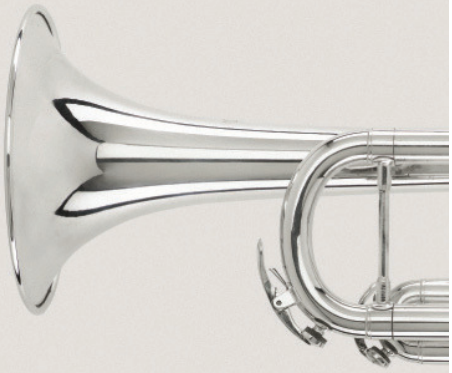
Avonwick Holdings Ltd v Webinvest Ltd and another

Privilege or Prejudice?



The recent High Court decision in *Avonwick Holdings Ltd v Webinvest Ltd and another* [2014] EWHC 3322 (Ch) has provided a useful reminder of each of the elements which comprise the test to be applied to determine whether a document is subject to without prejudice privilege under English law. It has also sounded a real note of caution to those who seek to rely on the label of 'without prejudice' in an attempt to cloak commercial negotiations with the protection of privilege.

The facts and issues

Avonwick and Webinvest were parties to a loan agreement. Following Webinvest's default in respect of its repayment obligations to Avonwick pursuant to that agreement, the parties engaged in an exchange of correspondence (and a demand for repayment by Avonwick) with a view to restructuring those obligations. The relevant communications (and accompanying draft Heads of Terms) were all marked *'Without Prejudice & Subject to Contract'*. It was only after the exchange of such communications (which did not lead to an agreed restructuring solution), and in the context of an application on the part of Webinvest to restrain Avonwick from presenting a winding-up petition against it, that Webinvest disputed its obligation to make repayment under the agreement. Webinvest submitted that there was an oral '*pay when paid*' agreement, whereby repayment of the loan was conditional upon Webinvest receiving repayment from its sub-borrower.

The question which arose for determination by the court in this instance was whether the correspondence between the parties relating to the restructuring proposals should be admissible as evidence at the future trial relating to the issue of Webinvest's repayment obligations, or whether it was protected by without prejudice privilege (as per the document markings).

Without prejudice privilege

Without prejudice privilege is a rule of evidence which applies to exclude from evidence in litigation between the parties all communications, whether oral or written, which are aimed at settlement of a dispute. The rationale behind the rule is to encourage parties as far as possible to settle their disputes without resorting to litigation by allowing them to communicate openly in settlement negotiations, and to make concessions in the course of those negotiations, without fear that what they say might subsequently be used to their prejudice in court in the event that the settlement negotiations are unsuccessful.

It has for some time been established that for the without prejudice rule to apply, there must be:

- An existing dispute: however, it is not essential that litigation has been either commenced or threatened. In *Framlington Group Ltd and Axa Framlington Group Ltd v Barnetson* [2007] EWCA Civ 502 it was held that the crucial consideration is whether, in the course of negotiation, the parties contemplated, or might reasonably have contemplated, litigation if they could not agree terms.
- A genuine attempt at settlement of that dispute; and
- Substance over form: although marking a document as 'without prejudice' is a strong indication that there is an existing dispute and a genuine attempt to settle that dispute, it is by no means determinative of the question of whether without prejudice privilege applies.

"…. one might assume that communications expressly marked 'without prejudice' between parties, starting on the same date as the service of a contractual demand….would attract the privilege."

The Avonwick decision

The High Court did not stray from the three established ingredients of the without prejudice rule, but, in the course of considering those elements in the relevant factual context, the judge, David Richards J, provided some useful clarification as to their scope:

