Without prejudice negotiations

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The parties to a dispute will invariably conduct negotiations in an attempt to resolve their differences without recourse to litigation. To encourage the settlement of disputes, communications which are labelled "without prejudice" are normally treated as privileged and, as such, will be inadmissible in evidence at the hearing of the dispute. This article looks at the without prejudice rule and its exceptions in the context of negotiating documents and opening shots in negotiations.

Rationale

Communications made under the label "without prejudice" are rendered inadmissible under the exclusionary of evidence, no so much because the courts wish to protect the parties' rights to privacy, but rather because it has always been judicial policy to encourage the early and cost-efficient settlement of civil disputes. To this end, the without prejudice rule protects a party who seeks to make any concessions or admissions to his opponent during the course of settlement negotiations. Such communications are designed to bring about an end to the dispute in an unfettered and confidential atmosphere, free from any danger that they could be made available to the court, should the negotiations break down. In *Rush and Tompkins Ltd v GLC*,[1] Lord Griffiths explained the underlying rationale for the rule in these terms:[2]

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish . . . 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 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

[1] [1989] A.C. 1280. See also, *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74, at [77] and [79]-80], and *West v Churchill* [2024] EWHC 940 (Ch), at [12]-[13].
[2] [1989] A.C. 1280, at 1299-1300.

be admissible at the trial and cannot be used to establish an admission or partial admission."

His Lordship cited (*inter alia* the following extract from the judgment of Oliver L.J. in *Cutts v Head*,[3] as expressing the reasons for the rule:

> ". . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to the prejudice in the course of the proceedings. They should . . . be encouraged fully and frankly to put their cards on the table . . . "

Although the rule is based primarily on public policy, its other foundation lies in the express (or implied) agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite negotiations, the matter proceeds to litigation.[4] The rule will, therefore, apply to exclude all negotiations genuinely aimed at settlement, whether made orally or in writing from being given in evidence. Invariably, the parties will expressly head their communications "without prejudice", so as to make it clear that they cannot be referred to at any subsequent hearing of the dispute in the event of negotiations breaking down. However, the application of the rule is not, as stated in the above-cited passage in *Rush*, dependent on the actual use of these words and, provided that it is clear from the surrounding circumstances that the parties were seeking to compromise the dispute, evidence of the content of their negotiations will generally not be admissible.[5] In *Jones v Lydon (No 2)*,[6] the last email in a chain of emails which was not marked "without prejudice" plainly followed on from the chain and was, therefore, treated as falling within the without prejudice protection.

Multi-party litigation

In the *Rush* case itself, the House of Lords held that without prejudice correspondence, entered into with the object of effecting the compromise of an action, remained privileged after the compromise had been reached. Such correspondence would, therefore, be inadmissible in any subsequent litigation connected with the same subject-matter (whether between the same or different parties) and was also protected from subsequent discovery by other parties to the same litigation. Without prejudice privilege cannot, however, be claimed by a party to other (separate) proceedings. In *Ofulue v Bossert*,[7] the House of Lords held that a statement made by a party in "without prejudice" correspondence written with a view to settling proceedings between him and another was not admissible in subsequent proceedings between the same parties except where it was wholly unconnected with the issues in those proceedings.

[3] [1984] Ch. 290, at 306.
[4] *Unilever plc v The Procter & Gamble Co* [2000] 1 W.L.R. 2436.
[5] *Rush and Tompkins Ltd v GLC* [1989] A.C. 1280.
[6] [2021] EWHC 2322 (Ch).
[7] [2009] 1 A.C. 990.

The opinion of Lord Griffiths in *Rush*, above, is also of interest on the distinction between the *disclosure* of evidence at the pre-trial stage of discovery of documents and the subsequent *admissibility* of that evidence at the actual trial. In his Lordship's view, the general public policy that applied to protect genuine negotiations from being admissible in evidence extended to protect also those negotiations from being disclosed to third parties involved in multi-party litigation.[8]

Recognised exceptions

It is evident from the case law that the without prejudice rule is not absolute and that resort may be had to without prejudice material for a variety of reasons where the justice of the case requires it. The various recognised exceptions are conveniently listed in Robert Walker L.J.'s judgment in *Unilever plc v The Procter & Gamble Co.*[9] Thus, without prejudice communications will be admissible if the issue is whether or not the parties' negotiations resulted in a concluded settlement.[10] Evidence of such negotiations will also be admissible to show that the agreement apparently concluded between the parties should be set aside on the grounds of misrepresentation, fraud or undue influence.[11] A statement in without prejudice negotiations may also be admissible to give rise to an estoppel.[12] In *Unilever*, his Lordship put the matter this way:[13]

> "Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel."

