



Without Prejudice Communications

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An update on which communications will be caught by the 'without prejudice' rule, the uncertain boundaries of the rule and a discussion of the exceptions to the rule, considered from the point of view of commercial litigation.

1. A general evidential rule is that all relevant evidence is admissible and this includes admissions. A party may put an admission in to evidence before the Court.
2. The without prejudice rule: an admission made in negotiations is not to be put in evidence before the Court.
3. The without prejudice rule is an exception to this general evidential rule. The public policy behind this exception is that litigation is more likely to settle if negotiations can take place in which admissions can be made freely, as those admissions cannot be put as evidence before the court. Oliver LJ stated in *Cutts v. Head*¹: "...parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations...may be used to their prejudice in the course of the proceedings. They should...be encouraged fully and frankly to put their cards on the table...The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."
4. The without prejudice rule applies to a communication made in the course of genuine negotiations with the intention that it would not be admitted in to evidence. Any following communications will be covered by the rule until one party labels a communication as being open.

¹ [1984] Ch 290

Without prejudice correspondence and acknowledgments for the purpose of limitation *Ofulue v Bossert*²

5. In the *Ofulue* case the Second Claimant, Mrs Ofulue, and her husband, claimed possession of 61 Coborn Road, London from the defendant, Ms Bossert. Mr and Mrs Ofulue were, and had been since 1976, the registered proprietors of the property but had not been in actual possession of the property since about 1981.
6. Ms Bossert claimed adverse possession³. Adverse possession of land: section 15(1) of the Limitation Act 1980⁴ provides that "*no action shall be brought ... to recover any land after the expiration of 12 years from the date on which the right of action accrued ...*". Time runs under section 15(1) so long as someone is in possession "adverse" to the owner of the paper title⁵.
7. The following chronology sets out the key facts

1981	D and Father permitted to occupy the house by a former tenant
1983	Cs discover D and her father were at the property
1987	Cs start first possession proceedings
18.7.1990	D's Defence [Document 1] – admits Cs title to the house, assert right to occupy as tenants in equity or by proprietary estoppel for a 14 year lease in return for works
17.7.1991	Directions hearing
14.1.1992	D and father send letter [Document 2] marked 'without prejudice' offers to settle claim by buying house from Cs
1992	Offer rejected
1996	D's father dies
26.4.2000	Automatic stay of first proceedings
1.2.2002	Application to lift stay
2002	First proceedings struck out
30.9.2003	Cs issue second claim issued seeking possession
	D defends second claim by claiming adverse possession. D

² [2009] UKHL 16. HL 11.3.09

³ The concept of adverse possession was considered and explained in the House of Lords case *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 - all that is normally required to make good a claim that section 15 applies is an intention to possess coupled with actual physical possession.

⁴ Still relevant for unregistered land, replaced from 13.10.03 by section 96 LRA 2002 for registered land.

⁵ Section 15(6) incorporates Schedule 1, including paragraphs 1 and 8.

	abandons her previous claim that she was a tenant in equity and asserts that she and her father had been in uninterrupted possession as trespassers for more than 12 years before issue (ie 30.9.1991)
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8. At the trial Judge Levy QC held that Ms Bossert (D) had been in adverse possession for more than 12 years prior to issue. It was enough that Ms Bossert and her father had intended to possess as tenants⁶.

9. Abortive proceedings for possession do not stop the running of time under section 15 – see *Markfield Investments Ltd v Evans*⁷. Mrs Ofulue needed to find an acknowledgment of title in order to defeat the adverse possession counterclaim.

10. What amounts to an acknowledgment of title for the purposes of section 29 of the Limitation Act 1980?
 - (1) Mrs Ofulue asserted that both the 18.7.1990 Defence [Document 1] and the 14.1.1992 offer letter [Document 2] were acknowledgments of her title under section 29 Limitation Act 1980 so as to extend time under section 15.

 - (2) In the 18.7.1990 Defence D admitted Mrs Ofulue’s title but denied her right to possession, asserting that there was a tenancy in law or equity. The Court of Appeal held that this was not sufficient to be an acknowledgment under section 29, as it did not acknowledge the right of action ie the right to immediate possession, only the title. In the

⁶ *Ofulue* case – Lord Neuberger para. 67 “... the fact that the Bosserts may have believed that they were in possession as tenants, in law or equity, of the Ofulues does not prevent their possession having been “adverse”. The decision in *JA Pye (Oxford) Ltd v Graham* made it clear that (provided that there is no other reason to defeat the claim) all that is normally required to make good a claim that section 15 applies is an intention to possess coupled with actual physical possession”

⁷ [2001] 1 WLR 1321, CA. Confirmed in *Ofulue* at para.70.

