Litigation

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The English Approach to 'Without Prejudice': a Reliable Shield for Settlement Negotiations?

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The doctrine of without prejudice is as old as the hills but continues to be a contentious issue between parties when one seeks to rely on it. Two recent decisions of the English High Court and the UK Employment Appeal Tribunal respectively highlight the difficulty in defining the exact scope of the rule and emphasise that extreme care must be taken to ensure that communications intended to be privileged indeed attract privilege. Important points of detail regarding how a "without prejudice" marking applies must be kept in mind before seeking to rely on it.

The recent cases of *Shepherd Construction Ltd v Berners (BVI) Ltd & Anr (2010) EWHC TCC 763* (discussed in our June 15, 2010 Client Advisory "English High Court Denies Privilege for Some Communications Marked "Without Prejudice"", and *Woodward v Santander (2010) UKEAT 0250092505* offer a reminder that the without prejudice label won't always protect all communications hiding behind it. The different approaches of the court in each case, on the one hand respecting the label and on the other disregarding it, underlines that legal advice should always be sought in connection with its use.

What Does "Without Prejudice" Mean?

Simply put, labeling a communication "without prejudice" allows one party in a dispute to put an offer of settlement to the other side without risk that the offer will be presented before the court as evidence of liability. In other words, it allows "off the record" negotiations to take place—those negotiations being shielded from publication or further use by either party.

Generally speaking, a party can only rely on the label if it is used in a genuine attempt to settle, as highlighted in the case of *Shepherd v Berners,* and it is not used to cloak "unambiguous impropriety," as reminded in the case of *Woodward v Santander*.

Shepherd v Berners

As previously noted, in *Shepherd v Berners*, the English High Court considered the without prejudice label and the circumstances where it would be meaningless. The English courts are likely to consider a without prejudice label useless if communications covered by the label are not made in the course of negotiations for settlement. The key question to ask is: is there anything to be settled between the parties? Although the *Shepherd* court found, under the circumstances before it, that there was nothing left to negotiate concerning payment of an admitted liability and that without prejudice could not be relied on, it is respectfully submitted that communications regarding the timing, amount of payments, and the manner of payment, all might have been made subject to legitimate negotiation that might have passed court muster as privileged.

Nevertheless, in addition to the fact that the without prejudice label will be meaningless if it is not used in what the court considers a genuine attempt to settle disputed liability, there are further exceptions to the rule which can negate protection and these are illustrated in *Woodward v Santander*.

Woodward v Santander

Key Take-Aways

- If an exception to the without prejudice rule applies, a party will be able to use without prejudice communications as evidence. "Unambiguous impropriety," is such an exception and although the list of exceptions to the rule is not closed, any attempt to extend it will be carefully scrutinised by the courts.

- The impropriety alleged in the without prejudice communications must be unambiguous—only in the clearest cases can there be an exception.

Summary of the Facts

- Mrs. Woodward alleged victimization and sex discrimination against Santandar and sought to use as evidence certain without prejudice negotiations that had occurred between her and her former employer.

- She wished to use evidence of her request for a reference and Santander's refusal to give one, in negotiations prior to settlement, to show that Santandar had "reprisal in mind" from the outset and that this was discriminatory.

- Santandar applied to prevent this material being used in court.

- The Employment Tribunal held that the without prejudice evidence could not be used.

The Employment Appeal Tribunal

- The EAT upheld the Employment Tribunal's decision, stating there was no evidence that the case fell within the "unambiguous impropriety" exception, which must be construed narrowly.

- It said that if this exception were not to be applied rigorously, it would have the potential to discourage parties from speaking freely when settling disputes.

Conclusion

Although not establishing new law, these two cases act as very useful reminders that simply marking a communication between adversaries as "without prejudice" may not provide protection from its later presentation to a court and use to the serious prejudice of its author.

Although the *Woodward* case represents good news for those seeking to rely on the without prejudice label since the EAT refused to widen the exceptions to the rule, the ease with which the High Court disregarded the label in *Shepherd* makes it clear that the context in which communications are exchanged, both before making them and in marking them, must always be considered and counsel taken to ensure that privilege will be maintained and the communications will not later be used as admissions against interest.

If you have any questions regarding the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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