

Expanded Exception to English Law of Privilege Shielding ‘Without Prejudice’ Settlement Negotiations

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Under English law documents and statements made in ‘without prejudice’ settlement negotiations can now be ordered disclosed to aid in proper interpretation of any resulting settlement agreements.

The extent to which ‘without prejudice’ discussions can be required to be disclosed under English law was recently extended by the UK Supreme Court in *Ocean Bulk Shipping SA -v- TMT Asia Ltd. and others (the Appellant)* [2010], 27 October 2010.¹ This decision is of importance to anyone conducting ‘without prejudice’ negotiations under English law: (a) to settle any formal dispute; (b) within the context of a mediation; or (c) in a commercial context in which admissions are being made.

In proceedings conducted before the courts and tribunals in England and Wales, each party is required to disclose to the other all documents which are relevant to the case (even if adverse) unless entitled to claim ‘privilege’ with respect to those documents. There are (broadly) two categories of privilege, namely ‘legal professional privilege’ and ‘without prejudice’. There have been recent developments in English law as regards both (see our articles dated 28 October 2010 **Client Alert—No Extension of English Law Privilege to Accountants, Non-Lawyer Tax Advisers**, and 20 July 2010 **Advisory—The English Approach to ‘Without Prejudice’: a Reliable Shield for Settlement Negotiations?**).

The *Ocean Bulk Shipping* decision on ‘without prejudice’ arose from a dispute as to the proper interpretation of the payment clause in a settlement agreement that provided a mechanism for determining closing out payments to be made after the settlement agreement was executed. The issue which formed the basis of the appeal concerned whether facts disclosed in ‘without prejudice’ negotiations leading to the settlement could be resorted to as proof of Appellant’s understanding of the settlement agreement. In other words, should the existing exception to the ‘without prejudice’ rule which permits disclosure to prove the existence of a settlement agreement be extended to permit disclosure in aid of construction of such an agreement?

¹ The decision in *Ocean Bulk Shipping* can be found on-line at <http://www.baili.org/uk/cases/UKSC/2010/44.html>.

There was no dispute that the purpose of the ‘without prejudice’ rule is to enable parties to exchange facts and material freely in order to settle disputes. It is well settled that in order to determine if a document or oral disclosure is truly ‘without prejudice’, the Court will look to the purpose and not only the label which the parties have applied. Accordingly, just because a document is labeled ‘without prejudice’ does not mean that it is, and conversely, a document which is not specifically so labeled may in fact still be covered by the privilege if its true purpose is to advance a settlement.

In *Ocean Bulk Shipping* there was no dispute that the facts needed to assist in interpreting the settlement agreement were made in ‘without prejudice’ settlement discussions. In addition, there was no dispute as to the existence of a settlement agreement but only as to its construction.

The Judge at first instance set out a concise review of the existing law on the exceptions to the applicability of the ‘without prejudice’ privilege rule. One such exception provides that the privilege will not apply where disclosure is necessary to prove the existence of a settlement or rectification. (In *Ocean Bulk Shipping* the issue of rectification, that is, judicially rewriting the contract to correct a mutual mistake and reflect the actual agreement of the parties (see our 2 September 2010 [Advisory—Oops! I Did It Again, But That’s OK—UK Courts Can Further Rectify Contractual Errors](#)), did not arise because both parties agreed that all the terms of the agreement were accurately recorded in the written settlement agreement). The Judge, not unreasonably, held that it would therefore be bizarre if the privilege would apply to prevent disclosure required to aid interpretation.

The Court of Appeal did not agree. The Supreme Court overruled the Court of Appeal. Lord Justice Clarke sitting in the Supreme Court was prepared to extend the ‘without prejudice’ exception although he stressed that this should not be interpreted as an attempt to erode the value which ‘without prejudice’ privilege provides. To the contrary, he stated that in upholding an ‘interpretation exception’, “I would however stress that I am not seeking either to underplay the importance of the without prejudice rule or to extend the exception beyond evidence which is admissible in order to explain the factual matrix or surrounding circumstances to the court whose responsibility is to construe the agreement...In particular nothing in this judgment is intended otherwise to encourage the admission of evidence of pre-contractual negotiations” (at paragraph 46).

The Practical Impact of *Ocean Bulk Shipping*

What does this ruling mean for parties who are involved in ‘without prejudice’ negotiations governed by English law?

1. The ‘without prejudice’ rule under English law has not been diluted by *Ocean Bulk Shipping*. Parties can still fully and actively participate in proper ‘without prejudice’ discussions under English law without being overly cautious or concerned about the extent to which disclosure is made, or the risk that they will not be able to rely on the ‘without prejudice’ privilege.
2. However, where parties engage in genuine ‘without prejudice’ discussions then disclosure may be a necessary part of this process to the extent it becomes necessary to interpret and construe properly an ambiguous settlement agreement. This approach will enable the English courts to ensure that the correct interpretation is given to any settlement agreement by disclosure and consideration of the factual matrix contained in the ‘without prejudice’ information. This is consistent with English law otherwise allowing pre-contractual negotiations which are part of the factual matrix to be admissible to interpret an agreement where no ‘without prejudice’ issue arises.

3. The ruling in *Ocean Bulk* will likely prompt parties engaging in ‘without prejudice’ discussions and subsequent settlement agreements, particularly those that provide for continuing obligations, to pay particular attention to ensure clarity in their agreements, especially in defining any on-going obligations. The decision will also mean that parties will no longer be able to hide behind ambiguous settlement agreement language supported by the ‘without prejudice’ rule.

If you have any questions on the English law of ‘without prejudice’ or its exceptions, which are more numerous than just this ‘interpretation’ exception in *Ocean Bulk Shipping*, please contact one of the authors at:

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