House of Lords Ms Bossert conceded that the Court of Appeal was wrong on this point. Lord Neuberger clearly considered the concession was rightly made⁸ and stated that all that was required was an acknowledgment of title, as set out in section 29(2).

- (3) The 18.7.1990 Defence was signed more than 12 years before the issue of the second claim. Mrs Ofulue asserted that D's acknowledgment of her title in the defence was a continuing acknowledgment throughout the life of the first proceedings. Mrs Ofulue asserted that the acknowledgment continued until the first claim was struck out in 2002. The Court of Appeal had rejected this argument.
- (4) The House of Lords agreed with the Court of Appeal and held that the acknowledgment in the Defence operated from the date of the statement of case and was not a continuing acknowledgment. Per Lord Neuberger⁹: *" the argument that the admission continued to operate as such an acknowledgment beyond 18 July 1990 was rightly rejected by the Court of Appeal. It is inconsistent both with the language of the relevant provisions, and with the policy, of the 1980 Act. Conceptually and as a matter of language, I accept that an "acknowledgment" could cover a continuing state of affairs. However, particularly where it has to be embodied in a signed document, the more natural meaning of the word would suggest that it arises as at the date of the document, most naturally the date on which the document is provided to the person to whom the acknowledgment is made. The requirement in section 30(1) that an acknowledgment must be in writing and signed was no doubt intended to minimise the room for argument as to whether and when it was made."*

⁸ Paragraphs 73 and 74.

⁹ Paragraph 80.

- (5) A re-publication of the acknowledgment would be required, such as the service of an amended defence or re-service of the original defence. A written and signed document is required. Relying on the defence at the strike out hearing was not enough¹⁰.
- (6) Ms Bossert conceded that the Court of Appeal was right in finding that her 14.1.1992 Offer letter [Document 2] by offering to buy the house was an implied acknowledgment of Cs' title under section 29 Limitation Act 1980 so as to extend time under section 15. The House of Lords agreed with the Court of Appeal¹¹. Even if an offer to buy the property was made 'subject to contract' this would still be an acknowledgment of title for section 29.

Without Prejudice privilege

11. The main issue in the Ofulue case was whether the cloak of the 'without prejudice' privilege prevented the Offer letter from being relied upon to extend time. Would the cloak of the 'without prejudice' privilege prevent the 'without prejudice' Offer letter being relied upon in the subsequent proceedings?
12. Mrs Ofulue argued that the acknowledgment of title in the without prejudice letter could be relied upon in evidence because:
- (1) The Ofulue's title was not in issue in the earlier proceedings. The acknowledgment of title related to a point that was an agreed ground between the parties in the first proceedings.
- (2) The acknowledgment was sought to be admitted as a fact rather than for the truth of its contents.

¹⁰ Paragraphs 83 and 84.

¹¹ Lord Neuberger paragraph 76.

- (3) Public policy justified an acknowledgment satisfying section 29 overriding the without prejudice rule or being an exception to the without prejudice rule.
- (4) The justice of the case.
13. The majority, Lord Neuberger (leading judgment), Lord Hope, Lord Rodger and Lord Walker held that the 14.1.92 'without prejudice' offer letter was covered by the 'without prejudice' privilege.
14. The public policy behind the 'without prejudice' rule was explained by Lord Neuberger: *'it is worth quoting a passage from Robert Walker LJ's invaluable judgment in the Unilever case which, in my opinion, makes a point which should always be borne in mind by any judge considering a contention that a statement made in without prejudice negotiations should be exempted from the rule'*, before citing the following passage from the judgment of Robert Walker LJ in the case of Unilever Plc v The Procter & Gamble Co¹²:
- "[the cases] make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties ... to speak freely about all issues in the litigation ... Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers ... sitting at their shoulders as minders."*
15. In the Ofulue case the majority of their Lordships considered that the fact that the rule was being invoked in relation to negotiations involving earlier

¹² [2000] 1 WLR 2436.

proceedings involved no new extension of the rule¹³. Lord Scott dissented on this point¹⁴ and sought to show that no previous case had applied the without prejudice rule to a communication from earlier proceedings.