Similarly, in the earlier case of *Hodgkinson & Corby v Wards Mobility Services*,[14] Neuberger J. stated:

> "Although, of course, contract and estoppel are quite separate concepts, it appears to me logical and consistent that, if 'without prejudice' correspondence can be looked at to see if it gives rise to a contract, then such correspondence can also be looked at to see if it gives rise to an estoppel."

The point was raised more recently in *West v Churchill*,[15] where the High Court acknowledged the existence of the estoppel exception but held that there was no arguable case, on the facts, for reliance on without prejudice communications between the parties on the basis of proprietary estoppel.

It is apparent also that evidence of privileged negotiations may be given in order to explain delay or apparent acquiescence in litigation (for example, on an application to

[8] See also, *Rabin v Mendoza* [1954] 1 All E.R. 247, where the Court of Appeal refused to order the production of without prejudice material on discovery.
[9] [2000] 1 W.L.R. 2436, at 2444-2445.
[10] *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 W.L.R. 1378.
[11] *Underwood v Cox* (1912) 4 D.L.R. 66, (Supreme Court of Ontario).
[12] *Hodgkinson & Corby v Wards Mobility Services* [1997] F.S.R. 178, at 190-191.
[13] [2000] 1 W.L.R. 2436, at 2444.
[14] [1997] F.S.R. 178, at 190.
[15] [2024] EWHC 940 (Ch), at [53]-[57].

strike out proceedings for want of prosecution [16] Similarly, without prejudice communications will be admitted if their exclusion would permit an abuse of a privileged occasion by providing a cloak for perjury, blackmail or other impropriety: It seems, however, that a mere inconsistency between what is admitted in negotiation and later disclosed openly in litigation is not of itself a sufficient impropriety to remove protection. To remove the privilege, there must be some real abuse of the negotiation process (such as threats, blackmail or the commission of perjury).[17]

In certain circumstances, without prejudice correspondence may be examined to determine a question of costs after judgment. The so-called "Calderbank" offer, which is applicable to any civil proceedings, allows an offer of settlement which has been expressly stated to be "without prejudice on the question of costs" to be considered by the court on question of costs at the end of the hearing.[18]

It is also well-established that without prejudice material contained in settlement negotiations may be admissible to determine the admission of an independent fact unconnected with the merits of the case. [19] Thus, the without prejudice privilege cannot be used to prevent proof of an act of bankruptcy on the hearing of a bankruptcy petition.[20] In *McDowall v Hirschfield Lipson and Rumney,*[21] the primary issue was whether or not a joint tenancy had been severed prior to the death of one of the joint tenants. It was argued on behalf of the deceased tenant's estate that severance had been effected by virtue of certain correspondence which had passed between the parties during the deceased's lifetime. The surviving joint tenant, on the other hand, argued that, since such correspondence had passed in the context of a dispute and was clearly marked "without prejudice", it was inadmissible. H.H. Judge Stockdale concluded that, where one party was seeking to prove an independent fact (i.e., unconnected with the issue with which the without prejudice correspondence was concerned), the without prejudice material was admissible in order to prove the independent fact. The case illustrates that the outcome of a given case may depend on the nexus between the issue affected by the without prejudice communications and the actual issue to be decided by the court.

Finally, without prejudice negotiations may be used as an aid to the interpretation of the settlement agreement. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd,*[22] the parties had reached a settlement agreement in respect of a dispute. When the claimant brought a claim alleging that the defendants were in breach of the settlement agreement, the defendants pleaded reliance on the without prejudice negotiations to support a particular interpretation of the relevant terms of the settlement agreement. The Supreme Court accepted that a further "interpretation exception" should be recognised - that facts which are communicated between the parties in the course of without prejudice negotiations, and which form part of the factual matrix of the eventual settlement agreement, and which (but for the without prejudice rule) would

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[16] *Walker v Wilsher* (1889) 23 Q.B.D. 335, at 338.
[17] *Berry Trade v Moussavi* [2003] EWCA Civ 715 and *Savings and Investments Bank v Fincken* [2004] 1 W.L.R. 667.
[18] *Calderbank v Calderbank* [1976] Fam. 93.
[19] *Waldridge v Kennison* (1794) 1 Esp. 143; 170 E.R. 306.
[20] *Re Daintrey, ex parte Holt* [1893] 2 Q.B. 116.
[21] The Times, February 13 1992, (unreported).
[22] [2011] 1 A.C. 662.

be admissible as an aid to the construction of the settlement agreement, should be admissible as an aid to construction notwithstanding the without prejudice rule.

