

## ***Without Prejudice Communications***

**This article examines the effect of the Without Prejudice rule and how it protects communications made in the course of settlement negotiations.**

### **How it works**

In the course of the litigation process (court proceedings), one or both of the parties may wish to negotiate to try to achieve an amicable settlement of their dispute. During these negotiations it may well happen that certain admissions are made or the parties make statements on the strengths and weaknesses of their respective case. What if after meeting and negotiating the parties fail to arrive at a settlement? Can one of the parties seek to use to its advantage information gained such as admissions made by the other party and/or communications made in the course of the negotiations as evidence in the court proceedings which follow? This is where the Without Prejudice rule comes into effect to protect the interests of the affected party and prevent misuse of communications made in the course of negotiations for settlement.

### **The Without Prejudice rule**

The Without Prejudice rule protects not only admissions in the form of an offer to settle but also communications between the parties generally in respect to issues in the dispute including anything said of the strengths and weaknesses of a party's case or an opponent's case.

The case law on this rule establishes that the rule rests in part upon public policy in that parties should be encouraged so far as possible to settle their disputes without resort to litigation. They should not be discouraged by the knowledge that anything said in those negotiations (and that includes of course as much the failure to reply to an offer) may be used to their prejudice in the course of the proceedings. They should be encouraged fully and frankly to put their cards on the table. Thus public policy deems it justified and necessary to prevent anything said or any offers made in the course of negotiations for settlement being brought before a court of trial as an admission on the question of liability.

The Without Prejudice rule has as another foundation the express or implied agreement of the parties that communications between themselves should not be admissible in evidence if these communications do not lead to settlement.

In the case of *Unilever Plc v Procter & Gamble Co* [1999] EWCA Civ 3027; [2000] 1 WLR 2436, Robert Walker LJ said at 2448 – 2449,

*“...they make clear that the Without Prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties to speak freely about all the issues in the litigation both factual and legal when seeking compromise and for the purpose of establishing a basis for compromise admitting certain facts. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence with lawyers at their shoulders as minders.*

*The law has developed so that there are now two bases underpinning the Without Prejudice rule, namely the*

*public interest in promoting the settlement of disputes without calling in aid the courts and an express or implied agreement between the parties that their communications will be kept confidential. The rule is not restricted to simply an offer made and not accepted but includes communications of all kinds which are genuinely entered into for the purpose of trying to reach a compromise. This is to encourage free and frank exchange of views between the parties.*

It is to be noted that the Without Prejudice rule renders inadmissible in any subsequent litigation connected with the same subject matter, the statements or admissions previously made in a genuine attempt to reach a settlement. Furthermore any admission made to reach settlement with a different party within the same litigation is also inadmissible whether or not settlement was reached with that party. For example, a plaintiff may have sued three defendants. Even if the plaintiff negotiates and settles with one of the defendants, any admissions made in the course of those negotiations cannot be used by the remaining two. Thus the rule is not limited only to cases which involve two parties.

### Exceptions

The Without Prejudice rule is not absolute and some exceptions apply. For example, if the issue is whether without prejudice communications have resulted in a concluded settlement those communications are admissible. Communications made during settlement negotiations are also admissible to show that a settlement should be set aside on the grounds of fraud, misrepresentation or undue influence. If there are prolonged negotiations which are eventually unsuccessful and one party then applies to court to strike out the other parties proceedings for want of prosecution, that party may bring evidence of the unsuccessful negotiations to explain the delay.

### Conclusion

Parties to a dispute who are contemplating entering into settlement negotiations are encouraged to do so in the knowledge that matters discussed during the

negotiations will be inadmissible as evidence in court. It goes without saying that a negotiated settlement will save the parties both costs and time if a court trial is avoided. It is to be noted that use of the words "Without Prejudice" carte blanche (by themselves) will not automatically result in any protection under the rule. Only communications of the type discussed above will bring into effect the privilege accorded by the Without Prejudice rule.

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*Comasters Law Firm can help if you have a dispute with another party and would like to try negotiating to settle the matter before resorting to court action.*

**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

### Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace  
743-755 George Street  
Sydney NSW 2000, Australia  
Phone: (612) 9288 0300 Fax: (612) 9288 0399  
Email: [comasters@comasters.com.au](mailto:comasters@comasters.com.au)  
Website: [www.comasters.com.au](http://www.comasters.com.au)