16. The majority dismissed the argument that the Ofulue's title was not in issue in the earlier proceedings:

(1) Lord Neuberger accepted that it was right that the Ofulue's title was not in issue in the earlier proceedings however he found this was not a good reason to override the 'without prejudice' rule.

(2) The sentence in the letter sought to be relied upon was the actual offer to buy the house. The offer contains an implied admission as to weakness of the defence.

(3) Lord Neuberger stated '*Quite apart from this, it appears to me that, save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence, other than in exceptional circumstances such as those mentioned in the Unilever case*¹⁵

(4) The offer contained in the relevant sentence of the letter was connected with the issue between the parties in the earlier proceedings.

(5) The title to the property was in issue in the earlier proceedings in the sense that the Ofulues claimed the unencumbered freehold, whereas

¹³ Lord Neuberger paragraph 87 and Lord Hope paragraphs 5 to 10.

¹⁴ Paragraphs 20 and 22.

¹⁵ Paragraph 91. See Lord Hope paragraph 9: the public policy of the rule would be contradicted if the protection was not available in fresh proceedings to replace those struck out.

the Bosserts were contending that the freehold was subject to their legal or equitable interest¹⁶.

17. The majority dismissed the argument that the acknowledgment was sought to be admitted as a fact rather than for the truth of its contents:
 - (1) It was argued that the offer was admissible as evidence that the Bosserts acknowledged the Ofulues' title to the property, although it would not be admissible as evidence of the fact that the Ofulues were the owners of the property.
 - (2) This is the distinction between an admission of fact and an acknowledgment in the judgment of Hoffmann LJ in *Muller v Linsley & Mortimer*¹⁷ and as developed in his opinion in *Bradford & Bingley v Rashid*¹⁸. Lord Hoffman considered that the without prejudice rule only related to admissions and so did not cover acknowledgments. Lord Scott's dissenting opinion in the *Ofulue* case adopted Lord Hoffman's argument¹⁹. Lord Neuberger found that though there was 'intellectual attraction' to the argument this was a distinction that was too subtle to apply in practice²⁰.
 - (3) Further the distinction was not satisfactory as an exception to the without prejudice rule, for reasons of legal and practical certainty²¹.
 - (4) It would be difficult to dissect out of a communication the identifiable admissions and to withhold protection from the rest of the without prejudice communication and it would be contrary to the underlying public policy of encouraging parties to speak freely²².

¹⁶ Per Lord Neuberger, paragraph 91.

¹⁷ [1996] PNLR 74, CA.

¹⁸ [2006] 1 WLR 2066 paragraphs 16 to 18.

¹⁹ Paragraphs 27 to 29.

²⁰ Paragraph 79. Lord Rodger paragraph 41.

²¹ Paragraph 98, paragraph 51.

²² Lord Hope, paragraph 7.

- (5) The protection which the rule gives to the admission must apply equally to the acknowledgment²³. The result is that Lord Hoffmann's dicta in the *Muller* and *Rashid* cases are now overruled by the majority opinions in the *Ofulue* case.
18. The majority dismissed the argument that public policy justified an acknowledgment overriding the public policy behind the without prejudice rule.
- (1) Lord Scott's dissenting opinion in the *Ofulue* case referred to the important public policy behind section 29²⁴, that title to land should not be lost if there was an acknowledgment within 12 years.
- (2) The public policy of allowing the parties to speak freely which underlies the without prejudice rule outweighs the countervailing policy reason for lengthening the period of limitation through a written acknowledgment – per Lord Neuberger²⁵ applying the reasoning of Lord Brown in the *Rashid* case²⁶.
19. The majority rejected the argument that the justice of the case required allowing Mrs Ofulue to refer to the acknowledgment in the letter.
- (1) On the facts of the case there was no unambiguous impropriety by Ms Bossert either generally or in claiming to rely on the without prejudice rule.
- (2) There was no basis for overriding the without prejudice rule simply because many people might think that, in relying on the rule, Ms

²³ Lord Hope paragraph 11.

²⁴ Paragraph 32.

²⁵ Paragraph 101.

²⁶ [2006] 1 WLR 2066, paragraph 75. Lord Rodger at paragraph 43.

Bossert was taking an unattractive point or that by changing her stance in the two sets of proceedings she has acted unattractively.

