send a letter, consider whether your letter is in substance a genuine attempt to settle a dispute, or written in the context of such negotiations. Consider what label, if any, your correspondence needs.

11.7. If there is to be a dispute about the admissibility of without prejudice material, it is better that this is dealt with prior to the trial and preferably by someone other than the trial judge. (even if you have a substantial hearing at a trial and this point comes up, talk to the Clerk, there is probably another judge who can hear the particular challenge to the "Without Prejudice" marking.

12. Principal cases:

Rush & Tomkins Limited v Greater London Council [1989] 1 AC 1280

Cutts v Head [1994] Ch 290

Unilever plc v Procter & Gamble [2000] 1 WLR 2436

Bradford & Bingley v Rashid [2006] 1 WLR 2006

Ofulue v Bossert [2009] 1 AC 990

Oceanbulk Shipping & Trading SA v TMT Asia Limited [2011] 1 AC 662

South Gloucestershore Council v Information Commissioner and Bovis Homes (EA/2009/0032 20th Oct 2009)

Bristol City Council v Information Commissioner and Portland and Brunswick Squares association (EA/2010/0012 24th May 2010)

Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106 4th January 2011)

Derry City Council v Information Commissioner (EA/2006/0014 11th December 2006)

Department for Work and Pensions v Information Commissioner (EA/2010/0073) 20th September 2010