



Bird & Bird & First for Disputes

Knowhow briefs
Without Prejudice

Executive Summary:

- Without Prejudice (“WP”) communications made in a **genuine attempt** to settle a dispute may not be used in court as evidence of an admission.
- WP communications may be made orally or in writing.
- The purpose of WP is to encourage parties to litigation to settle their disputes out of court by allowing them to speak freely during settlement discussions.
- Protection is not absolute, however, and limited exceptions apply, making communications which may otherwise have attracted WP protection admissible in court.
- Parties should take care in making WP communications – merely labelling a document ‘without prejudice’ will not guarantee protection.
- “Without prejudice save as to costs” offers may be used as a tactic to put pressure on an adverse party.

What is ‘without prejudice’?

1. The effect of the without prejudice rule is that communications made in a genuine attempt to settle a dispute are prevented from being referred to in court. The rationale for the rule is that parties should not be discouraged from having full and frank settlement discussions by the fear that any admissions or prejudicial comments that they make will be used by the other side to their detriment. The purpose of the rule is to encourage settlement without the involvement of the court.
2. In order to attract WP protection, a communication, which made be made orally or in writing, must be made in a genuine attempt to settle a dispute.
3. In relation to written documents, merely labelling a document “without prejudice” will not afford a document WP protection if the communication does not form part of a genuine attempt to settle a dispute. Conversely, failing to label a written document ‘without prejudice’ will not necessarily result in a loss of WP protection provided the communication, when viewed objectively, is genuinely aimed at settlement.
4. In relation to oral correspondence, whether in person or on the telephone, parties should make clear that what is being said is WP.
5. In a chain of correspondence, where WP protection attaches to the initial communication, it will be assumed that subsequent communications in the chain are WP (again provided they are part of genuine settlement attempts). It should therefore be made clear if subsequent communications are intended to be ‘open’ communications.
6. WP protection is generally accepted to extend to any dispute whether the subject of litigation, arbitration, alternative dispute resolution (‘ADR’) or tribunal proceedings.

When can WP communications be used in court?

1. **Waiver by mutual consent:** WP protection is a joint protection and therefore can only be waived jointly. If the parties agree to waive WP protection, communications which would otherwise have attracted WP may be used in court. It is not possible to waive WP protection in relation to part of a document only. If WP protection is waived, this waiver will open up the entire document and potentially a related wider class of documents, which will then be admissible in court as evidence.
2. **Inadvertent waiver:** WP protection can be waived inadvertently, for example in *Hall & Another v Pertemps* [2005] EWHC 3110 allegations about threats made during a WP mediation were made in a separate action aside from the main proceedings. The court held that both parties were deemed to have waived WP protection in the main proceedings by virtue of their conduct in the separate action – one party by making the allegations and the other by denying that any threats had been made. As a result, the content of the WP discussions were admissible in the main proceedings.
3. **Dispute following acceptance of WP offer:** An agreement reached as a result of WP negotiations will become a binding contract as soon as a WP offer is accepted and as such will be subject to the ordinary principles of contract law. In the event that a dispute arises as to the existence of a settlement or its terms, the content of the WP negotiations may be admissible for the purpose of determining whether a settlement was agreed and on what terms.
4. **Impropriety:** WP protection will not apply to communications which show that a party is pursuing a dishonest case by pleading untrue facts or making false statements, or where a party has committed a criminal or fraudulent act. However, “unambiguous impropriety” must be shown before a court will strip WP communications of their protection.¹ The court will consider whether or not there has been “unambiguous impropriety” on a case by case basis. However, it is clear from previous decisions that the threshold is high for a party seeking to establish that there has been “unambiguous impropriety”.²
5. **Delay:** Evidence of the fact of WP discussions, but not the substance, may be given to the court in order to explain a delay in issuing or progressing proceedings, or apparent acquiescence. This may be necessary, for example, when defending an application to strike out a claim for delay or want of prosecution.
6. **“Save as to costs”:** WP communications may be used in limited circumstances for the purpose of assisting the court in making a costs award (see below).
7. **Evidence as to reasonableness of a settlement:** Where a party (A) pays money to settle a dispute to another party (B) and then tries to recover all or part of the sum from a third party (C), C will often argue that the sum paid by way of settlement was unreasonably high. In such circumstances, the court may order that the content of the WP discussions between A and B are disclosed to C despite C not being party to the WP discussions.³

¹ *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436

² See *Unilever* and the Court of Appeal decisions in *Fazil-Alzadehi v Nikbin* (Times, 19 March 1993) and *Forster and Others v Friedland & Anor* [1992] CA Transcript 1052.

³ *Muller v Linsley and Mortimer* [1996] 1 PNLR 74

Without Prejudice “Save as to Costs”

1. Correspondence marked “without prejudice save as to costs” can be put to the court in order to assist the judge in making a decision in relation to costs. This correspondence cannot be disclosed for any other purposes and, as such, standard WP protection will apply to WP communications for the duration of the substantive proceedings until judgment is handed down and the issue of costs is considered by the court.
2. An offer made “without prejudice save as to costs” can be a useful tactical device to put pressure on the other party to a dispute. If the other party rejects a reasonable offer of settlement, the fact of the rejection may be used as an argument in support of the offering party’s submissions for a more favourable costs award at trial. The party receiving the “without prejudice save as to costs” offer knows that the offer may be put before a judge as evidence at a costs hearing following trial, which therefore encourages that party to give serious consideration to reasonable offers to settle.
3. A “without prejudice save as to costs” offer can be made under Part 36 of the Civil Procedures Rules – in which case particular procedural rules must be followed. This is a complex area and specialist advice should be sought.

Objecting to use of WP protected communications

1. In the event that a party in a dispute improperly attempts to use WP material at trial, an objection should be raised at the earliest opportunity. When agreeing a bundle of documents for trial, parties should look out for any WP documents that the other side may have included and contest any WP documents on which the opponent seeks to rely.

Practical Application

1. Ensure correspondence intended to attract WP protection is labelled so. Make clear that oral communications that are intended to be WP are clearly stated to be so. It is advisable to make a written note of oral communications that are intended to be WP.
2. If in doubt as to whether a communication attracts WP, mark it WP. However, exercise caution in marking correspondence WP which is intended to be open and disclosable to the court WP. For example, it will be necessary for any correspondence which demonstrates a party’s compliance with a dispute escalation clause to remain open. In addition, if a party receives a letter from opposing party which sets out allegations of liability, the receiving party may wish to rebut these allegations in an open letter whilst simultaneously sending a WP letter containing its position regarding settlement.

Case in action:

- Bird & Bird acted for a client involved in an ongoing dispute. The parties were engaged in WP settlement negotiations.
- At an interim injunction application hearing, witness evidence had been adduced as to the potential breach of a relevant contract by a third party
- During the course of the WP negotiations it became apparent that there was no risk of third parties terminating contracts with the other side – contrary to the witness evidence put forward at the previous hearing.
- Bird & Bird considered the pros and cons of applying to put the content of the WP negotiations before the court at trial on the grounds that they showed the other side had made false statements at the earlier hearing.
- It was decided not to pursue this course of action on the grounds that 1) the settlement negotiations were proving productive; and 2) it was not clear that the high threshold of ‘unambiguous impropriety’ would be met. If an application had been made and unambiguous impropriety was not found, there was a risk that the judge would have to recuse himself and send the case to another trial judge.

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