20. Uncertain boundaries of the Without Prejudice rule:

- (1) The House of Lords has left open whether and to what extent a statement made in without prejudice negotiations would be admissible if it were "*in no way connected*" with the issues in the case the subject of the negotiations²⁷.
- (2) Any extension of the boundaries could create difficulties in relation to the confidentiality of mediations. There is case law that confidentiality attaches to mediation only to the extent that it does in without prejudice negotiations²⁸. Whilst the parties to a mediation can enter a mediation agreement that seeks to create a stronger shield this may not assist where a third party seeks disclosure or reliance on the content of the negotiations. The concern over this point is highlighted in an article of Mr Justice Briggs 'Mediation Privilege'²⁹.

21. Multi party litigation: a settlement between two parties does not allow or make the 'without prejudice' communications between those parties admissible to other parties in the litigation³⁰.

22. Recognised exceptions to the without prejudice rule³¹:

²⁷ Lord Neuberger paragraph 92, citing Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300, where he referred to *Waldrige v Kennison* (1794) 1 Esp 143 (where handwriting in a without prejudice letter was admitted into evidence). Lord Neuberger said this equated to Lord Hope's suggestion in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, paragraph 25, that "*an admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise*". In the *Ofulue* case Lord Hope agrees with Lord Neuberger's opinion see paragraph 1; in paragraph 10 Lord Hope declines to explore the outer limits of the rule. Lord Rodger paragraphs 38 – 39: who considers such an extension would be contrary to the general approach endorsed in the *Rush & Tompkin* case. Lord Walker at paragraph 58 – declines to consider the exception.

²⁸ *Brown v Rice and Patel* [2007] EWHC 625, *Cattley v Pollard* (Master Bragge) unreported.

²⁹ 3.4.09 New Law Journal 159 NLJ 506.

³⁰ Lord Hope paragraph 6, *Rush & Tompkins v GLC* [1989] AC 1280, 1299-1300.

³¹ Paragraph 86, applying *Unilever* case [2000] 1 WLR 2436, 2444-2445.

- (1) Where letters are headed 'without prejudice' unnecessarily or meaninglessly³².
- (2) If the party expressly reserves the right to refer to the without prejudice letter on the issue of costs³³ i.e. A Calderbank letter: 'without prejudice save as to costs'.
- (3) Where the negotiations are said to result in a contract³⁴. In the case of *Oceanbulk Shipping v TMT*³⁵ it was held that without prejudice communications could be admitted both to decide if an agreement had been reached and, if it contained admissible background facts and understandings, to inform the interpretation and construction of the agreement³⁶. The interests of justice require the meaning of a settlement to be ascertained by reference to the without prejudice exchanges if they form part of the factual matrix.
- (4) Where negotiations are relied upon as evidence to justify the rectification of a settlement agreement.
- (5) Where the negotiations are said to result in an estoppel³⁷.
- (6) Where the negotiations are said to result in a misrepresentation, fraud, undue influence (or mistake³⁸).

³² Lord Hope paragraph 2, citing *Tomlin v Standard Telephones* [1969] 1 WLR 1378, 1384. This is not a true exception, as the rule simply does not apply if the communication is not part of settlement negotiations.

³³ Lord Hope paragraph 5.

³⁴ *Walker v Wilsher (1889) 23 QBD 335*: The 'without prejudice' material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, applied in *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378

³⁵ [2010] UKSC 44 [2011] 1 AC 662, following the *Ofulue* case. The contrary text in Passmore on Privilege (2006) 2nd Edition paragraph 10.057 is now out of date.

³⁶ See also *Admiral Management Services v Para-Protect Europe* [2002] EWHC 233.

³⁷ *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178. On appeal the 'without prejudice' communications were shown to have become irrelevant by being subsumed in to matters ventilated in open court and recorded in open attendance notes [1998] FSR 530. See *AAG Investments Ltd v BAA Airports Ltd* in footnote 38.

- (7) Where the negotiations are said to include an unambiguous impropriety³⁹. The without prejudice rule cannot be invoked as a cloak for perjury, blackmail or other unambiguous impropriety⁴⁰.
- (8) Where the negotiations are said to be an explanation for delay. This may allow in evidence not only the fact of the letter being sent but also the contents, if the justice of the case requires this⁴¹.

³⁸ This was not listed by Walker LJ in the *Unilever* case.

