PRIVILEGE AND WITHOUT PREJUDICE?

when your words can't come back and bite you and when they can;

Simply labelling a document "without prejudice" doesn't make it entitled to be treated as a without prejudice document

Without Prejudice is a marking to allow parties to try to reach settlement where they can communicate on a basis that legal advisers can talk openly and freely without the letters being brought before the Court - in other words, "Without Prejudice" means your words cannot come back and haunt you in court - but the protection is not absolute and there are both exceptions and misunderstandings about the rule.

LABELLING IT WITHOUT PREJUDICE DOESN"T MAKE IT WITHOUT PREJUDICE

MYTH: Marking something "without prejudice" means it can't be shown to the court. Simply labelling a document "without prejudice" doesn't make it entitled to be treated as a without prejudice document.

FACT: Anything containing an offer to settle or attempts to facilitate settlement can be without prejudice and it doesn't need to be marked as such - it can be written or oral. Even SMS messages can be without prejudice.

Privilege and without prejudice are different things

Privilege applies to advice given by external lawyers and also to in-house lawyers provided that they act in their capacity as lawyer.

It does not extend to in-house legal advice given to their employers or given in an executive or compliance capacity. An in-house lawyer is also only entitled to their limited privilege if qualified to practice under the Solicitors Regulatory Authority or Bar Council rules. (Privilege also extends to employees such as legal executives, trainee solicitors and paralegals provided that they are properly supervised by qualified lawyers). Limited privilege applies to trademark and patent agents.

Privilege does not apply to other professionals, such as accountants,

FACT: To be entitled to be treated as WITHOUT PREJUDICE, a communication being must be "made in the context of genuine settlement negotiations".

FACT: "Without Prejudice" is not a label that you can use to stop a letter being referred to or which you can use to avoid the normal legal consequences of the communication where there is no genuine dispute or where the letter does not contain communications in a negotiation with a view to achieving a settlement. (See Rush & Tompkins Ltd -v- Greater London Council [1989] AC 1280).

FACT: Even if a letter is not labelled "without prejudice", it may still be entitled to the protection of without prejudice status as long as the negotiations are genuinely aimed at settlement.

Thus a pre-action letters sent that forms part of compromise negotiations is therefore protected even though not headed "without prejudice". (see Belt -v- Basildon & Thurrock NHS Trust [2004] EWHC 783 (QB)).

Unlike the USA there is not fruit of the poisoned tree doctrine

FACT: Simply marking a letter"without prejudice", does not cloak it with protection unless the contents are negotiations are genuinely aimed at settlement.
(see Unilever Plc -v- Proctor & Gamble Co [2001] 1 All ER 783.)

So, if you write a letter that you don't want produced to Court, simply marking it *Without Prejudice* doesn't prevent it being referred to a Court.

In practice, lawyers mark correspondence or communications with "without prejudice" or "without prejudice save as to costs" to ensure that there is no confusion.

Even lawyers sometimes mark letters WP when they're not entitled to be marked as such

> - so always ask the question *"Is there a genuine dispute and if so, does the letter contain a genuine step in a negotiation with a view to achieving a settlement?"*

The Chain of Communication
Where the words "without prejudice" are used but cease to be used in subsequent correspondence, does the "without prejudice" status continue?

The answer is that if the protection is applicable to the first communication - whether or not marked as such - then all subsequent letters of communications are also entitled to without prejudice **providing that they form part of the**

It is essential to agree what "Off the Record" means if you're going to use it.

For example, *the Parties agree that "Off the Record" communications shall be treated as never having taken place and therefore, notwithstanding that they may not constitute genuine settlement negotiations, they will be confidential and that neither party shall be entitled to refer to these conversations before any court*

same set of genuine negotiations. (see Cheddar Valley Engineering Ltd -v- Chaddlewood Homes [1992] 1 WLR 820.).

Once the chain of protected communication is broken where there is clear intention to communicate on an open basis, then protection fails from that point onwards.

Both parties will hold *Without Prejudice* correspondence because it has been exchanged between the parties in the course of genuine negotiations - so both parties know of its existence and both parties know its content). and is therefore known to both parties.

> (See Somatra -v- Sinclair Roach & Temperley [2000] 1 Lloyd's Rep 311 CA where the court considered it an implied contract to hold away from disclosure to the Court).

When is Without Prejudice not?

In Leclerc v BSI Products Services Ltd, a 'without prejudice' meeting was held in order to agree exit terms following a grievance but the meeting was ruled not to be in the context of a genuine dispute but one held to terminate the employee's employment, - a separate matter to the grievance. It was not therefore a genuine attempt to settle a dispute and not without prejudice.

