

Without prejudice: In the matter of the R Trusts

October 2017

"We wants it, we needs it. Must have the precious."

Gollum/Smeagol - Lord of the Rings

IN THE MATTER OF THE R TRUSTS

The Royal Court of Guernsey has recently handed down judgment on the status of "without prejudice" materials in the context of what is commonly referred to as the second limb of a *Public Trustee v Cooper* [1] application - an application by trustees to the court to bless a momentous decision.

The judge ruled that "without prejudice" materials are inadmissible into any part of the court proceeding in or related to a trustees' contested application to the court to bless its momentous decision.

The decision affirms what the judge referred to as *the jealous preservation by the courts of parties' ability to speak feely in the course of negotiations, without fear that anything said might be used against their interests in subsequent proceedings*, even in an administrative "blessing" application.

The judge's reasons why are set out below.

The background

The R Trusts are discretionary trusts administered in Guernsey. The settlor is deceased and there is much hostility between the settlor's widow and his two sons on the one hand and his daughter on the other. Disputes and disagreements over the trusts and their assets have been in existence for a very long time.

With a view to separating the daughter and her children's interest from those of the other beneficiaries of the R Trusts, in December 2016 the trustees made an application to the Royal Court of Guernsey for it to "bless" their momentous decision that they had arrived at to divide the trust assets.

While the main beneficiaries agree that a division would be a good idea, such division is not so simple, not least because of the nature of the trust assets and the mistrust between family members and disagrees as to how the division should happen.

Application to admit "without prejudice" materials

In March 2017 the daughter made an application for extensive disclosure of evidence, permission to adduce expert evidence of the value of trust assets and permission to cross-examine the trustees as to their deliberations and meetings and how they reached their decision.

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The settlor's wife and two sons resisted the position being taken by the daughter and made their own application to admit certain "without prejudice" materials into evidence on the hearing of the daughter's application.

The law

The judgment explained that the foundation of without prejudice privilege from admissibility is partly public policy and partly contractual^[2], the two aspects being separate but mutually reinforcing.

Public Policy

The public policy aspect is to encourage and facilitate parties to settle their disputes without recourse to legal proceedings. The judge observed that *It leads to the jealous preservation by the courts of parties' ability to speak freely in the course of negotiations, without fear that anything said might be used against their interests in subsequent proceedings.*

It only applies to situations in which there is a dispute in existence, although the term "dispute" is given a wide meaning.

It is public policy that is the basis for the rule that "without prejudice" material is inadmissible in subsequent proceeding relating to the same subject matter but with a third party^[3].

Contract

The contractual aspect recognises that parties who understand the effects of without prejudice privilege can agree expressly or implicitly to apply the principles to their communications, even if this should happen outside the confines within which it would operate as a matter of public policy.

In the judge's view, it is the contractual element that makes "without prejudice" privilege a joint privilege that cannot be waived by one party.

The materials in the case

These fell into three categories:

- A mediation position paper prepared on behalf of the daughter headed "Without Prejudice and Subject to Mediation Privilege"
- Amongst other things, a lengthy letter of 29 June 2016 from the trustees' London solicitors to the respective solicitors of the settlor's wife and two sons and the daughter, headed "WP" or "WITHOUT PREJUDICE" expressing views on valuations of property and businesses
- Emails exchanged between the trustees' London solicitors and the London solicitors for the settlor's wife and two sons that referred to without prejudice discussion which the trustees' solicitors had entered into with the daughter's solicitors, and a letter from the daughter's London solicitors to the trustees' solicitors marked "WITHOUT PREJUDICE", in March 2017.

