



Without Prejudice discussions*

You might think that this applies to lawyers only. It probably does but we regularly come across people who come to us and tell us that they have had a Without Prejudice discussion with an employer or employee. We think that it is important that it is understood as to what a Without Prejudice discussion is. A discussion will be protected by the Without Prejudice privilege rule where it is obvious that their purpose is to resolve a dispute even if not expressly agreed between the parties. This is important in cases involving litigant in person or lay litigants which came up in a recent case in the UK being *Sush -v- Mace (UK) Ltd*.

Where there is a genuine attempt to settle a dispute then Without Prejudice privilege means that no statement can be used as evidence against the party which made them as part of the genuine attempt to settle the dispute. It is a policy decision that is there to encourage those involved in litigation to settle their disputes through negotiation rather than litigation.

In the UK case, and it is not necessary going to the full facts, Mr. Sush arranged to meet with a landlord after proceedings issued. The UK High Court held that the meeting was not for the purpose of negotiating a settlement. The Court of Appeal disagreed. It took the view that where there are lay litigants it can be difficult to determine objectively whether discussions were negotiations genuinely aimed at settlement. They took the view that the only sensible purpose of Ms. Sush arranged to meet the Solicitors for the landlord was to speak about some kind of solution to the litigation. The Court found that the entire discussion and the correspondence that followed were protected. In this case Ms. Sush had admitted that she was behind with the rent.

The case deals with how correspondence went between the parties. However, in our view, the decision is an important reminder of the importance of parties at the outset of any discussions to determine and to advise us as to whether these are on a Without Prejudice basis or not. However it should be remembered that the Without Prejudice rule only applies where there is a genuine attempt to try to settle a dispute where there is litigation. For example the Without Prejudice rule would apply if a Solicitor or even a lay litigant was to phone the opposite side and say “I would like to discuss with you on a Without Prejudice basis the possible settlement of my claim as I value it as at



“€X”. Even if the other party stated that they were not happy to settle the case that would be a Without Prejudice discussion even if the other party did not agree to have it as a Without Prejudice discussion because it was a phone call or a meeting for the purposes of trying to resolved the issue and was clearly indicated at the start to be a Without Prejudice proposal. The very basis of the Without Prejudice rule is that it only applies to discussion where there is a genuine attempt to seek to settle the case. The fact that the person receiving the phone call may regard the proposal for settlement as outlandish is not relevant. It is whether there was for the person making the contact a genuine effort to settle the case.

It is always advisable where discussions are taking place that it is specified at the start whether these are Without Prejudice or not. If they are Without Prejudice then they still only attracts to Without Prejudice rule where is a genuine attempt made to try to settle the case. Phoning somebody and asking them where there is a litigation in place are they happy to have a Without Prejudice discussion and then using it for the purposes of berating them for having brought the claim or telling them that they will never be able to prove the case that you are going to defend the case fully and that they will never get a penny may not get the benefit of the Without Prejudice rule because there was no genuine attempt there to settle the case.

The important thing to remember is that not every discussion is Without Prejudice even if the party claims that it is.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**

****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**