OFF THE RECORD

There is no caselaw on the meaning of "off-the-record", although it is governed by the ordinary principles of contract and custom. It is also possible that confidentiality may apply and the parties may be deemed to have agreed that the meeting is to be kept confidential, although this does not make them privileged or without prejudice. (see Santa Fe International Corp -v- Napier Shipping S.A. [1985] LT 430).

It is possible that following Somatra -v- Sinclair Roach & Temperley [2000] 1 Lloyd's Rep 311 CA there could be an implied contract, but the interpretation is likely to mean "confidential but disclosable to the court and not privileged or without prejudice. Thus it is a dangerous phrase to use. Parties should ensure a written agreement to what has been agreed as the meaning of the phrase *"off the record"* if it is to be used.

Without more protection such as an express agreement about an "off-the-record" status being "without prejudice" then an "off-the-record" communications remains disclosable and may be referred to before a Court. Even with an Agreement, it

would probably on public policy grounds to avoid risk of interfering with the CPR rules ofcoourt, have to fall wthin the test

> *"Is there a genuine dispute and if so, does the letter contain a genuine step in a negotiation with a view to achieving a settlement?"*

LOSING WITHOUT PREJUDICE PROTECTION

1. Mutual waiver of "without prejudice" is required

The *without prejudice* status is normally a joint protection that can be waived only by mutual agreement. This is because any letter created in genuine settlement attempts is likely to contain without prejudice material provided by both parties.

It is unclear if the writing party can open up a without prejudice letter voluntarily if that letter was created in genuine settlement attempts but only contains without prejudice material provided by the writing party and this is because the *without prejudice* status is normally a joint protection that can be waived only by mutual agreement allowing free exchange of settlement ideas, and settlement discussions would be hampered if not stifled completely if lawyers had to consider "what are the consequences of these negotiations if the other side decides to waive without prejudice on this particular letter.

So if a communication is created in genuine settlement attempts and ranks as *without prejudice,* then its *without prejudice* protection can be waived only by mutual agreement. By contrast, the holder of *privilege* can waive privilege unilaterally (i.e. by disclosure).

The exception: Unilateral waiver of "without prejudice"

The exception to the rule that if a communication is created in genuine settlement attempts and ranks as *without prejudice,* then its *without prejudice* protection can be waived only by mutual agreement arises in relation to an opening offer, entitled to "without prejudice" protection to which the other party has not responded.

Generally, where one party sends an opening offer, entitled to "without prejudice" protection and the other party has not responded to it, the letter cannot be put before a court and remains "without prejudice". If, however, the sending party

chooses to, it may waive its *without prejudice* nature and amend the status to an open offer. This is limited to the initial opening letter and where no further communication is made.

(See Hall & Another -v- Pertemps [2005] EWHC 3110 and Rush & Tompkins Ltd -v- Greater London Council [1989] AC 1280).

Without Prejudice correspondence may be examined by the Court when assessing whether the parties have agreed a settlement.

The decision of the Supreme Court in Oceanbulk Shipping & Trading SA -v- TMT Asia Limited and 3 others [2010] UKSC 44 stated that *without prejudice* evidence will be admissible for the purposes of proper interpretation of a settlement agreement.Obviously to prevent the abuse of claiming "settlement!", if the Court determines that no settlement arose, the correspondence is re-cloaked with *without prejudice* status.

Without Prejudice can be seen by a Court to look at evidence as to the reasonableness of a settlement

A party may seek to recover money paid by one party in litigation to another in settlement of a dispute. For example, if one Defendant settles, it may seek contribution from another Defendant or may seek to recover via an indemnity. It is usually the case that the party from whom the contribution is sought will argue that the settlement occurred at an unreasonably high figure and in such cases the Courts will readily open up the without prejudice communications in order to enquire whether there was proper mitigation of loss.Muller -v- Linsley & Mortimer [1996] PNLR 74.

IMPROPRIETY, FRAUD & FALSE STATEMENTS

In Hall & Another -v- Pertemps [2005] EWHC 3110 there was a failed mediation and the defendants brought a second action alleging that the first claimant had told a third party that threats had been made against him during or after the mediation. The court held that ordinarily without prejudice

protection applied to allegations of threats made in mediation but there was mutually consented to waive the without prejudice status once the defendants had denied in their pleadings that any threats had been made. (They should have pleaded that anything said in the mediation was covered by the without prejudice protection, but once they went further they waived the without prejudice protection.

Without Prejudice protection is also not granted where the documents would show that a party was pleading patently untrue facts or making false statements amounting to perjury.

In other words, without prejudice correspondence can be used to demonstrate that one party is pursuing a dishonest case or committing a criminal or fraudulent act.

(See Hawick Jersey International Ltd -v- Caplan Times, 11 March 1988).

