COLLYER BRISTOW

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

WITHOUT PREJUDICE NEGOTIATIONS

The courts encourage parties to settle their disputes and "without prejudice" negotiations are a common tool for that. It enables the parties to freely negotiate a settlement without being concerned that what they say (for instance by way of making concessions to try to reach a settlement) will be repeated to the court and may potentially damage their case if a settlement is not reached (Cutts v Head [1994] CH290).

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THE EFFECT OF THE WITHOUT PREJUDICE RULE

Without prejudice means "…..without prejudice to the position of the writer of the letter if the terms proposed are not accepted" (Cutts v Head). The hope is that by enabling the parties to put their cards on the table that this will enable a settlement to be reached. The ambit of the rule is wide and in most cases, it will even prevent without prejudice material being used in subsequent proceedings involving third parties.

The communications can be written or oral and they do not have to be made by lawyers and the protection applies even if a settlement is not reached. Even if a without prejudice letter contains material that could be said not to be without prejudice, the whole of the letter will be given the protection, and a response to a without prejudice letter will be protected even if it does not make a counter-offer.

THE NEED FOR A GENUINE DISPUTE AND ATTEMPT TO SETTLE

A genuine dispute, however, has to exist to achieve the protection. So, if a debtor has agreed its liability to pay a debt, then because there is consequently no dispute about liability, discussions about time to pay, or accepting a lesser sum in settlement, can be disclosed to the court as not being privileged from disclosure. Importantly, to achieve the protection from disclosure, litigation does not have to have started nor is it necessary for one of the parties to have threatened litigation.

It is sufficient that the parties were anticipating that litigation was likely if they could not reach a settlement (Framlington v Barnetson [2007] EWCA Civ502).

Not only must there be a genuine dispute but there must also be a genuine attempt to settle. Parties merely using the phrases "without prejudice" or "off the record" (this phrase has no legal status) in their communications in the hope that they will not be referred to in legal proceedings do not achieve the protection unless there is also a genuine attempt to settle.

THE IMPORTANCE OF MARKING CORRESPONDENCE "WITHOUT PREJUDICE"

Just as the parties can choose to negotiate without prejudice, so they can choose to end it for future communications and indeed past communications. Consequently, it is highly desirable that, for clarity, the parties mark communications without prejudice so as to avoid disputes about what is and what is not without prejudice and can be shown to the judge. A dispute over that would need to be decided by a judge other than the trial judge.

Without prejudice correspondence arises from an implied agreement between the parties that the communications will not be disclosed. If a party uses the correspondence in the proceedings, the other party can apply to strike it out and the judge can penalise the disclosing party in costs as well as declining to preside over the trial if the judge considers that a fair trial is no longer possible because the without prejudice correspondence has been seen by him or her.

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EXCEPTIONS TO THE WITHOUT PREJUDICE RULE

The main exceptions are that if there is a dispute about settlement the correspondence can be disclosed to the court as evidence that a settlement agreement has been reached and/or to prove the terms of the settlement.

It can also be disclosed if the settlement agreement has been made as a result of mis-representation, fraud or undue influence.

EFFECT OF A "WITHOUT PREJUDICE SAVE AS TO COSTS" OFFER

Where such an offer is made but not accepted and the court subsequently issues a judgement, the judge can consider the correspondence when deciding what costs order to make. So, for instance, if a defendant loses at trial it will normally be ordered to pay the claimant's costs but if the defendant made an offer which was more favourable to the claimant than the judge's decision, the defendant may be awarded part of its costs even though it lost the litigation.

EFFECT OF A "WITHOUT PREJUDICE SUBJECT TO CONTRACT" OFFER

This means that even if the offer made is accepted by the other party, it will still be necessary to negotiate and agree the formal, written detailed terms before a legally binding agreement has been reached.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT

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