

Insights

ADJUDICATION DECISION RENDERED UNENFORCEABLE DUE TO INADMISSIBLE WITHOUT PREJUDICE MATERIAL

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SUMMARY

Without prejudice is a phrase often used in communications between parties seeking to reach settlement. Whether or not communications will be regarded as without prejudice will depend on their substance and [we recently looked at](#) a decision that highlighted the uncertainty that this can create in normal commercial discussions. This Insight takes a look at the recent TCC decision of [AZ v BY \[2023\] EWHC 2388 \(TCC\)](#), which looked at the effect of referring to without prejudice material in adjudication. In this case, this led to the decision not being enforced.

THE LEGAL PRINCIPLES

As explained in the earlier [BCLP Insight](#), without prejudice privilege is designed to protect communications between parties that are genuinely aimed at facilitating settlement from being presented as evidence. This rule is in place not only for public policy considerations but also to uphold the parties' express or implied agreement to treat such communications as confidential.

There are, however, certain exceptions where this rule does not apply. One such exception arises when these communications are necessary to establish whether a settlement has been reached between the parties, displacing the original dispute about which the parties had been negotiating.

Where no exception applies, the risk is that by relying on without prejudice material, the tribunal will be seen as being unable to make a decision on the dispute impartially.

The courts have held that in order to determine whether the adjudicator was, unconsciously, biased after being exposed to the without prejudice material, the court must first ascertain all the circumstances that may suggest bias in the adjudication process, and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the adjudicator was biased (*Re Medicaments and Related Classes of Goods (No 2)*)

[2001] 1 WLR 700, affirmed in *Volker Stevin Ltd v Holystone Contracts Ltd* [2010] EWHC 2344 (TCC)).

There have also been concerns that adjudicators who are not legally qualified may not fully appreciate the impact of without prejudice material on their decision-making processes (*Ellis Building Contractors Limited v Vincent Goldstein* [2011] EWHC 269 (TCC)). An error as to the admissibility of without prejudice material is an error of law which could potentially impact the fairness of the decision-making process in accordance with the rules of natural justice. Consequently, if it is determined that the material is in fact protected by without prejudice privilege and the test of apparent bias is met, an adjudicator's decision may not be enforced.

BACKGROUND

AZ commenced an adjudication against BY in relation to works to replace the stair core pressurisation systems to a building. Prior to the adjudication, without prejudice communications and meetings took place in parallel with a separate stream of open communications.

An issue in the adjudication was whether an agreement was reached between the parties. During the adjudication, AZ relied on material that included concessions by BY, in order to undermine the contractual position that BY adopted, but BY argued that the material was subject to without prejudice privilege and could not be relied upon.

ADJUDICATOR'S DECISION

The adjudicator considered whether the material qualified as without privilege in nature. He concluded there was no evidence to support a view that the purpose of the communications was to reach a commercial settlement, and that the meeting was an "open" meeting to find a way forward. He then went on to determine that there was a finalised contract between the parties.

Subsequently, AZ applied for summary judgment to enforce the adjudicator's decision, while BY initiated Part 8 Proceedings to seek declarations that the without prejudice material was inadmissible, thus rendering the adjudicator's decision unenforceable.

COURT'S DECISION

After examining the same information as the adjudicator, the judge reached a different conclusion to the adjudicator. The judge found that the communications were without prejudice and that the communications between the parties did not result in any concluded agreement, for reasons that have been heavily redacted from the judgment because of the confidential nature of the without prejudice material.

The judge then concluded that the without prejudice material was inadmissible in the adjudication. This was because, unlike cases where the material was deployed to establish an agreement, in this

instance, it was used to demonstrate an alleged inconsistency in BY's asserted contractual position. This particular use of without prejudice material was not deemed to be legitimate.

Regarding the issue of enforceability, the judge held that the disclosure of without prejudice material to the adjudicator made their decision unenforceable. A fair-minded and informed observer, considering all of the circumstances of the case, would conclude there was a real possibility that the adjudicator was unconsciously biased after reviewing the without prejudice material. Several reasons supported this ruling: the without prejudice material was "placed front and centre" within the adjudication and played a significant role in AZ's case; it contained implicit admissions by BY that were inconsistent with its open position; and the material was not only prejudicial and adverse to BY's interests but was also related to the central issues in dispute.

The judge's view was that this left "an inevitable question mark" about whether the adjudicator's decision was shaped by his knowledge of the concessions / admissions made by BY during negotiations. As a result, the decision was unenforceable due to a breach of the rules of natural justice by reason of apparent bias.

COMMENTARY

This decision is helpful in summarising the applicable principles on without prejudice privilege in the context of adjudication. The judgment is heavily redacted, but summarises the applicable principles on without prejudice privilege, considers the test for apparent bias and frames both in the context of adjudication.

It also clarifies that the correct approach is the test of apparent bias as stated in *Re Medicaments*, which assesses the objective perception of the influence the exposure to the material may have on the mind of the decision-maker, rather than depending on actual influence. The court explicitly rejected AZ's interpretation of *Ellis*, which argued that the adjudicator's decision must be shown to be "primarily" based on the without prejudice material to be rendered unenforceable. Instead, it clarified that the communications need only be "material" in the sense that they objectively give rise to a legitimate fear of partiality.

It is worth noting that, as is usually the case in construction disputes, each case is decided on its own facts. The Scottish Court in *Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd* [2020] CSOH 19 found that submitting without prejudice letters to the adjudicator did not constitute a breach of natural justice or apparent bias, influenced by specific factors such as the question of admissibility of the letters being a central issue in the adjudication. In *AZ v BY*, however, the court emphasised that this decision does not go further than stating the test of apparent bias had not been made out. The precedent set by one case should not be applied as a standard for future challenges concerning the admissibility of without prejudice material.

CONCLUSION

This case underlines the need for careful handling of without prejudice material.

The application of the rule does not solely depend on the “without prejudice” label being used, as the court will examine the substance of the communications. In a construction context, where commercial discussions take place in order to agree items such as the value of variations, this is not always straightforward. In situations where parties run parallel streams of open and without prejudice communications, the correct application of the label becomes even more critical due to the fine line between open and without prejudice communications. In addition, there are exceptions to the rule, for example when it is necessary to determine whether the negotiations resulted in an agreed settlement.

When it is not immediately clear whether certain communications are protected by without prejudice privilege, there is an increased risk in presenting them during an adjudication, a practice that the court has long discouraged. Although this case represents one of the few instances where a breach of the rules of natural justice, by reason of apparent bias, renders an adjudicator’s decision unenforceable, it demonstrates the repercussions that can arise from the wrongful deployment of without prejudice material. In practice, using the “without prejudice” label when appropriate and understanding when the exceptions to the rule may apply should help reduce any related risks.

This Insight was co-authored by Yorkie Fong and Shy Jackson.

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