

ARTICLE FOR NSC LEGAL UPDATE

ARE INTER PARTES COMMUNICATIONS OPEN OR WITHOUT PREJUDICE?

Every lawyer will be aware of the privilege which surrounds communications which are expressly marked 'without prejudice' and which render inadmissible the evidence contained therein. However what may not be so well known is the fact that such privilege can equally apply to communications which are not expressly described in such way. Accordingly, for example, an exchange of letters which amounts to a bona fide attempt at settlement of a dispute, can still attract the cloak of privilege even if (1) there is no mention of the words 'without prejudice' and (2) the letters cannot be tied into other without prejudice communications.

The definitive explanation of the 'without prejudice rule' is contained in the judgment of Oliver LJ in *Cutts v Head* [1984] 1 All ER 596 at 605-606:-

*"That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* [1927] 4RPC 151 at 157, be encouraged freely and frankly to put their cards on the table The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*

Such explanation was approved by the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737. In the leading speech, Lord Griffiths goes on to say at p740 (with emphasis added):-

"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties are seeking to compromise the action, evidence of the content of those negotiations will, as a general rule' not be admissible at the trial and cannot be used to establish an admission or partial admission."

The without prejudice status of apparently open communications had been previously considered by Sir Robert Megarry V-C in *Chocoladefabriken Lindt & Sprugli AG v The Nestle Co Ltd* [1978] RPC 287. The cause of action in that case was infringement in England of registered trade mark in relation to chocolate bars. The communications in question were a telephone conversation and two telexes and took place before the commencement of the proceedings. They were between people and places in

Switzerland but nothing turned on such fact. Importantly in and relation to none of those communications did either party or its representative use the words 'without prejudice', or any other words to the equivalent effect. A preliminary issue arose as to the admissibility of the evidence contained in those communications

The Court decided that the three communications were each privileged and were thus inadmissible. Of particular interest are the following comments of the Judge (with emphasis added):-

"..... it seems plain that the courts favour the protection of discussions which take place between actual or prospective litigants with a view to avoiding the expense and burden of litigation, and are very ready to hold that discussions made with this purposes are inadmissible in evidence. Men ought to be able to 'buy their peace' without prejudicing their positions if the attempt fails and hostilities break out or continue. The mere failure to use the expression 'without prejudice' does not conclude the matter. The question is whether from the circumstances, the court can infer that the attempt was in fact to be covered by the 'without prejudice' doctrine.

I may add that references in the evidence before me to expressions such as 'off the record' and 'confidential' seem to miss the point. Terms such as these normally have no legal significance in relation to the law of evidence, however popular they may be in contracts with the media. At best such terms may assist in showing that the discussions were to be 'without prejudice. In this case having considered the discussions in detail and the surrounding circumstances as they appear in the evidence before me, I think that it is quite plain that both the telexes and the telephone conversation are covered by the protection of being 'without prejudice'."

The Chocladefabriken case was referred to and applied in Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 4 All ER 942. In that case Mr Jules Sher QC sitting as a Deputy Judge of the High Court decided that a certain telephone conversation on 9 August 1990 between the solicitors for the parties was privileged despite the fact that the person making the telephone call had said at the outset of the conversation that the same was 'open', and had an attendance note to support that position. The Judge said as follows (with emphasis added):-

"..... at the beginning of these negotiations, namely on 1 August [1990], the offer made by the plaintiff's solicitors was plainly without prejudice, as is accepted by both sides, and conversations connected with these negotiations on 17 August [1990] are also accepted to have been without prejudice. In the circumstances one would expect to find something very specific and clear before one came to the conclusion that conversations conducted as part of these negotiations in the period between 1 and 17 August [1990] were not without prejudice and conducted on an open basis

..... in my judgment, if the communication is made in circumstances in which the change [from without prejudice to open] would be brought home to the mind of a reasonable man in the position of the recipient of the information that would be enough. In other words it is not enough for the recipient to show that he did not understand the meaning of the word 'open' due to his ignorance of the difference between without prejudice and open negotiations.

..... it is incumbent on the party who changes the basis of such negotiations to spell out the change with clarity. It may not be enough merely to say the word 'open'. I find on the evidence that the [caller] did not do enough to bring the change home to [the

recipient’.

In this potential minefield, what does the practitioner do to protect the position of his client, and himself. It is suggested that the following precautions are taken:-

- ensure that all communications which are ‘without prejudice’ are clearly and prominently marked to that effect;
- if such communications are oral, make a contemporaneous attendance note which sets out the important content of the conversation and the precise context and place in the conversation where the words ‘without prejudice’ were used;
- if such communications are with a litigant in person, explain briefly the meaning and effect of ‘without prejudice’;
- if during the course of a series of without prejudice communications it is desired to include an ‘open’ communication, ensure that it is abundantly clear that a change in status is intended by explaining fully that the relevant communication will be capable of being referred to at trial - even if the change is in a conversation with a legal representative;
- if such change is in an oral communication, make a contemporaneous attendance note which sets out (1) the important content of the conversation, (2) the precise context and place in the conversation where the change took place, and (3) the words used to explain the change;
- if there is any doubt about the fact that a communication is open, ensure that its status is expressly confirmed.

Finally, from the above authorities, it is clear that even if the phrase ‘without prejudice’ or its equivalents, are not used in a communication, there may be grounds for ensuring that the cloak of privilege is not lifted.

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20 June 2007

Word count of article 1,420 words