

Without Prejudice: Dos and Don'ts

David Nicholls

1. Introduction

Good afternoon! My name is David Nicholls and I will be speaking about the Without Prejudice Rule. By way of background, I have been in practice for 14 years and I joined Landmark Chambers in 2015 from a chambers in Lincoln's Inn. I specialise particularly in real estate law but I also undertake commercial litigation, company law matters, and insolvency, and I have often been asked to advise on ratings questions in an insolvency context.

The purpose of this afternoon's talk is to set out in general terms the Without Prejudice Rule. What it is; how it works; and some of the pitfalls to be aware of. It is not intended to be an in depth exegesis of the law but a practical and hopefully useful guide.

2. What is the Without Prejudice Rule

"The law loves compromise!" So said Lord Bingham the former Lord Chief Justice in 1996. Why? Because an agreement is better than an argument – and because judges prefer to be on the golf course rather than listening to barristers...

The Without Prejudice Rule is a rule of law and part of the law of privilege. There are two aspects to the law of privilege. First, there is legal professional privilege, which enables litigants to obtain legal advice and assistance in the confidence that those communications are protected from production or disclosure.

Secondly, there is the Without Prejudice Rule, which 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). 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.

It is 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. Moreover, once privilege is established, the right to withhold the document is an absolute right. There is no balancing act to be performed by the court, for instance, to assess whether the document should nonetheless be disclosed on a discretionary basis or because it would be in the interests of justice for it to be disclosed. There are, however, certain categories of exception.

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). 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.

3. Key aspects

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

- 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).
- Must be a genuine attempt to compromise a dispute. Merely setting out your case or criticizing the other side's case is not sufficient.
- 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 coherent and definable issues, not simply a number of reciprocal differences and grievances.
- The entirety of the communications are protected – the court will not dissect them.

- The label 'Without Prejudice' can be useful but it is not determinative. It is the substance that counts and this is assessed objectively. It is important to distinguish between the label 'Without Prejudice' and the label 'Without Prejudice Save As To Costs'

3A. When does the Rule apply?

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.

Conversely, if the correspondence is genuinely directed to resolving a dispute, then the communications are protected even if the label is not used. A party who makes an offer in correspondence and intends the correspondence to be open is best advised to say so clearly.

However, 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. In that case, the defendant was simply asking for a concession rather than giving one. It was not a dispute about *how much* was owing; rather the offer made was that the claimant should accept a lower sum than the admitted amount being claimed.

3B. Extent

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. Save in relation to certain limited exceptions, which I touch on below, without prejudice negotiations are not admissible in evidence and it is the *totality* of the communications that are protected.

3C. Labelling

As a general rule, it is good practice to label genuinely without prejudice communications with a label such as 'Without Prejudice'. The reason for this is that it makes clear to the other side that you consider the content of the communication to be without prejudice. In addition, should the point ever be contested in court, the court will take into account the label used. Although the court will look to 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.

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, it may have been the parties' intention that the correspondence should be capable of being referred to subsequently.

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.

It is therefore important that parties are clear about the label they are using (if any) and why they are using it. Ideally, there should be an express agreement with the other side that a particular line of correspondence should be without prejudice.

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 the correspondence to stop being privileged.

3D. What label?

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. 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).

3E. Waiver

Without prejudice correspondence attracts *joint privilege* meaning that it can only be waived with the consent of both parties. However, this can be done inadvertently, particularly where parties wish to refer to or rely on part of without prejudice correspondence. The effect of waiving privilege in relation to part will generally be to waive privilege in relation to the whole chain of communication.

4. Exceptions

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:

- Demonstrate the fact of a concluded settlement agreement
- 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)
- Provide evidence of grounds to set aside a concluded settlement agreement on the basis of misrepresentation, fraud or undue influence
- 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.
- Are evidence of perjury, blackmail or other serious and unambiguous impropriety (see *Halfords Media (UK) Limited v Ponomarjovs* (October 2015 – Chancery))

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

That said, the rule still effectively prevents any use by either party of the protected communications in a manner that would adversely affect the interests of the other.

5. Example

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. She had no legal representation. The landlord subsequently alleged that Mrs Suh made a number of admissions that undermined her case and on which the landlord wanted to rely. 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. 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.

At first instance, the judge concluded that the meetings were not settlement discussions and as a result the tenants' claim failed. However, this was overturned on appeal. 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 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. 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. Thus, Vos LJ decided that all the communications at the meetings and the related correspondence were protected by without prejudice privilege.

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.

6. Pitfalls, lessons, and tips

1. Rule applies to any negotiation with the genuine intention of settling a dispute
2. But there are exceptions to the Rule
3. The label used is *not* determinative
4. But a label should be given, provided it is applied with *thought*
5. Indiscriminate use of labelling or failure to label should be avoided.
 - a. Parties often use phrases like 'without prejudice' and 'off the record' interchangeably when they want to engage in written or oral correspondence privately in the hope or expectation that it won't be referred to in subsequent legal proceedings. But this hope is misplaced. However, mere use of these labels does not give the communications any protection unless there is a genuine attempt to settle.
6. Waiver requires both parties to consent but beware of waiving inadvertently (or consenting to the other side's waiver)
7. Be on guard at all times. Remember Mrs Suh.

8. Communications cannot be salami chopped into some bits which are privileged and some bits which are not.
9. Take extra care when dealing with litigants in person

Tips

- i. 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.
- ii. 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.
- iii. If you consider that the content of otherwise without prejudice correspondence should be referred to, consider whether one of the established exceptions to the rule applies. If not, the correspondence will be privileged.
- iv. 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.

7. Conclusion

Encouraging free communication is paramount in settlement discussions and, as such, save for any legitimate instances of abuse, privilege will be afforded to settlement discussions in their entirety. For a communication to attract this privilege, there must be a real issue between the parties and the communication must be an attempt – or part of an attempt – to negotiate a resolution of that issue. The court will look at the substance of the communication and not the label attached to it, but it is

nonetheless good practice that the parties should think carefully and accurately about the label they give the communication.

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

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