

Without Prejudice Costs Negotiations and Cost Schedules Remain Inadmissible.

Defendants, normally backed by Insurers, continue to take the point that a mere discrepancy between a “Without Prejudice” Schedule (with no certification) and a Bill of Costs constitutes unambiguous impropriety. They then usually argue as a preliminary issue in Points of Dispute that such Bills of Costs should be struck out under the old CPR 44.14 (now CPR 44.11).

This recently culminated in a hearing before a District Judge on 15th March 2013 listed as a preliminary issue in the case of *Steven Wickenden –v- Carl Brian* in the Bradford County Court.

It is well established, in law, that written and/or oral communications, which are made for the purpose of a genuine attempt to compromise a dispute between the parties, may generally not be admitted in evidence.

This wide approach is consistent with the judgment of Esher M.R. in *Walker –v- Wilsher* (1889) 23 QBD 335:

“It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed”.

The judgment of Esher M.R. reflects the underlying policy which was described by Oliver LJ in *Cutts –v- Head* [1984] Ch 290 as follows:

“It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations....may be used to their prejudice in the course of the proceedings.”

This decision was subsequently cited, with approval by Lord Griffiths, in the House of Lords in *Rush & Tompkins –v- Greater London Council* [1989] A.C. 1280, 1299 WLR 939.

The without prejudice rule is partly based on public policy and partly on contract law. There is an implied agreement between the parties to the effect that what is said and done during the course of without prejudice negotiations will not and should not be relied upon in Court.

In the case heard in Bradford in March 2013, it was accepted that the communication was expressly without prejudice and the receiving party had not sought to remove the privilege afforded not only to the “without prejudice” Schedule but the without negotiations as a whole.

There are of course well established exceptions to the rule. The relevant exception for consideration is “if the exclusion of the evidence would act as a cloak for perjury, blackmail or other “unambiguous impropriety” “(see *Unilever Plc –v- Procter & Gamble Co* [2000] 1 WLR 2436).

The term “unambiguous impropriety” was also used by Hoffman LJ in *Forster –v- Friedland* 10 November 1992 (*unreported*). That Lord Justice, with whom Neill and Butler-Sloss LJ agreed, referred to two cases, *Greenwood –v- Fitt* [1961] 29 DLR 1 and *Hawick Jersey International Ltd –v- Caplan*, *The Times*, 11 March 1998, which were cases of threats, the impropriety of which was unambiguously admitted in without prejudice negotiations.

In the case of *Greenwood –v- Fitt* the Defendant threatened during negotiations that he would give perjured evidence and bribe other witnesses to perjure themselves unless the Claimants withdrew their claim. Hoffman LJ said:

“These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition”

The District Judge in *Wickenden* accepted that the narrowness of the exception should not and could not be underestimated.

It was held that the “without prejudice” Schedule, and indeed the without prejudice negotiations, could play no central role in the Detailed Assessment of the Bill of Costs and, moreover, the Schedule and the negotiations were protected by the privilege afforded to them under the without prejudice rule.

No evidence, at any stage, had been introduced to substantiate a serious allegation of a clear case of “unambiguous impropriety”. The Claimant merely sought to infer that the discrepancy itself and alone in isolation is sufficient which it clearly was not.

The District Judge followed the approach in *Fazil-Alizadeh –v- Nikbin* [1993] CAT 205 where Simon Brown LJ said:

“There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless the highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded”.

The District Judge accepted that disclosure of “without prejudice” communications and/or Schedules in the context of informal settlement discussions prior to Detailed Assessment should only take place where it is proved, beyond reasonable doubt, that it involved only the clearest case of “unambiguous impropriety” and of the need for an unequivocal case of abuse of a privileged occasion.

It was accepted that to allow anything else would, in essence, erode the “without prejudice” rule. The net effect would be to open the flood gates for satellite litigation to paying parties to embark on nothing more than a “fishing expedition” in the hope that they can prove unambiguous impropriety where a discrepancy, however large or small, exists.

Paying parties do, of course, have the “safety net” of rejecting the attempt to negotiate informally on a without prejudice basis and seeking a formal detailed certified Bill of Costs. That is their right and prerogative.

The Bill of Costs will then be assessed, upon the standard inter partes basis, by reference to the file of papers before the Court with a reasonable amount being determined inter partes.

As a result, disclosure of a Without Prejudice Costs Schedule would serve no meaningful purpose on the Assessment hearing.

There is no provision within the Civil Procedure Rules to the effect that the parties should attempt to agree costs informally, either in open or without prejudice terms, prior to the preparation of a Bill of Costs for detailed assessment.

There is nothing within Rule 44.3(4) which purports to touch the existing law as to “without prejudice” negotiations.

The Civil Procedure Rules represent the current policy which is aimed at making litigation a last resort. Accordingly, it follows that the policy in favour of encouraging pre-litigation settlement (and pre detailed assessment settlement) is now stronger than ever before.

In conclusion, applying the earlier rationale, the possibility of informal without prejudice negotiations without recourse to Detailed Assessment is not and should not be a relevant factor to be taken into account on any subsequent assessment hearing.

Jim Knight

Jim Knight | Costs Lawyer | Harmans

59 New London Road, Chelmsford, Essex, CM2 0ND.

DX: 3302 Chelmsford

Tel: 01245 250 101

jim.knight@harmanscosts.com | www.harmanscosts.com

HARMANS | Experts in legal costs

