

UPDATE

The Without Prejudice Rule – When does it apply?

Update prepared by Ursula Lawrence-Archer (BVI)

The Eastern Caribbean Court of Appeal in *Grenada Rice Mills Ltd v Grenada Marketing and National Importing Board*¹ considered the application of the 'without prejudice' rule and the admissibility of evidence covered by the rule.

The 'without prejudice' rule

The 'without prejudice' rule is a rule governing the admissibility of evidence and makes communications between parties during negotiations privileged and inadmissible in court proceedings unless both parties consent. The policy considerations underlying the rule are that parties should be encouraged to settle their disputes out of court and should not be deterred by fear that their settlement negotiations might be used against them in future proceedings.

Grenada Rice Mills Ltd v Grenada Marketing and National Importing Board

In issue in this case was the admissibility of an offer to settle, sent by letter from Grenada Marketing and National Importing Board (the **Board**) to Grenada Rice Mills Ltd (**GRM**). The existence of the offer letter was raised in cross-examination in the first instance hearing, in which counsel for GRM submitted that the offer letter constituted an admission of debt. The Board contested the admissibility of the letter on the basis that the 'without prejudice' rule applied to the offer letter and therefore GRM could not rely on it to support their argument.

At first instance, the trial Judge ruled that the offer letter was covered by the 'without prejudice' rule and therefore privileged and inadmissible. GRM appealed the first instance decision. GRM submitted that the offer letter was not covered by the 'without prejudice' rule as it was raised at trial by the trial Judge and not the Board, it was not marked as 'without prejudice', and because it did not form part of continuing negotiations. GRM alleged that the prior settlement negotiations had ceased and the offer was therefore made on the Board's own volition and was admissible.

The Court of Appeal held that where a party seeks to base their case on a statement made during negotiations, the author of the statement could object to the admission of the statement, usually done by way of an application to strike out. However, where the issue of admissibility arises during cross-examination, it is open to the author of the statement (in this case the offer letter) to contend that the document was privileged by virtue of the 'without prejudice' rule in their submissions to the Judge.

Notwithstanding that the offer letter was not marked 'without prejudice', the Court of Appeal agreed with the trial Judge that the offer letter fell under the 'without prejudice' rule on the basis that there was evidence to support the contention that negotiations were ongoing between the parties. There was also no evidence to show that negotiations had ended during the time the offer letter was sent. The Court of Appeal also found that the offer letter did not constitute an admission of debt.

¹ (GDAHCVAP2015/0002, 6 October 2021).

Conclusion

This decision confirms that in determining whether communications between parties are likely to fall under the 'without prejudice' rule, the court will consider whether or not negotiations are ongoing when the communication was issued, or whether there is any evidence to show that negotiations had already ended. The court will also look at the content of the communication and not the form. The mere fact that the words 'without prejudice' are not included in the communications is not, on its own, enough to prevent the communication from falling within the ambit of the 'without prejudice' rule.

Contacts



Eleanor Morgan
Managing Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com



Shane Donovan
Partner, Mourant Ozannes
BVI
+1 284 852 1731
shane.donovan@mourant.com



Ursula Lawrence-Archer
Associate, Mourant Ozannes
BVI
+1 284 852 1729
ursula.lawrence-archer@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2021 MOURANT OZANNES ALL RIGHTS RESERVED