Inappropriate use

The decision of Nolan J. in *Royal Life Insurance v Phillips*[23] reiterates the view that the without prejudice rubric has no universal application but, on the contrary, is appropriate (and effective) only in specific legal contexts. In this case, the landlord wrote to the tenant setting out its figure for the revised rent on review. The letter in question was headed “subject to contract” and “without prejudice”. The tenant duly acknowledged receipt but made clear her disagreement with the suggested figure. Later, the tenant wrote to the landlord contending that the latter’s initial letter triggering the review was not a valid notice. The landlord submitted that, looking at the matter objectively, the letter fell to be regarded as a notice complying with the terms of the lease notwithstanding that it was marked with the “without prejudice” rubric. A reasonably-minded tenant receiving such a letter four days prior to the expiry of the time-limit would have understood it as a notice pursuant to the review clause. Nolan J., agreeing with this reasoning, concluded that the “without prejudice” and “subject to contract” rubrics made no sense in the context of a document clearly intended to have legal effect. The tenant’s reaction to the letter was that she understood it as a notice, to which she responded. Accordingly, the landlord’s review notice was held to constitute a valid notice initiating the review procedure. The case is significant in highlighting that, if such phrases are used inappropriately, they may (as in the *Phillips’* case) be disregarded by the court as being “meaningless estate agents’ verbiage” or, alternatively, render correspondence equivocal and, therefore, incapable of giving rise to a valid landlord’s notice.[24]

The same conclusion was reached in *British Rail Pension Trustee Co v Cardshops Ltd*,[25] where a rent review clause provided that, unless the tenant, in response to the landlord's trigger" notice, served a counter-notice within a specified time, the amount set out in the landlord's notice would be the new rent. Shortly before the expiry of the prescribed time, the tenant sent a letter marked "subject to contract" stating the rent which the tenant was prepared to agree. Vinelot J. held that, notwithstanding the words "subject to contract," no reasonably sensible businessman could have been left in any real doubt that this was to be a valid counter-notice.

By contrast, in *Sheridan v Blaircourt Investments Ltd*,[26] a rent review clause provided that, if the tenant wished to refer the determination of a new rent to an independent referee, he should give a written counter-notice within a time limit for which time was of the essence. When the landlord proposed a new rent, the tenant's agents wrote three letters expressing the tenant's disagreement with the landlord's proposals, and subsequently sent a fourth letter, headed "without prejudice and subject to contract," stating, ". . . I suggest it would be appropriate to make application to the RICS for an

[23] [1990] 43 E.G. 70.

[24] See, for example, *Shirclar Properties Ltd v Heinitz* (1983) 268 E.G. 362, (rent review notice headed "subject to contract" ineffective); *Re Weston and Thomas’s Contract* [1907] 1 Ch. 244, (notice of rescission signed "without prejudice" void).

[25] [1987] 1 E.G.L.R 127.

[26] (1984) 270 E.G. 1290.

independent valuer . . . I must advise my clients accordingly." Nicholls J. held that it was not possible to construe the wording in the letter as an unequivocal intention to the landlord's advisers that the tenant required the determination of the rent to be referred to a referee. Similarly, in *Maurice Investments Ltd. v Lincoln Services Ltd*,[27] a letter containing the words "subject to contract and without prejudice" was held not to amount to a valid landlord's trigger notice because a reasonable recipient of the letter could not have been sure that the landlord was instituting the rent review in the lease - it was necessary for the trigger notice to give a clear indication sufficient to bring home to a reasonable tenant that the landlord was thereby triggering the rent review.

