ARTICLE

Asking a decision-maker to take a sneaky peak isn't a strategically clever move:

Adjudicator's decision held unenforceable due to breach of without prejudice rules

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A party (AZ) brought proceedings in the England and Wales Technology and Construction Court (Court) to enforce the decision of an adjudicator against the respondent (BY).[1] During the adjudication, AZ had placed without prejudice emails before the adjudicator and, despite BY objecting, the adjudicator had considered them. BY brought its own claim before the Court asking for a declaration that the decision was unenforceable due to adjudicator bias created by the emails. The Court found there was apparent bias and declared the decision unenforceable. What test did the Court apply to reach that conclusion?

The adjudication and the attempt to enforce it

A dispute arose between AZ and BY in relation to works involving stair systems in a building. The parties went to adjudication to resolve it. AZ placed before the adjudicator email communications between itself and BY. BY objected to the documents being admitted on the basis that they were subject to without prejudice privilege. The adjudicator disagreed and considered the communications. The result of the adjudicator's decision was in AZ's favour. AZ then filed a claim in the Court seeking to enforce the decision. BY filed its own claim seeking a declaration from the Court that the emails were subject to without prejudice privilege and that, as a result, the decision was unenforceable.

The Court looks at the rules around without prejudice communications

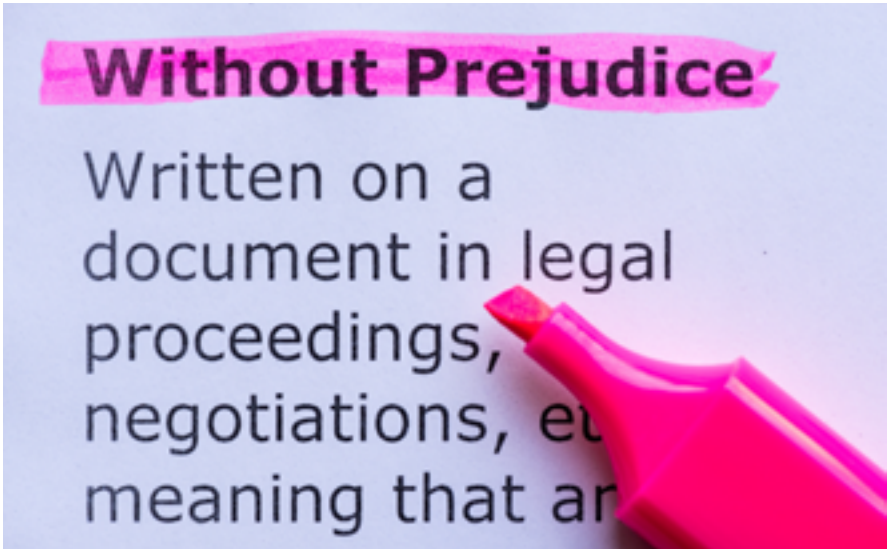
As a starting point, the Judge considered the legal framework that applies to without prejudice communications. This included looking at the limited circumstances in which they are admissible, as well as the extent to which admission of the communications by a decision-maker may make the resultant decision unenforceable. From this, His Honour distilled the following principles relevant to the matters before him:

> *(1) the without prejudice rule is founded partly in public policy and partly in the agreement of the parties;*

1 *AZ v BY* [2023] EWHC 2388 (TCC).

Without prejudice

→ Did the adjudicator show bias by considering negotiations correspondence?



(2) the court has to determine whether or not a communication is bona fide intended to be part of or to promote negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient;

3) the fact that a document is marked "without prejudice" is not conclusive as to its status, although it is often a strong pointer;

(4) where negotiations are expressly made without prejudice to begin with, the burden is upon the Party who wishes to change the basis of such negotiations to do so explicitly and with clarity. Whether they have done so is assessed objectively;

(5) whilst parties may be communicating both openly and on a without prejudice basis concurrently, the court must exercise extreme caution in embarking upon a dissection of the communications, or discussions in meetings, so as not to undermine the public policy objective;

(6) once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for making an exception is absolutely plain;

(7) one such exception relates to when the issue is whether without prejudice letters have resulted in an agreed settlement. In this situation, the correspondence is admissible, because it contains the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. However, where the without prejudice letters have not in fact resulted in an agreed settlement which has replaced the original dispute about which the parties were negotiating, the decision-maker, having seen the without prejudice material, must then assess their own ability to go on to decide the remaining dispute fairly, in accordance with the principles which govern

apparent bias and the rules of natural justice.

The objective apparent bias test

At the heart of the apparent bias test is the maxim "Justice must not only be done, but must also be seen to be done".

In making its decision on whether there was apparent bias, the Court said the key question for it to answer was whether *a fair-minded and informed observer would conclude that there was a real possibility that, having seen the without prejudice material, the Adjudicator was biased*.

Were the communications without prejudice?

The judgment has been significantly redacted and the details of the communications are not available. However, the judgment indicates that AZ did not dispute that certain without prejudice communications and meetings took place between the parties and that there were *two parallel streams of communication, some without prejudice and some open.* After reviewing the communications, the Court found they attracted without prejudice privilege.

Did the communications come within the general exception so they could be admissible in the adjudication?

No. The Judge explained that the *exception to the without prejudice rule is generally not involved unless the agreement said to have come into existence is one which has replaced the underlying dispute which was the subject of without prejudice negotiations.* The Court found that the communications did not result in a binding agreement that replaced and settled the underlying dispute and accordingly were not within the general exception.

Was there a failure of the apparent bias test meaning the decision was unenforceable?

Yes. The adjudicator had concluded that a relevant meeting between the parties was "open" and went on to decide that a number of matters were unequivocally agreed. The Court said that it was quite possible that because the adjudicator has not seen all of the without prejudice communications, which clearly placed the meeting and email in proper context, he was wrong to reach those conclusions. The Judge found that a *fair-minded and informed observer considering all of the circumstances of this case* would conclude there was a real possibility the adjudicator was unconsciously biased due to having seen the without prejudice materials.

The result was:

> *In the circumstances, this is one of the few cases in which a breach of the rules of natural justice, by reason of apparent bias, dictates that the Decision should not be enforced.*

Conclusion

There are undoubtedly times where communications between parties and their representatives can result in confusion about where privilege attaches. Sometimes unrepresented parties simply won't understand what making a communication "without prejudice" actually means. It is worth taking the time to ensure that any evidence which is intended to be placed before a decision-maker can be admitted and does not have privilege attached to it. Unrepresented parties in particular will benefit from obtaining legal advice on this. A failure to identify without prejudice communications can result in an expensive waste of time, effort and money, with the breaching party finding themselves with an unenforceable decision.

About the author

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Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, including working with BDT. She was previously a civil litigation barrister for over a decade. During that time she worked on several multi-million dollar development disputes and was involved in arbitrations and mediations.