

With or without prejudice? – exceptions to the “without prejudice” rule

In the recent case of *Oceanbulk Shipping & Trading SA v TMT Asia Ltd and others* [2010] UKSC 44, the Supreme Court has created a further exception to the general rule that communications protected by without prejudice privilege are inadmissible in court.

What is without prejudice privilege?

Without prejudice privilege is, broadly, a rule of evidence which applies to exclude communications aimed at settlement of a dispute, whether made orally or in writing, from evidence in litigation between the parties. The rationale behind the rule is to encourage parties to settle their disputes by enabling them to speak openly to each other in settlement negotiations, without fear that what they say might be subsequently used in court against them if the settlement negotiations fail.

For the without prejudice rule to apply, there must be:

- ☑ A dispute: however it is not essential that litigation has been either commenced or threatened. In *Framlington Group Ltd and Axa Framlington Group Ltd v Barnettson* [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.
- ☑ Negotiations genuinely aimed at settlement of the dispute: it cannot apply where the parties have merely asserted their case or criticised the other side's case.
- ☑ Substance over form: whether or not a communication is labelled "without prejudice" is not determinative of the question of whether without prejudice privilege applies. The courts will always consider substance over form and conduct an objective analysis of the communication in the context in which it was made. However, correct labelling is important since the "without prejudice" label might indicate that a document was intended to be used in negotiations. Similarly, a failure to use the label may indicate that the document was not so intended and place the onus on the party asserting privilege to establish that the communication was in fact made without prejudice.

The rule applies to exclude relevant communications from evidence in subsequent proceedings between the same parties in relation to the dispute and between different parties to the dispute (for example, in tripartite litigation where X has settled with Y but not Z, X's without prejudice communications with Y would nevertheless be inadmissible in the proceedings against Z). It also applies to exclude relevant communications from evidence in subsequent proceedings between the same parties in relation to a different dispute, provided it is "connected to the same subject matter" as the original dispute. The position where the subsequent litigation is wholly unconnected to the original dispute is somewhat unclear. The position where the subsequent proceedings are in a foreign jurisdiction is also complex.

Exceptions to the rule

Even when a communication is protected by without prejudice privilege, there are certain circumstances where the courts have recognised that the justice of a case demands that the communications should nevertheless be admissible in court.

“the interpretation exception should be recognised as an exception to the without prejudice rule.....because... justice clearly demands it”

“nothing in this judgment is intended otherwise to encourage the admission of evidence of pre-contractual negotiations”

Prior to Oceanbulk

The most common and established exceptions to the without prejudice rule (in a commercial context), recognised prior to the Oceanbulk decision, are that without prejudice communications are admissible:

- ☒ as evidence of a concluded settlement agreement;
- ☒ if they provide evidence to set aside a settlement agreement on the grounds of misrepresentation, fraud or undue influence;
- ☒ as evidence of statements made by one party and relied upon by another giving rise to an estoppel, even where no settlement agreement is concluded;
- ☒ as evidence of perjury, blackmail or other unambiguous impropriety;
- ☒ as evidence of the fact (but not the detail) of without prejudice communications to justify a delay;
- ☒ as evidence that a claimant has acted reasonably in mitigating its losses by settlement (to the extent it evidences such reasonableness); and
- ☒ as evidence where both parties to the privileged communication either expressly or impliedly agree that it should be admitted. For example, a communication marked "without prejudice save as to costs" may be presented after the conclusion of a hearing to determine the costs issues.

Following Oceanbulk

- ☒ Communications protected by without prejudice privilege will be admissible if they form part of the "factual matrix" or surrounding circumstances that would, but for the without prejudice rule, be used as an aid to construing a settlement agreement. This was the key issue for determination by the Supreme Court in *Oceanbulk* and it found that such communications should be admissible. It should be noted that this decision does not override the "exclusionary rule" upheld in the case of *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38: whilst that rule excludes evidence of what was said or done in the course of negotiating an agreement when determining what that agreement means, it does not exclude the use of evidence which establishes that a relevant fact was known to the parties at the time they entered into the agreement, as was the case in *Oceanbulk*.
- ☒ The Supreme Court also confirmed that a party to without prejudice negotiations can rely upon communications made in the course of those negotiations to evidence that a settlement agreement should be rectified (prior to *Oceanbulk* this was widely assumed to be an exception but had not been judicially confirmed).

Comment

For those concerned that settlement discussions will be affected by the introduction of a further exception to the without prejudice principle, Lord Clarke's comments may offer some comfort. In delivering the leading judgment in *Oceanbulk*, he made it clear that introducing this further exception was not intended to underplay the importance of the without prejudice rule, and that the exception was not to extend beyond evidence explaining the factual matrix or surrounding circumstances to the court.

Such reassurances do seem well-founded. After all, the decision in *Oceanbulk* simply upholds the concept, on which the exceptions to the without prejudice rule are consistently based, that a court requires certain facts in front of it to effectively decide a dispute. Moreover, the additional exception can be seen as a natural extension of the already established exceptions to the without prejudice principle: if settlement negotiations are admissible to prove the existence of, rescind, or rectify an agreement, then they should also be admissible to establish the meaning of the agreement.

Following *Oceanbulk*, the risk that without prejudice communications might become admissible has nevertheless inevitably increased and the decision underscores the importance of clearly drafted settlement agreements.

This briefing is not intended to provide legal advice, which should be sought in relation to particular matters. If you would like any advice as to the circumstances in which without prejudice privilege applies or how to protect it, please speak to your usual contact at the firm. Please note that the concepts of privilege and without prejudice communications are not recognised in certain jurisdictions and local advice should therefore always be taken where foreign proceedings are concerned.

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