

With Or Without Prejudice?

When commercial disputes first arise, the natural inclination for the parties involved is often to attempt to resolve matters between them, without involving lawyers at an early stage.

Instructing lawyers is often seen as being a last resort. Amongst other things, parties to a dispute are often concerned that instructing solicitors gives the impression that the business relationship with the other party has broken down irretrievably.

Whilst many disputes will be capable of resolution without the involvement of lawyers, care should be taken in any correspondence sent with a view to settling a dispute.

If matters can not be resolved amicably and recourse to the courts is required, then the other party to the dispute may very often attempt to rely on the content of correspondence sent during this period.

Some people make the mistake of assuming that including the words “without prejudice” in correspondence provides a magical shield which protects all statements made from being relied upon in court at a later date.

In fact, the extent to which without prejudice clauses protect the contents of a communication is not entirely settled in Scots Law. There is line of authority which suggests that an appropriately drafted without prejudice clause only renders inadmissible concessions which are made for the purposes of negotiation and not clear statements of fact.

The distinction between these two categories of statement is not always easy to identify.

The following Case Law example relates to the use of a without prejudice clause.

In 1994 case of Daks Simpson Group Plc v Kuiper, the Pursuer company claimed that a former director had received commission from customers, which he had retained for himself and had not accounted for to the company.

An admission was made during a meeting which took place between the parties and their solicitors that the director had received secret commission in excess of the sum of £600,000.

After the meeting, the company’s solicitor wrote to the director’s solicitor with a schedule of payments that they alleged the director had received.

The director’s solicitor responded indicating that, whilst the schedule was exaggerated in some respects, sums in excess £600,000 were due to the company. The response letter was concluded with a “without prejudice “clause.

On the basis of the letter, the company asked the court for judgement against the director for the sum that he admitted to be due.

The director, however, argued that the letter had been sent on a “without prejudice” basis and that, accordingly, its terms could not be relied upon in the context of the court action.

However, the judge granted judgment and offered the following guidance on the issue of without prejudice correspondence:

“If offers, suggestions, concessions or whatever are made for the purposes of negotiating a settlement, these cannot be converted into admissions of fact... if however someone makes a clear and unequivocal statement of fact, then there could be no objection in principle to that admission being used in subsequent proceedings, even though it was made in correspondence stated to be “without prejudice”.

Advice should be sought during the early stages of negotiating disputes and in particular, it is wise to have any correspondence reviewed which you propose to send to the other party to a dispute.

Taking advice on the wording of a without prejudice clause, if appropriate, may very well assist in preventing statements which were made during the early negotiations stage from prejudicing the case, should it eventually reach the courts.

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