Labelling correspondence "without prejudice" will not always grant the user protection

Written by **SAM DORNE**

When is correspondence labelled "without prejudice" truly to be treated as such? The High Court of England and Wales has looked at this issue when deciding costs at the end of a claim. The Court set out guidance for when a party can successfully rely on the privilege that is intended by the term.

What is "without prejudice" correspondence?

Anyone who has worked in any kind of legal setting will notice be aware of the term "without prejudice" or "without prejudice save as to costs" which is used ubiquitously and often inappropriately. It is not unusual for inexperienced or unskilled practitioners to add a "without prejudice" on every bit of correspondence regardless of the situation.

The term is broadly intended to foster candid communication and facilitate dispute resolution.

The fundamental purpose of marking communications as "without prejudice" is to shield them from being used as evidence in court proceedings, or to reserve them only for dealing with the issue of costs once the substantive issue has been decided. This protection encourages parties to speak freely during negotiations, fostering an environment where settlement

Inter-solicitor correspondence

The High Court in England and Wales examines whether correspondence labelled "without prejudice" always grants privilege.

discussions can occur without fear of later repercussions.

Parties nowadays reflexively mark communications "without prejudice" without fully considering whether the circumstances warrant such protection.

Labelling "without prejudice" is not determinative

The High Court in England looked at the issue of "without prejudice" correspondence in dealing with the costs in the case of *Jones v Tracey* [2023] EWHC 2256 (Ch).

In *Jones*, the High Court grappled with the question of whether inter-solicitor correspondence discussing the potential for Alternative Dispute Resolution (**ADR**) was truly "without prejudice" despite the correspondence being marked as such.

The heart of the matter revolved around a letter dated 7 June 2023, marked "without prejudice," sent by the defendant's solicitors. This letter, discussing the possibility of ADR without moving the trial date, became a focal point in determining costs following judgment for the claimant in a contested probate dispute.

The Court's ruling emphasised that the "without prejudice" marking, while a relevant factor, is not determinative. In this case, the Court considered the context and content of the correspondence, finding that despite the marking, the letter was not intended to be without prejudice.

The Court emphasised the importance of how a reasonably minded recipient would perceive the letter. Unmarked letters within a chain of communications related to settlement negotiations are generally treated as without prejudice, unless an opposite intention is glaringly obvious.

The 7 June 2023 letter, while

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marked "without prejudice," was in response to an open letter discussing the possibility of ADR. It was part of a series of open communications dealing with the potential use of ADR. Despite the marking, the Court concluded that all these communications were open and intended to be so. The absence of an offer in the letter and its focus on ADR made it pertinent to consider.

The distinction between ADR and Court process

The decision highlights the distinction between the ADR process itself, typically conducted on a "without prejudice" basis, and correspondence about the mere possibility of engaging in ADR. The Court reasoned that such correspondence is "more likely to be open than without prejudice" as parties often intend to rely on it later, especially concerning cost issues.

Importantly, the ruling reflects the evolving acceptance of ADR as a standard practice in civil procedure. While proposals for ADR are generally conducted on a "without prejudice" basis, the Court acknowledged that not every communication about the possibility of ADR automatically falls under this protection.

The Court's approach aligns with the evolving landscape of civil procedure, where ADR is becoming a mainstream element. The decision implies that proposing ADR itself may not or should not be prejudicial to a party's case.

In this case, the Court found that the 7 June letter was part of a chain of communications, all intended to be open. Since it did not contain a specific offer and related to the general possibility of ADR, the Court deemed it open rather than "without prejudice".

Conclusion

Ultimately, the decision reinforces the idea that the determination of "without prejudice" protection involves an objective assessment of the communication's true nature. In this instance, the Court's ruling had implications for the costs awarded to the claimant and as such should not be shielded by privileged correspondence protection. Therefore, just because correspondence may be labelled "without prejudice" this does not automatically confer the right of privilege.

About the author

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.