The arguments

The advocate for the settlor's wife and two sons argued that:

1. An application invoking the court's power to "bless" the trustees' momentous decision does not attract the operation of without prejudice privilege at all
2. Even if a "blessing" application attracts without prejudice privilege, the materials are not, in fact, "without prejudice" materials at all
3. Even if the materials *prime facie* attract without prejudice privilege, they are admissible as an exception which applies in a situation where the court would be misled if it were not apprised of the without prejudice materials
4. The daughter is estopped from asserting without prejudice privilege over the communications

The judge's decision and reasons

The judge considered each argument (1 – 4 above) and decided as follows:

1. The argument that the application invoking the court's power to "bless" a momentous decision of the trustees is not contentious because the court is not determining a dispute at all (rather, the trustees are appealing to the Court's supervisory jurisdiction for approval) was rejected for five reasons:
 1. A contested "blessing" application is contentious between the parties, as to whether the court ought to bless the trustees' decision. Which of the parties to the proceedings that the contest is between does not affect that it is a dispute (even if the trustees take a neutral position). The policy aspects of without privilege prejudice apply
 2. A "blessing" application will fix the parties' subsequent substantive rights and so attempts to agree the outcome of the application is quite fairly regarded as attempting to resolve a potential dispute. Where, like here, disputes have already materialised, and the trustees are attempting by their decision to prevent or reduce these, the application can be seen as an attempt to resolve an actual dispute. The policy aspects of without prejudice privilege apply
 3. Case law shows that without prejudice privilege as a matter of policy is jealously upheld and protected by courts and therefore is given wide application. There is no reason why a contentious "blessing" application should be excluded
 4. An ordinary intelligent layman familiar with the operation of without prejudice privilege would naturally and reasonably expect "WP" or "without prejudice" communications with a view to agreeing the substance of a "blessing" application to attract privilege
 5. By implication, through the mutual use of "WP" headings, the parties through their conduct conferred a contractual without prejudice status on communications and materials
2. The argument that the trustees letter dated 29 June 2016 was simply a statement of position and did not contain "without prejudice" statements was rejected. It was held that the letter as a without prejudice communication was clear and proper, as:
 1. By heading the letter "WITHOUT PREJUDICE" the trustees were implicitly reserving their own right to change the views expressed in the letter without it then being used in later proceedings if they proved contentious

2. It is consistent with public policy to encourage trustees to accept office by enabling them to feel comfortable about fulfilling their functions fearlessly, as well as encouraging resolutions of differences out of court
3. It would not be open to the trustees' solicitors to withdraw its purported imposition of "without prejudice" as it is a joint privilege that cannot be waived by one party
3. The argument that the trustees have a duty of "full and frank" disclosure to the court, requiring them to disclose all matters that are material or potentially material to their decision, including their knowledge of the attitude(s) taken by other parties in without prejudice communications, overrides any countervailing considerations of without prejudice privilege (otherwise the court is in danger of being misled), was rejected.
4. Once in court, the argument of estoppel from asserting privilege in respect of the documentary without prejudice materials was not strongly argued and was rejected. The judge held that the documentary materials did not even arguably give rise to any situation of estoppel against the daughter, which requires the following elements:
 1. The making of a clear statement or representation by one party to the without prejudice negotiations to another party
 2. Which is intended to be acted on by another party
 3. Which is so acted on by that party
 4. To its detriment, such that
 5. It would be unconscionable to permit the representing party to resile from the representation

And further, there was no arguable allegation that the trustees acted to their detriment in reliance on any such estoppel.

The Conclusion

Ultimately, the application was dismissed, and the without prejudice nature of the materials preserved.

The judge rounded off with two helpful comments: (i) it is no infringement of without prejudice privilege to mention to the court that without prejudice correspondence and discussion had happened and when and (ii) nor would it be an infringement for a party who has been part of without prejudice communications to repeat such communication (or the gist of it) on an expressly open basis, so long as it contained no reference to earlier without prejudice communications which had taken place.

[1] *Public Trustee v Cooper* [2001] WTLR 901

[2] *Avonwick Holdings Ltd v Webinvest Ltd and anor* [2014] EWCA Civ 1436

[3] *Rush & Tompkins Limited v Greater London Council & others* [1989] AC 1280

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