Pride and the ‘without prejudice’ rule

Jonathan Parker
Director

E: Jonathan.Parker@QuiggGolden.com

T: +44 (0)1622 541700

Allow me to indulge in a moment’s scene setting. Mr Devious Developer and the unfortunate/poorly chosen – delete according to your prejudices – Cutthroat Contractor are having real difficulties on the valuations surrounding variations under contract relating to Trumpington Tower. The gold lifts have ended up way over budget as a result of Devious stating that the original installation needed to be changed.

The usual discussions on what the correct interpretation is follow. Politely initially, but less so as Devious gets fed up continually stating their position and starts to believe that Cutthroat has just seen some slightly ambiguous wording as an opening to increase their profit margin, while Cutthroat thinks that the additional benefit is being passed on to the client but not down to them. The parties cannot find middle ground and the matter ends up going legal.

And here we join our two parties, dealing with an issue over evidence because in one email headed “Without prejudice” Cutthroat stated that: “We could have done it for the price in the bills but we’re losing money on every other part of the job because of the way you’re treating us so we needed to find somewhere to make it up.” Oh, and before you spit your coffee out in disbelief, we often see more daft correspondence than that!

So, on one hand we have a written statement from one of the parties that could potentially resolve the matter completely. On the other hand, it is under the cover of “without prejudice” and so may be inadmissible evidence.
If you’re curious about whether admitting elements of liability in an attempt to resolve disputes early on will be used against you if things get really contentious, it’s a topic I hope to cover further after articles on the Pope’s choice of religion and bears’ preferred toileting areas.

Content dictates legal privilege

It is here that I get to the point. Without prejudice protection simply does not apply to anything that bears that heading. It is the content of the communication that dictates whether it attracts legal privilege. What we so often see are emails and letters divulging all sorts of points that you wouldn’t want a judge or adjudicator to catch sight of, with the heading “without prejudice”.

“What we often see are emails and letters divulging points you wouldn’t want a judge or adjudicator to catch sight of, with the heading ‘Without prejudice’.”

Quigg Golden

England

Quigg Golden Solicitors
Central Court
25 Southampton Buildings
Chancery Lane
London WC2A 1AL

+44 (0)20 7022 2192
London@QuiggGolden.com

Quigg Golden Solicitors
1 Tonbridge Road
Maidstone
Kent ME16 8RL

+44 (0)1622 541 700
SouthEast@QuiggGolden.com

Ireland

Quigg Golden
31 Waterloo Road
Ballsbridge Dublin 4

+353 (0)1 676 6744
Dublin@QuiggGolden.com

Northern Ireland

Quigg Golden
18-22 Hill Street
Cathedral Quarter
Belfast BT1 2LA

+44 (0)28 9032 1022
Belfast@QuiggGolden.com

Kingdom of Saudi Arabia

Quigg Golden
P.O. Box 18623
Jeddah 21425
Saudi Arabia

+966 (0)2 651 8222
Jeddah@QuiggGolden.com

The thought process behind these admissions is that the inclusion of these magic words provide complete protection against those statements being relied upon. I really cannot overemphasise quite how frequently clients hand us documents like this (often proudly exclaiming that they made it without prejudice). And though I accept that legal privilege is a complex area in its own right, we do also see lawyers make the same mistake despite it being within their area of expertise.

To invoke the without prejudice rule, the communication must be genuinely aimed at settlement, in which case it will be protected from being presented in evidence and cannot be used by an opponent. That can be so, even if the communication doesn't bear the magic phrase, as, conversely, the inclusion of the words doesn't guarantee their operation.

So, for example, if Devious were, in an uncharacteristic moment, to say "How about we just meet halfway on the valuation of this item so that we can move on with the project?", the statement cannot be taken as demonstrating that more money is due, given that they are prepared to halve the value of it – something they obviously wouldn't do if they genuinely believed in their position, that the completed work fell within the original specification.

This rule regarding protection from disclosure came about to help parties have open negotiations over settlement without fear of recourse if agreement isn't achieved. When you think about it in that context, it is perhaps easier to understand why a settlement offer is more likely to attract protection from disclosure before a judge than a statement that can effectively assist in deciding liability that you want to hide for that reason.

That perhaps extends to the rationale behind disclosure in litigation and arbitration that you generally must disclose everything, whether it helps or harms your position. Nobody enjoys telling a client that they have to hand the opponent a document that undermines their case. Perhaps an article on that point can follow the others I have mentioned.