Dispute Resolution

‘Without Prejudice’

Date: November 2016
What are ‘Without Prejudice’ communications all about?

The Courts in this and other common law countries consider it desirable to facilitate and encourage the settlement of disputes and legal proceedings. Parties that are genuinely seeking to peacefully resolve disputes should not be discouraged by a fear that communications exchanged during negotiations could be used to their detriment during legal proceedings. Accordingly, the courts have developed a policy whereby if parties to a dispute are genuinely seeking to resolve that dispute, communications exchanged in the attempt to resolve the dispute cannot be used as evidence against the parties if the dispute ends up in court. Those communications are made without prejudice or harm to the position of both parties to the communications.

For example, one of your customers owes you €500,000. You believe that the case is clear cut but there may be deficiencies with some of the documentation you need to prove that the amount is owed to you. You appreciate this could cause you difficulty in obtaining a judgement for that amount if the dispute ended up before a Court. Your customer is denying that all of the money is owed to you. He/she has pointed out the deficiencies with the necessary documentation. In order to resolve the dispute, you write a ‘without prejudice’ letter offering to settle the dispute for an amount that is lower than €500,000. If your customer rejects the offer the dispute may end up before the Judge for hearing. Your customer cannot introduce your ‘without prejudice’ communication into evidence in an attempt to prove that your claim is inflated. You can maintain your original position and the Court will be unaware that the offer was ever made. Similarly, any specific concessions made by you in the ‘without prejudice’ communication regarding the strength of your case cannot be revealed to the court by your opponent.

Any person or entity involved in a genuine dispute likely to lead to litigation can correspond with the benefit of without prejudice privilege. It is not a privilege reserved for lawyers. However, the words ‘without prejudice’ are often placed on letters in the mistaken belief that the contents of those letters will never be seen by a court. This is not always the case and one should only enter into ‘without prejudice’ correspondence with great care.

So what is required in order to rely on ‘Without Prejudice’ protection?

1. The communication(s), which can be written or oral, must be made in the context of a genuine attempt to negotiate the settlement of a dispute which has given rise to, or is likely to give rise to, the issuing of legal proceedings.

2. You and your opponent intend that the communications(s) will not be admitted into evidence.

Can ‘Without Prejudice’ privilege be removed from a communication?

Yes, there are a number of ways the privilege can be lost, some of which are:

1. Waiver: The privilege can be waived but only if both you and your opponent consent;

2. Disputes arising from settlement agreements: Having settled proceedings you may have a further dispute concerning the terms of the settlement agreement or whether a settlement agreement existed at all. In these circumstances a court will look at the without prejudice communications to determine what exactly was agreed.

3. Fraud, misrepresentation and undue influence: Without prejudice communications will be allowed as evidence to show that you were induced into a settlement agreement through fraudulent conduct, misrepresentations made or undue influence exerted by your opponent.
4. Perjury, Blackmail and Unambiguous Impropriety: Where the exclusion of evidence from without prejudice communications would conceal perjury or blackmail, then the court will allow that evidence to be heard. The rather quaint phrase ‘unambiguous impropriety’ has been held to refer to a situation where a plaintiff (1) admitted its proceedings were groundless and were brought to persuade the defendant into settling matters and (2) asserted it would proceed with the claim regardless of the fact it was groundless. Therefore, without prejudice privilege is a useful tool to encourage settlement of claims or proceedings but care must be exercised at all times in relation to the placing of ‘without prejudice’ on communications.

For further information on this topic please contact: Jonathan Lynch, Associate, Dispute Resolution, E jlynch@efc.ie