COLLAS CRILL

Not always what it says on the tin: The pitfalls of 'without prejudice' privilege in Jersey

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What is 'without prejudice' privilege?

'Without prejudice' privilege (**WPP**) is a valuable tool for parties who are genuinely trying to settle a dispute out of court. As the Royal Court noted in Kilbey v Grafters Limited [2015] (1) JLR 1, the reason for the rule is essentially one of public policy in encouraging parties to settle a dispute, with the Court noting:

"*...the public interest in encouraging settlement to be extremely strong. Litigation is very expensive and even the eventual winner may find himself out of pocket. Litigation to the bitter end can often cause real hardship. It is therefore in the interests of justice that parties should be encouraged to settle their differences at as early a stage as possible.*"

In general terms, a document (construed very widely so as to include emails, letters, manuscript notes, etc) which attracts WPP is protected from disclosure in legal proceedings. Otherwise, unless another type of privilege is applicable (such as legal advice privilege – being that between a client and their lawyer), the starting point is that the document is disclosable in legal proceedings.

Importantly, WPP may only be waived by both parties. Unlike other types of privilege, it may not be waived simply by one party. This gives the maker control over the document.

When attempting to settle a dispute, it is not unusual for parties to adopt a tandem approach whereby they send an open (non-privileged) letter which is typically robust and hard-hitting, with a second, more conciliatory 'without prejudice' letter designed to reach a compromise. The first open letter will be disclosable to the Court in legal proceedings. The second letter (on the basis that it is truly 'without prejudice') will not be unless it is expressed to be 'save as to costs', discussed further below.

'Without prejudice' and commercial pressure

In addition to being able to liaise with the other side in a more open manner and without fear of what is being said being provided to the Court or other parties, there is a second reason for using 'without prejudice' correspondence, but with 'save as to costs' tagged on.

In summary, a 'without prejudice save as to costs' (**WPSATC**) letter can be provided to the Court when it determines how the parties' legal costs should be dealt with. This is usually after the Court has made a

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decision. In practical terms, a WPSATC letter is generally used to try and show that the other side has been unreasonable and should be penalised in costs.

A classic example is where a WPSATC offer has been made to a party previously which is in excess of what that party ultimately recovers in Court. The paying party would be able to present the previous (higher) WPSATC offer to the Court and make representations as to why its legal costs, at least from the date of the WPSATC letter, should be paid by the other side (as, had the offer been accepted, those costs would not have been incurred). The Court retains a complete discretion when dealing with costs, but tactfully deployed WPSATC correspondence can influence the outcome.

WPP criteria

Simply heading up a document 'without prejudice' does not make it so. A document must form part of a genuine attempt at settling an existing dispute. Conversely, even if a document is not expressly labelled 'without prejudice', the WPP will not be lost provided the negotiations are genuinely aimed at settlement.

In X v Amity Partners & Darmanin [2021] JRC 183, the Court recently had to consider whether an attendance note arising from a telephone call fell within the 'without prejudice' rule. The Court held that the attendance note did not form part of an attempt to settle an existing dispute and therefore could not be covered by WPP.

Exceptions to 'without prejudice' privilege

Although the Court held that the attendance note was not covered by WPP, it went on to consider some of the exceptions to the rule had it been.

Reliance and estoppel

The Court noted the *dicta* in the English case of Hodgkinson & Corby Limited v Wards Mobility Services Limited (No 2) [1997] FSR where it was held that there is a powerful argument for saying that if a) a clear and unambiguous statement is made by one party in 'without prejudice' correspondence, and b) the statement is reasonably acted on by the other party, then an objection by the first party to stop this statement being referred to openly by the relying party would be *"plainly unconscionable and not upheld by the court"*.

This exception is geared towards avoiding a party intentionally making clear statements in 'without prejudice' discussions, which the other party relies or acts upon to their detriment, but then cannot raise with the Court because of WPP.

A cloak for fraud, perjury, blackmail or other clear impropriety

Unsurprisingly, a party cannot hide behind WPP in an attempt to conceal egregious behaviour. However, the Court is loath to undermine WPP for anything less than clear impropriety as the rule is designed to encourage parties to express themselves freely and without inhibition.

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The Court has noted that it is not uncommon for statements to be made in 'without prejudice' discussions which are inconsistent with the case being advanced at trial and that most of the time public policy in support of maintaining WPP will trump the outrage felt by those who have been told a different story on a 'without prejudice' basis.

A binding agreement

Where a party alleges that a binding agreement has been reached in 'without prejudice' correspondence and seeks to rely upon it, the Court can consider the evidence as to whether this is the case (by looking at the documentation, but as narrowly as possible).

Documentation can be headed 'subject to contract' (on the basis that a separate binding contract will need to be entered into) to militate against the risk of a misunderstanding between the parties in this regard.

Court supervision

Where a liquidator or trustee is seeking directions or a blessing from the Court, it will need to be given the full information so that it can make an informed decision. It follows that the Court, when being asked to make an order in relation to contemplated or ongoing legal proceedings, will need to see the content of any relevant 'without prejudice' discussions.

Mutual waiver

As mentioned above, WPP needs to be waived by both parties. In *Amity Partners* both parties had referred to the content of the telephone call and the attendance note in their pleadings, which amounted to a clear waiver of WPP.

Conclusion

There are other exceptions to WPP which are beyond the scope of this short note. However, the main takeaway point is that care should be taken to ensure that a document intended to be 'without prejudice' actually attracts this type of privilege and is not susceptible to being excluded on other perhaps unforeseen grounds.

Parties who use WPP wisely, particularly in the context of a WPSATC offer, can leverage its dual qualities of 'carrot and stick' when promoting settlement.

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