³⁹ *Berry Trade Ltd v Moussavi (no.2)* (CA) Times 3.6.03: admissions made in without prejudice negotiations indicated that statements in the defence may be false. The trial judge applied the test of whether there was a serious and substantial risk of perjury. The Court of Appeal said this test was too low and would seriously erode the without-prejudice rule. The requirement was one of unambiguous impropriety and the need for a very clear case of abuse of a privileged occasion. *AAG Investments Ltd v BAA Airports Ltd* [2010] EWHC 2844 (Comm) [2011] 2 All ER (Comm) 1171 Walker J. Statements were made in negotiations at a meeting that were damaging to the Claimant's case and these matters were left out of the defendant's subsequent defence. The Court held that the statements at the meeting attracted without prejudice privilege and did not fall into the unambiguous impropriety exception. Nor did the statements create estoppels as it would not have been reasonable to rely upon statements setting out a negotiating stance.

⁴⁰ Paragraph 103. An example might be to suppress a threat if an offer is not accepted, see *Kitcat v Sharp* (1882) 48 LT 64. *Woodward v Santander UK Plc* [2010] IRLR 834 (EAT): An employee's settled her claim alleging unfair dismissal and sex discrimination. The terms of settlement did not require the provision of a reference. She was unable to find suitable work. She brought a second claim against her former employer which included alleging that it had victimised her contrary to s.4 of the Sex Discrimination Act 1975, by providing a poor reference to prospective employers or not providing one at all. She argued before the EAT that the tribunal had erred in excluding evidence of the settlement negotiations, since she asserted that the without prejudice rule did not apply to exclude evidence of 'unambiguous impropriety', a concept which she said included acts of discrimination. The EAT held that parties when they participate in negotiations or mediation should be able to argue their case and speak their mind, within limits. Those limits are best stated in terms of the existing exception for impropriety, which applies only in the very clearest of cases. Words which are unambiguously discriminatory will fall within that exception. It would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions (which may have been lengthy or contentious) in order to point to equivocal words or actions in support of an inference of discrimination. The EAT rejected the argument that there ought to be a further exception to the rule for discrimination cases based on the EAT decision in *BNP Paribas v Mezzotero* [2004] IRLR 508 EAT.

⁴¹ *Muller v Linsley & Mortimer* [1996] PNLR 74. CA. The Defendant solicitors acted for the Claimant advising him on his employment rights. He was then dismissed by his employer and settled his action against his former employer. He claimed in professional negligence against the Defendant solicitors who sought to see the without prejudice correspondence leading up to the settlement. The CA (Hoffman LJ) held the evidence was subject to disclosure as it went to whether the claimant had acted reasonably in mitigating his loss, not to an admission. This part of the judgment was criticised in the *Unilever* case and it is doubted if it survives the reasoning in

- (9) Where the without prejudice letter contained a statement that amounted to an 'act of bankruptcy'⁴². This could not form a ground for a bankruptcy petition under the Insolvency Act 1986, though the statement might be useful as a matter of evidence.
- (10) Whether proceedings were threatened for infringement of a trade mark pursuant to section 21 of the Trade Marks Act 1994⁴³.
- (11) Where there was a severance of a joint tenancy⁴⁴.
- (12) As a trigger for a rent review⁴⁵.

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Ofulue. The result would still stand based on the waiver of privilege by referring to the settlement as a step in the reasonable mitigation of loss.

⁴² Lord Scott paragraph 27, citing *In Re Daintrey; ex p Holt* [1893] 2 QB 116. By s 4(1) of the Bankruptcy Act 1883 (now repealed): 'A debtor commits an act of bankruptcy . . . (h) If the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.' A document sent by a debtor to a creditor may be looked at by the court in order to decide whether or not it amounts to a notice of suspension within the meaning of s 4(1)(h) though the document is headed 'Private and confidential, without prejudice'.

⁴³ *Best Buy Co Inc v Worldwide Sales Corp. Espana SL* [2011] EWCA Civ 618; Obiter / provisional view at paragraphs 42 to 45.

⁴⁴ Paragraph 33, *McDowell v Hirschfield Lieson & Rumney* [1992] 2 FLR 126. During negotiations a legal event had taken place: a severance of the joint tenancy. An admission was not being relied upon. The without prejudice correspondence could be looked at to see whether there had been a severance.

⁴⁵ Paragraph 33, *Norwich Union v Tony Waller Ltd* (1984) 270 EG 42.