- The fact that parties are engaged in negotiations does not, in and of itself, point to the existence of a genuine dispute; rather, the substance of those negotiations must be considered. Negotiations as to how and when an admitted liability should be repaid are distinct from those as to the settlement of a disputed liability: communications evidencing the former are not covered by without prejudice privilege (as there is no underlying dispute in existence), whilst communications evidencing the latter are protected. This reasoning follows the House of Lords decision in *Bradford & Bingley v Rashid* [2006] UKHL 37, in which Lord Brown held (albeit in relation to documents that were not marked 'without prejudice') that the without prejudice rule is not applicable to communications "*designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability*".
- The dispute must be in existence at the time when the relevant communication is made for that communication to attract the protection of without prejudice privilege. Communications cannot, with retrospective effect, be afforded the protection of without prejudice privilege by a point of dispute subsequently being raised.
- Use of the 'without prejudice' formulation on correspondence by an experienced litigator is not conclusive: where, on an analysis of the facts, the court is satisfied that there was no existing dispute or no genuine attempt at settlement of a dispute, the solicitor will be viewed as having made a mistake as to the marking of the correspondence. This finding expands on the House of Lords decision in *Bradford & Bingley*, where the documents in question were, on their face, open communications.

David Richards J held that the relevant communications passing between Avonwick and Webinvest were not subject to the protection of without prejudice privilege and would be admissible at the forthcoming trial. Notwithstanding that the correspondence had been marked 'without prejudice', the parties had proceeded quite clearly on the basis that there was an existing liability; indeed, the very purpose of the correspondence and the proposals set out therein was to arrive at an agreed restructuring of the implicitly accepted liability. Further, although Webinvest did ultimately dispute its liability, this point was taken at a later date, once the relevant correspondence had already been exchanged, and could not be applied retrospectively to protect the correspondence.

Comment

As David Richards J himself recognised, the findings are, at first blush, something of a surprise: "*one might assume that communications expressly marked 'without prejudice', starting on the same date as the service of a contractual demand…would attract the privilege*". What may be considered more surprising is that Avonwick was afforded the favour of the court (in the granting of its application that the correspondence be admissible) notwithstanding that the party which initiated the marking of the communications as 'without prejudice' was Avonwick itself. The judge did comment, on this point, that whilst the test for determining the purpose of marking documents 'without prejudice' is purely objective, a party may nevertheless be called upon to explain its reasons for labelling correspondence 'without prejudice' where it later alleges that the correspondence was not in fact made without prejudice.

A key takeaway from the judgment is that substance over form will prevail, and where there is no genuine dispute in existence (either as a result of an express admission of liability, as in *Bradford & Bingley*, or a failure to dispute liability, as in *Avonwick*), a communication cannot be deemed properly to have been made without prejudice, regardless of how the document itself is marked. This is not to say that parties should refrain from marking correspondence which they wish to protect from the eyes of the court as 'without prejudice'; notwithstanding the underlying message, David Richards J did note that the label of 'without prejudice' is a "*highly material factor*" in determining the status of a communication. However, parties should not rely upon that labelling as a complete means of protection, since it is the existence or otherwise of a dispute which will be determinative.

It is to be noted that no point arose in *Avonwick* as to the timing of the communications; it was well established by the Court of Appeal in *Axa Framlington* that communications which pre-date litigation or indeed any threat of litigation (as here) may nevertheless attract without prejudice privilege. Rather, and distinct from the position in *Axa Framlington*, the communications in *Avonwick* failed to attract the protection of without prejudice privilege for the simple reason that there was no dispute as between the parties at the time the communications were made (meaning that litigation could not have been contemplated). Such distinction highlights the real need, in circumstances where litigation may be a possibility (even if a very remote one), for parties to make clear that any communication which seeks resolution by way of compromise is expressed to do just that, and is not made by way of acceptance of the position which the parties are looking to compromise (i.e. here the liability itself).

David Richards J's judgment in Avonwick has since been considered by the Court of Appeal (on an expedited basis in light of the trial of the matter which is now underway) and upheld.

Travers Smith LLP
10 Snow Hill
London
EC1A 2AL

T: +44 20 7295 3000
F: +44 20 7295 3500
www.traverssmith.com

Caroline Edwards
Partner, Dispute Resolution
T: +44 (0) 20 7295 3322
caroline.edwards@traverssmith.com

Stephanie Lee
Associate, Dispute Resolution
T: +44 (0)20 7295 3465
stephanie.lee@traverssmith.com