Requirement of a dispute

As we have seen, the without prejudice rule has no application unless the parties are actually in dispute or negotiation with one another with a view to reaching a compromise.[28] In *Norwich Union Life Insurance Society v Tony Waller Ltd*,[29] the landlord's surveyor wrote a letter to the tenant, headed "without prejudice", calling for a review of the rent and proposing a rental of £11,500 per year. One of the issues was whether the landlord had given a valid notice in writing triggering the review. In this case, the letter was held to be admissible in evidence because there was no dispute or negotiations in progress between the parties when it was served. The letter had been written at a time when no view was emanating from the tenant. It was, therefore, not governed by the rubric "without prejudice" and was not privileged from disclosure. Similarly, in *Prudential Assurance Co Ltd v Prudential Assurance Company of America*,[30] merely "sensitive" negotiations, in the absence of a dispute, were held not to be privileged.

In *Bradford & Bingley plc v Rashid,*[31] the House of Lords held that the without prejudice rule has no application to apparently open communications that are designed only to discuss the repayment of an admitted liability. In this case, letters from a mortgagor seeking time to pay the shortfall due under a mortgage following repossession and sale of the mortgaged property were held not to be protected by the rule as they did not contain any statements (or offers) with a view to settling a dispute – on the contrary, the debt was already admitted and, hence, there was no dispute. By contrast, in *Bill v Simes*,[32] a letter responding to a letter before action was intended to negotiate a disputed liability rather than seek time to pay an accepted liability and was, therefore, held to be without prejudice and inadmissible.

Interestingly, in *Stax Claimants v Bank of Nova Scotia Channel Islands Ltd and Others*,[33] an attempt was made to extend the privilege to cover the parties' discussions regarding the strength and weaknesses of potential claims, legal tactics and case management issues. No actual claims, however, had been made against the relevant

[27] [2006] All ER (D) 402.
[28] *CMC Spreadbet plc v Tchenguiz* [2021] 4 W.L.U.K. 254.
[29] (1984) 270 E.G. 42.
[30] [2003] EWCA Civ 1154.
[31] [2006] UKHL 37.
[32] [2013] EWHC 2613 (QB).
[33] [2007] EWHC 1153 (Ch).

parties. According to Warren J., the public policy which attached to without prejudice privilege was "clearly directed at avoiding litigation by settling disputes" and not simply "allowing litigants to conduct their cases more privately".[34] Accordingly, his Lordship rejected the notion of a wider public policy objective of allowing parties to discuss frankly before entering into litigation.

Although the rule requires the relevant communications to be made in the course of a dispute, it is not essential that litigation should have begun. In *Barnetson v Framlington Group Ltd*,[35] the Court of Appeal had to consider whether there had to be a threat of litigation underlying the relevant negotiations or, failing that, some proximity in time to the eventual litigation commenced between the parties. The Court concluded, perhaps not surprisingly given the policy aims of the rule, that the crucial consideration was simply whether, in the course of the negotiations, the parties contemplated (or might reasonably have contemplated) litigation if they could not agree. In the words of Auld L.J.:[36]

> "If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation – hardly the encouragement to settle their disputes without *resort* to litigation . . ."

It seems, therefore, that the correct approach is to focus on the subject-matter of the dispute rather than how long before the threat (or start) of litigation it was addressed in negotiations. In *Barnetson*, therefore, the relevant exchanges between the parties were covered by the without prejudice rule since they amounted to disputes over the terms of the respondent's contractual entitlement and both parties were aware at the time of the potential for litigation if they could not agree.[37]

Opening shot in negotiations

In *South Shropshire District Council v Amos*,[38] the relevant document sent by the claimant, which had been labelled "without prejudice", contained nothing more but assertions of that party's rights and entitlements. However, there was already a dispute in existence and the claimant had indicated from the outset that he wished to negotiate (this being a common practice when a reference to the Lands Tribunal was in prospect). Taking, therefore, all these circumstances into account, the Court of Appeal concluded that the without prejudice rubric should apply. Parker L.J. put forward the following general guidelines:[39]

[34] [2007] EWHC 1153 (Ch), at [29].
[35] [2007] EWCA Civ 502.
[36] [2007] EWCA Civ 502, at [32].
[37] See also, *Sang Kook Suh v Mace (UK) Ltd* [2016] EWCA Civ 4, (negotiations genuinely aimed at settlement).
[38] [1986] 1 W.L.R. 1271.
[39] [1986] 1 W.L.R. 1271, at 1277-1278.