Obviously however this is a high hurdle to get to and the Courts in Unilever Plc -v- Proctor & Gamble Co [2001] 1 All ER 783, 796 made it clear that there must be "unambiguous impropriety" - in other words conduct which is in some way "oppressive, or dishonest, or dishonourable". Thus mere posturing during negotiations is not enough and a party may adopt a position in "without prejudice" discussions which is inconsistent and different from that which is or will be taken in the open position, but the "without prejudice" label will not protect a party where it is being dishonest or fraudulent and stating things that are blatantly untrue or false.

Where such improper letters are written, the Courts will readily expunge the *"without prejudice"* status, even in some cases allowing redacting (obscuring) of genuinely without prejudice content in the same letter.

OBJECTIONS TO USE OF WITHOUT PREJUDICE

Where a party does something inconsistent with the maintenance of the *without prejudice* status on their own correspondence, then the other party is entitled to accept the waiver or the *without prejudice* status or may alternatively refuse to do so and make complaint to the relevant tribunal.

As waiver must be mutual, deemed acceptance of waiver is not enough and there must be clear and unambiguous acceptance of the waiver.

WHAT ABOUT MULTI-PARTIES

In Rush & Tompkins -v- GLC, the House of Lords was faced with a Claimant and 2 Defendants. The Claimant reached settlement with the 1st Defendant via without prejudice communications and the 2nd Defendant sought access to that correspondence. The House of Lords held that to disclose the negotiations would deter parties in multi-party disputes from trying to reach a genuine settlement to reduce the issues before the Court. Lord Griffiths said:

"... as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible, whether or not settlement was reached with that party".

DELAY?

It has been argued that if significant time elapses between the failure of negotiations and the commencement of litigation, this is evidence that there was no existing dispute &/or that the negotiations were not genuine made with a view to settling a dispute and that the delay means earlier correspondence should not be cloaked with *without prejudice* status.

Delay is irrelevant and the correct test is (again):

> *Is there a genuine dispute and if so, does the letter contain a genuine step in a negotiation with a view to achieving a settlement?"*

In Framlington Group Limited and Axa Framlington Group Limited –v- Barnetson [2007] EWCA Civ 502, the Court of Appeal overturned the lower court and held that the critical feature was whether litigation was genuinely contemplated and the dispute's subject matter of the dispute. Time had nothing to do with it and if, in the course of negotiations, the parties might reasonably have contemplated litigation if agreement was not reached, then Without Prejudice may arise.

The Court will look at the purpose of the negotiations, rather than their proximity in time to any proceedings.

SO WHAT IS PRIVILEGE?

Privileged information is that information that only one party holds and which it seeks to prevent being disclosed to the other party.

Privilege is different. "Privilege entitles a client to refuse to disclose certain confidential, legal communications to third parties. **It is an absolute right that can only be overridden in very limited circumstances, such as fraud or money laundering.**

Privilege only arises between a lawyer and his client (but not communications with third parties) and provided that the communications are for the purpose of seeking legal advice in a relevant legal context.

Litigation Privilege:

A special category of legal privilege called litigation privilege protects confidential communications (and even the evidence of existence of those communications) arising for the primary purpose of obtaining legal advice, evidence or information in preparation for actual or "reasonably in prospect" litigation and made between

- a lawyer and his client
- a lawyer and his client
- a client and/or a third party.

Recent restrictions

Companies and their lawyers are concerned about the courts' narrow approach to privilege in recent cases, with particular concern directed towards the status of lawyers' notes of interviews with employees.

The Court of Appeal has granted ENRC permission to appeal in Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd but this will only further the year of uncertainty awaiting that appeal.

What actions will result in the loss or waiver of privilege was recently discussed in 'D' Cash & Carry Ltd v HM Revenue & Customs.

'D' Cash & Carry ('D') made an unsuccessful application to HMRC under the Alcohol Wholesaler Registration Scheme. It wanted to appeal against the decision but failed to meet the 30

day deadline for lodging an appeal with the First-tier Tax Tribunal. It applied for acceptance of an out of time appeal on the ground that it had not had legal advice from its solicitors about the deadline, but HMRC opposed this and applied for disclosure of the advice given to 'D', contending that 'D' had waived privilege over any advice given to it by its lawyers when it relied upon the absence of advice in support of its application. Although the Tribunal agreed with HMRC, leading to the Tribunal commenting that "some contradictory evidence" leads us to question the integrity of the basis of the application" and that fairness required disclosure of relevant information and documentation, subject to any redactions acceptable to the Tribunal.

Once the court has decided whether the party has done more than merely refer to the existence of privileged advice, it has to decide whether it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information, and whilst a party who chooses, in effect, to waive privilege by relying on legal advice (or its absence) can decide to what extent they do so, the court will not allow them to cherry-pick. In deciding about waiver, the court must identify the transaction in respect of which the waiver has been made – in this case the need to appeal and the procedure and time limits for an appeal.

