

# 'Without prejudice'

## negotiating with confidence



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**In this article Jane Argyle, a solicitor with Anderson Lloyd, explains what 'without prejudice' means.**

### What does 'without prejudice' mean?

Lawyers sometimes attach the term 'without prejudice' to a statement or offer made during an attempt to resolve a dispute. The effect of making a statement or an offer in these circumstances is that the statement or offer becomes privileged information. This means that the statement or offer cannot be produced in evidence at a court hearing. The label 'without prejudice' is usually used to identify such a communication.

### Why do we use it?

As lawyers we have a duty to encourage the parties in a dispute as far as possible to settle the dispute without having to resort to litigation. But the fear that statements made in the course of negotiations may be used against them if the matter goes to court may deter the parties from attempting to resolve the matter. Being able to communicate 'without prejudice' offers protection from this possibility.

'The courts have recognised that 'without prejudice' protection is in the public interest as it may help settle disputes.'

The Evidence Act 2006 codifies the established common law position that parties should be encouraged to settle

disputes, and that a person who is a party to a civil dispute has privilege in respect of a communication that the person has prepared in connection with an attempt to negotiate a settlement of the dispute.

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Section 57 of the Evidence Act now provides the foundation for privilege in conducting settlement negotiations. The section recognises that the words 'without prejudice' need not be used to ensure that the privilege is effective. However, commentators suggest that it is likely that parties will continue to use the express term 'without prejudice'. It has also been suggested that the courts will continue to rely on this label as an indication that the party making the communication was seeking the protection of the privilege and section 57.

### When does 'without prejudice' apply?

Communications are only truly privileged when two features are present:

- there is a dispute;
- the communications have some bearing on the mediation or settlement of the dispute.

Whether communications are protected by being privileged depends on whether that is the intention of the parties involved in the dispute. In some cases the communication itself clearly implies a privileged protection even when the term is not expressly used.

It is not necessary to use the 'without prejudice' protection if the clear intention of a document is to engage in settlement negotiations. However, where the first in a series of communications is 'without prejudice' this may in some situations apply to the whole series of communications on the matter.

### When does 'without prejudice' not apply?

On the other hand, a document does not automatically have privileged status just because it states that it is 'without prejudice'. In an English case, the court held that a document and the surrounding circumstances may need to be examined by a court to consider whether it satisfies the criteria to be privileged (*South Shropshire District Council v Amos* [1987] 1 All ER 340).

A communication described as being 'without prejudice' may not have privileged status if:

- the other party rejects the claim absolutely and shows no intention of negotiating;
- lifting the privilege is necessary to suppress a threat when an offer is not accepted;
- the communication expressly reserves the right to refer to statements in a claim for costs (that is, the communication is 'without prejudice except as to costs'); or
- the privileged status is waived by both parties involved – either by an express waiver in writing, or by way of implied actions (such as providing the information to the court or to a third party).

Privileged communications are a useful tool to assist with the settlement of disputes between parties. However, care should be taken when using the term as there are some circumstances when it may not apply. If you are in any doubt about whether this term should be used or need assistance with a dispute, contact your Lawlink lawyer.

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