

EXCEPTIONS TO 'WITHOUT PREJUDICE' PRIVILEGE

THE RULE

The 'without prejudice' rule means that any communications (oral or written) which are genuinely aimed at settling a dispute cannot be put before the courts in evidence should the negotiations fail.

The rationale behind the rule is to encourage the parties to reach a settlement. It enables them to speak openly without fear that anything they say will be used against them.

The House of Lords decision in Rush & Tompkins Ltd v Greater London Council set out the principle:

"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish."

EXCEPTIONS

However, the without prejudice rule is not absolute and the courts have established certain exceptions. There are currently 8 of these. They are referred to in the case of Unilever v Procter & Gamble. They are:

1. To establish the existence of a concluded settlement agreement;
2. To show evidence of misrepresentation, fraud or undue influence such that any agreement reached should be set aside;
3. To prove an estoppel;
4. To prove abuse of a privileged occasion (unambiguous impropriety);
5. To explain delay in pursuing an action;
6. To determine whether the claimant acted

reasonably to mitigate its loss in agreeing a settlement;

7. Where agreed by the parties. For example, a communication marked "without prejudice save as to costs" can be presented in evidence after the conclusion of a hearing to determine which party should pay the costs;
8. In matrimonial cases, communications received in confidence with a view to matrimonial conciliation can be admitted.

FURTHER EXCEPTIONS TO THE RULE?

In the case of Oceanbulk Shipping and Trading v TMT Asia Ltd [2010] UKSC 44 the parties had entered into a written settlement agreement in respect of a dispute between them over sums due by the Defendant to the Claimant under a number of freight forwarding agreements. The Claimant subsequently brought a claim against the Defendant alleging that it had failed to comply with a particular clause of the settlement agreement. The Defendant sought to rely on statements made by the Claimant during the without prejudice discussions leading up to the settlement agreement, in support of its claim that it would not have to comply. The judge at first instance held that the evidence was admissible notwithstanding the without prejudice rule. The Claimant successfully appealed to the Court of Appeal. The Defendant then appealed to the Supreme Court.

In a landmark ruling, the Supreme Court overturned the decision of the Court of Appeal and held that evidence of what was said or written in the course of without prejudice negotiations should in principle be admissible

to assist the interpretation of any agreement concluded as a result of those negotiations, thereby creating a further exception to the without prejudice rule (the "interpretation exception"). There was no reason why the ordinary principles governing the interpretation of a settlement agreement should be any different regardless of whether the negotiations which had led to it had been without prejudice.

CONCLUSION

The effect of the decision in Oceanbulk remains to be seen and it is arguable that it will do little to deter without prejudice negotiations as it simply means the court applies the same principles for contractual interpretation whether the contract was negotiated openly or on a without prejudice basis.

Notwithstanding the recent expansion to the without prejudice exceptions, the court will continue to be reluctant to admit such communications in the majority of cases. Parties should be encouraged to participate in without prejudice negotiations to help reduce the time and cost of pursuing litigation but it should be ensured that any communications are clearly marked as such to minimise the possibility of their subsequent admission in court proceedings.

We would be delighted to discuss your requirements or our services with you. Please contact Jessica Tinker on 020 7003 8126 or email her at jtinker@cclaw.co.uk with any enquiries.