- The heading "without prejudice" does not conclusively or automatically render a document so marked privileged

- If privilege is claimed but challenged, the court can look at a document so headed in order to determine its nature

- Privilege can attach to a document headed "without prejudice" even if it is an opening shot

- The without prejudice rule is not limited to documents which are offers but attaches to all documents which are marked "without prejudice" and form part of negotiations, whether or not they are themselves offers

In *Standrin v Yenton Minster Homes Ltd*,[40] the Court of Appeal held that letters asserting a claim under an insurance policy (and letters written in response by the insurers) were not protected by without prejudice privilege because, at that point, there was no dispute between the parties to form the basis of negotiations. On the subject of an opening shot in negotiations, Lloyd L.J. stated:

> " . . . [these] may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement, or . . . where a person offers to accept a sum in settlement of an as yet unquantified claim. But where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie it is not protected."

Thus, the crucial distinction, it seems, is whether the opening shot is something more than merely an assertion of that person's claim. To qualify as a negotiating document, the initial "shot" must put forward some proposal for settlement. A good illustration is to be found in the case of *Buckinghamshire County Council v Moran*,[41] where the defendant's letter was written in an attempt to persuade the other party that his letter was well founded. As such, it did not amount to an offer to negotiate but simply an assertion of the defendant's rights. In the absence, therefore, of any willingness to compromise or negotiate, the letter could not be covered by without prejudice privilege. Ultimately, however, the question will revolve around determining the true intentions of the parties. This approach was emphasised in *Schering Corporation v Cipla Ltd*,[42] where Laddie J. observed:[43]

> "The court has to determine whether or not a communication is bona fide intended to be part of or to promote negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient."

[40] The Times, 22 July 1991, (unreported).
[41] [1990] Ch. 623.
[42] [2004] EWHC 2587 (Ch).
[43] [2004] EWHC 2587 (Ch), at [14]-[15].

The suggestion here is that the heading "without prejudice", whilst by no means conclusive, may be one of the factors indicating how the relevant document should be interpreted. In all cases, the crucial question is: "can the letter be regarded as a negotiating document?" And in answering this question, it is helpful to consider the position from the standpoint of the reasonable recipient. In *Schering* itself, the message conveyed by the party's letter was that he was prepared to avoid confrontation if there was "an alternative commercial solution acceptable to both parties". That, according to the judge, could mean only one thing, namely, that the party was willing to talk. The heading "without prejudice" attached to the letter merely reinforced that message. Accordingly, there was no doubt that it was a negotiating document covered by the without prejudice rubric.

Changing the basis of negotiations

If one party to negotiations on a without prejudice basis wishes to change the basis of negotiating to an open one, the burden is on him to bring the change sufficiently to the attention of the other party. The point arose in *Cheddar Valley Engineering Ltd v Chadlewood Homes Ltd*,[44] involving an action for breach of contract for the sale of land. In an attempt to compromise the litigation, the vendor's solicitors made a without prejudice offer of settlement. This offer was not accepted and negotiations took place. The purchaser's solicitor then telephoned the vendor's solicitors and said that he was making an "open offer" of settlement. The terms were varied by a subsequent telephone call made by and confirmed by a letter written later that day. That letter was not headed "without prejudice" but did not expressly state that the offer was now an open one. The legal executive acting for the vendor, who received both the telephone conversations and the confirming letter, was under the impression that the offer was without prejudice. The purchaser's offer was not accepted and the negotiations broke down. The issue was whether the offer made in the telephone conversation and subsequent letter remained without prejudice and, therefore, inadmissible in evidence. On this point, the court held that the correct test was an objective one, namely, whether a reasonable person in the position of the recipient of the information would have realised that a change in the basis of negotiations was being made. On the facts, the mere use of the word "open" was insufficient and, accordingly, the attendance notes of the conversations and confirming letter remained privileged.

Conclusion

The law relating to without prejudice communications has now evolved into a complex set of rules and principles and, no doubt, will be the subject of further case law development in the future. What has become clear is that the use of the "without prejudice" rubric may be wholly inapt in a variety of legal contexts and, far from providing a general safeguard to the parties, may actually produce positive harm by invalidating (in some cases) important notices served between the parties which are held to be equivocal.

[44] [1992] 1 W.L.R. 820,