

Without Prejudice: *Dos and Don'ts*

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Key Aspects of the Without Prejudice Rule

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- Applies to oral and written communications
 - But only where the communication is made as part of a *'genuine attempt to compromise a dispute'*
 - Does not need to be litigation on foot or the threat of litigation
 - Communications will not be dissected for parts that are without prejudice and parts that are not
 - Labels...
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Points to consider:

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- When does the Rule apply?
 - What is the extent of the Rule?
 - Should the correspondence be labelled?
 - If so, what label should be used?
 - Beware waiver
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Exceptions

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- As evidence of a concluded agreement
 - As an aid to interpreting a concluded agreement
 - As evidence of grounds to set aside a concluded agreement
 - As evidence of delay
 - As evidence of unambiguous impropriety
 - Where the communications give rise to an estoppel
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Example:

Sang Kook Suh v Mace Ltd [2016] EWCA Civ 4

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The Court of Appeal emphasised that:

- Settlement discussions should not be dissected in order to assess which parts may or may not be protected by the Without Prejudice Rule
 - This is because it is impractical for the courts
 - And it undermines the very nature of privilege because parties cannot have confidence in what is or is not protected
 - A broad view should be taken to assessing whether communications were without prejudice.
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Pitfalls, lessons, and tips

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- The Without Prejudice Rule applies to any negotiation with the genuine intention of settling a dispute
 - But there are exceptions
 - The Rule applies to the whole communication – no salami-chopping
 - The label used is *not* determinative
 - But ideally a label should be given, provided it is applied with *careful thought*
 - The dangers of waiver
 - Be on guard – Remember Mrs Suh!
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Principal case law



- *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
- *Suh v Mace (UK) Limited* [2016] EWCA Civ 4