References to privileged advice in correspondence - the god, the bad and the really ugly

Although 'D' Cash & Carry Ltd v HMRC concerned reliance on the existence of legal advice in the context of an application to a tribunal, the question more often happened is whether the same principles apply where, as often happens, litigants or their solicitors refer in general terms in inter-partes correspondence to the gist of counsel's opinion.

There are a number of positions that, it can be safely taken. Notification of an intention to take Counsel's opinion cannot waive privilege as privilege has not yet arise.

Prudent solicitors will then simply correspond with counter-party and refer to the delay that has arisen because of the need to take Counsel's opinion. As this refers to the historic decision to take the opinion, it clearly does not waive privilege anymore that the original notification of intention to take counsel's opinion waived privilege.

The prudent solicitor will then simply refer to the immediate issue of proceedings. There is no gist of counsel's opinion or any part of counsel's opinion referred to and therefore there can be no waiver of privilege.

It is then obvious to any counter-party solicitor with an operational brain-cell that there are only two possibilities:
a) Counsel's opinion is favourable and therefore proceedings are being issued; or
b) Counsel's opinion is unfavourable and therefore there is a huge bluff being carried out.

In fact, it is likely that references in correspondence with the other side cannot amount to a waiver of privilege since the rules of privilege are concerned with the process of putting evidence before a court and counsel's opinion cannot be evidence.

The references to opinions usually occur in "without prejudice" or "without prejudice save as to costs" correspondence. This creates another barrier to the argument that there has been a waiver of privilege in counsel's advice, because the disclosure of lawyers' or experts' opinions on a "without prejudice" or "without prejudice save as to costs" does not result in a general waiver of privilege.

A prudent solicitor will of course state that there is no intention to waive privilege therein by any mention of Counsel's opinion and a prudent counter-party solicitor will then offer the concession of no waiver if they can see the opinion "informally and on a without prejudice basis". This should be resisted but can be dealt with by an agreement to redact certain paragraphs which refer to strategy and steps in proceedings and an undertaking by the counter-party that there will be no steps take to discover the content of the redacting. It is therefore risky ever to refer to the content of privileged advice in correspondence without a specific agreement.

Never refer to the **content** of Counsel's opinion

in open correspondence.

If the reference is made in what is in fact open correspondence, the advice may also lose its confidential status and so no longer be privileged for that reason and the e reference may also lead to a waiver of privilege if the correspondence is subsequently included in the court bundle and read to the judge. The judge

might then conclude that the full advice should be disclosed in these circumstances.

Sending privileged advice to an interested third party

Parties often want or need to show legal advice they've received to another adviser or interested third party but they don't want to lose privilege in the document. There should be no danger of losing privilege as long as the document is provided in confidence and without the intention of abandoning the privilege. Ideally this should be stated expressly. Even better, the recipient should be asked to acknowledge that they are accepting the advice on this basis in a short 1-page contract prior to receipt. .

The courts have quoted the following passage from Style and Hollander on Documentary Evidence with approval on several occasions:

"If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of the friends sues him because the document is not confidential as between him and the friend. But the fact six people have seen it does not prevent him claiming privilege as against the rest of the world".

Circulation of privileged advice within an organisation or company

The same approach applies to the circulation of privileged legal advice within an organisation. Circulation of privileged legal advice, whether given by external or in-house lawyers, among employees, whether in its original form or in summary, will not in itself have the effect of losing or waiving privilege.

If this were not the case, the public policy behind the privilege would be frustrated.

By and large companies and organisations seek legal advice to help them make decisions and those involved need to understand the legal advice in order to implement those decisions, but a blanket distribution of advice to employees without a "need to know" basis may allow erosion of privilege because the advice may also lose its confidential status and so no longer be privileged for that reason.

Companies and other organisations can summarise legal advice but should restrict its circulation. If the courts don't uphold privilege when it's been sent to those with an interest (whether inside or outside the organisation) and need to know and under a banner of privilege not being waived and confidentiality being retained, then all of the recent reforms aimed at reducing costs have been a waste of time.

If those disseminating privileged advice forget to say that it is confidential and that there is no intention to waive privilege generally, then the stance should be taken similar to the without prejudice rule, that it is was capable of retaining confidence and there was no clear intention to waive privilege generally, then it should retain its status of privilege and confidentiality. If however, privileged advice is emailed onwards to those without a genuine need to know then companies must accept that problems are likely to arise and the wider dissemination risks that privilege will be lost as having entered the public domain.

Problems can also arise where employees then update manuals and external guidance on the basis that "we have been advised that " or "following legal advise, we've amended our policies" because the references to legal advice is no longer discrete and the gist of the advice has been referred to. So train your employees never to use these ill-advised phrases. In other words, although the legal advice would be privileged and had retained that status, the new presentational advice, made taking into account the legal advice, is not privileged and if referring to the content of that advice, may waive privilege in the original legal advice.