Are final account negotiations covered by "without prejudice" privilege?

By Mark Breslin and Rebecca Rous

A recent decision of the Privy Council, made up of members of the UK's highest court, has considered the application of "without prejudice" privilege to final account negotiations under a construction contract. The meaning and operation of "without prejudice" privilege is often a point of confusion among those in the construction industry and the clarity provided by this decision is to be welcomed.

What is "without prejudice" privilege?

The purpose of the "without prejudice" rule is to prevent any written or oral statement made in a genuine attempt to settle an existing dispute from later being put before the court or other tribunal as evidence against the party that made the statement. The rule is an exception to the general position that statements made against your own interests (ie admissions) are admissible in evidence. The rule therefore allows parties to speak and write openly without fear that this may be later used against them. Where the rule applies those communications will be considered privileged and will remain confidential (unless that privilege is waived). The rule is designed to encourage parties to settle their disputes amicably.

The use of the phrase "without prejudice" is not required for the rule to apply. Provided the communications in question represent a genuine attempt to settle an existing dispute, they will be privileged even if this phrase has not been used. Conversely, merely heading an email or other communication as "without prejudice" will not usually attract the privilege where the content of the communication does not contain a genuine attempt at settlement. An exception to this is where both parties have used the "without prejudice" tag in the same chain of communications with a view to attracting privilege. In such a case, "without prejudice" privilege will apply as a matter of agreement even where there is no genuine attempt at settlement.

In a construction context, the "without prejudice" designation is often misunderstood and deployed in an entirely different sense. Parties commonly use the term merely to effect a reservation of rights in the sense that the position advanced in a given piece of correspondence is "without prejudice" to the party's right to take a different position in the future. This often leads to arguments as to whether a particular email or letter is properly subject to "without prejudice" privilege or not. Similar arguments were recently considered by the Privy Council in a construction case on appeal from Trinidad and Tobago.

A & A v Petroleum Company of Trinidad and Tobago

A&A, a construction company working in the energy sector, was contracted by PCTT, a state-owned petroleum company, to provide steel works relating to the strengthening of a platform and block station in an oilfield owned by PCTT. The contract between the parties was for a fixed price but allowed variations to be instructed by PCTT. Clause 7 of the contract stipulated that the value of such variations *shall in all cases be agreed between [PCTT] and [A&A] and the amount thereof shall be added to or deducted from the Contract price as appropriate*.

After completion of work under the contract, the parties were unable to reach agreement over the value of the variation account. A&A filed a claim in the High Court and relied on a letter from PCTT dated June 2008 which recorded agreements between the parties (and their outstanding differences) reached during a meeting in May 2008 regarding the value of certain variations. The June 2008 letter was not marked "without prejudice" but a subsequent letter by PCTT in the same chain of correspondence was marked "without prejudice".

PCTT objected to the June 2008 letter being admitted in evidence claiming it formed part of without prejudice negotiations. The High Court disagreed and gave judgment in A&A's favour based on the agreements recorded in the June 2008 letter. PCTT appealed and the Court of Appeal set aside the judgment, finding that the June 2008 letter was a "without prejudice" communication and therefore inadmissible. A&A

appealed to the Privy Council.

The Privy Council

The Privy Council agreed with the judge at first instance and concluded that the June 2008 letter was admissible. It reached its decision on the basis that the agreement made at the meeting in May 2008, as recorded in the June 2008 letter, formed part of a process under the contract for arriving at a value for the work. As the contract intended that this process should be open the letter was therefore admissible.

The court noted that clause 7 of the contract (dealing with variations) imposed an obligation on the parties to set out their respective positions in order to seek to agree any variations and their value. It interpreted this as providing for an ongoing process which was wholly distinct from negotiations between parties who in contemplation of litigation were seeking to settle. It also saw no policy reason why this contractual process should be conducted on a "without prejudice" basis. In a scenario where the court had to later determine any variation and its value it would be assisted by knowing the earlier position adopted by the parties. On an objective assessment, the parties did not intend any of the correspondence forming part of that process to be "without prejudice" (including PCTT's subsequent letter headed "without prejudice").

These findings did not mean there couldn't be separate "without prejudice" negotiations whereby one of the parties had made an offer to compromise the position it had adopted in open correspondence. However, in the context of these communications and circumstances, a reasonable person would have understood the parties' joint intention to be that the process of reaching agreement on variations should be an open process.

The Privy Council noted that even if its view was incorrect and the June 2008 letter was protected by "without prejudice" privilege, the exception which allows "without prejudice" material to be relied upon to prove agreements reached between the parties would have applied. It was not necessary for the exception to apply that agreement be reached across the whole account, as PCTT had contended.

Conclusions and implications

This case provides helpful judicial guidance at the highest level as to the application of the "without prejudice" rule to final account type negotiations

which are an everyday feature of the construction industry in the UK. The case shows that where the "without prejudice" designation is not used, the contractual framework against which the negotiations take place is likely to point against the application of "without prejudice" privilege in most cases. Merely marking a communication "without prejudice" is also unlikely to provide protection where the contract explicitly provides for a regime or process in which those communications are intended to be open and therefore admissible.

Parties wishing to allow themselves greater freedom in such negotiations would be well advised to state in more fulsome language that "without prejudice" privilege is intended to apply. For example, a communication might be stated to be, "Subject to 'without prejudice' privilege for the purpose of genuine attempts at settlement". Such parties may also wish to mark such communications as "subject to contract" – meaning that even if "without prejudice" privilege were not to apply, any agreements or concessions made in such correspondence ought not to be binding pending the execution of a formal contract.

This article was written by CMS partner Mark Breslin and senior associate Rebecca Rous and was first published on CMS Law-Now on 24 November 2022 available here https://www.cms-lawnow.com/ealerts/2022/11/are-final-account-negotiations-covered-by-without-prejudice-privilege.

ABOUT THE AUTHORS

CMS
law·tax·future

Mark Breslin | Partner

Mark Breslin is a Partner in the ICE Disputes team.Click here for his full biography,

Rebecca Rous | Senior Associate

Rebecca Rous is a Senior Associate in the ICE Disputes department. Click here for her full biography.