BCLP. Client Intelligent

Insights

WITHOUT PREJUDICE PRIVILEGE – GUIDANCE FROM THE PRIVY COUNCIL

Feb 09, 2023

I advise many clients involved in construction projects who are on the cusp of a dispute. While they take legal advice on the merits of their position, my clients usually continue to seek to reach an amicable solution with their counterparty through direct negotiation as well as continuing to liaise on a day to day basis to get the job finished.

In this context, my clients regularly ask, “Should my email be without prejudice?”

Although the law in this area is relatively settled, the question continues to throw up difficulties. I have been involved with several cases where one party has attempted to put material before a judge or adjudicator that the other side says is inadmissible because it was made without prejudice.

The recent Privy Council case of A&A v Petroleum Co of Trinidad & Tobago sheds some light on this perennial problem.

WHAT IS WITHOUT PREJUDICE PRIVILEGE?

Without prejudice privilege applies to communications between parties that contain negotiations, with the aim of genuinely attempting to settle the dispute. Communications that are subject to without prejudice privilege cannot be admitted in evidence in legal proceedings.

WHAT IS WITHOUT PREJUDICE PRIVILEGE FOR?

There are strong public policy reasons for protecting without prejudice communications. Disputes are time consuming and costly, and there is a public interest in encouraging parties to settle amicably. Allowing the parties to communicate without fear that the communications will be read by the judge (or other decision maker) should, in theory, allow the parties to be more open and make concessions that would otherwise go against their interests.

WHAT HAPPENED IN THE CASE?

The facts of the case are relatively simple and will be familiar to most practitioners. In September 2004, Petroleum appointed A&A to perform certain steelworks at its main Soldado oilfield. A&A

agreed to carry out the works for a specified contract price. The contract also allowed Petroleum to instruct variations. Clause 7 of the contract provided that the value of any extras, alterations, additions or omissions would be agreed between the parties.

A&A completed its works in early 2006 and Petroleum paid it the original contract price. However, the parties disagreed as to the amount and value of additional work that had been instructed along the way. Attempts to agree what matters were variations and, if so, the amounts to be attributed to them ensued.

A key meeting took place on 23 May 2008. According to A&A, at that meeting, the parties came to an agreement as to which items were variations, and the valuation to be attributed to them. After that meeting, Petroleum sent a letter dated 23 June 2008 (the June Letter) recording what had been agreed at the meeting. Attachment 1 to the letter set out "all that has been agreed to thus far" and listed, for each variation, the amount claimed and the amount agreed. The letter also listed a number of variations that had not been agreed and suggested a further meeting to close these out.

However, the parties did not manage to agree the remaining variations and, by April 2009, A&A wrote to Petroleum saying that all previous offers and concessions were retracted.

A&A started proceedings, claiming that the amounts agreed in the 23 May 2008 meeting (and recorded in the June Letter) should represent the amounts of variations under the contract. The June Letter was included in the agreed bundle (and referred to by Petroleum's counsel during cross examination).

However, later in the trial, Petroleum objected to A&A's counsel referring to the June Letter, on the basis that it was part of without prejudice correspondence.

WAS THE JUNE 2008 LETTER PROTECTED BY WITHOUT PREJUDICE PRIVILEGE?

At first instance, the judge decided that the June Letter was not subject to without prejudice privilege. The Court of Appeal (Republic of Trinidad and Tobago) disagreed and decided that the letter **did** attract that privilege.

The dispute was finally heard by the Privy Council (the Board), which decided that the June Letter was **not** subject to without prejudice privilege, for the following reasons:

- The agreements reached in the May 2008 meeting, as recorded in the June 2008 letter, were part of the process of arriving at a value for the work under clause 7 of the contract.
- That process was intended to be open.
- Clause 7 imposed an obligation on the parties to be involved in an iterative process to reach agreement on the value of variations. This was an ongoing process, and distinct from negotiations between parties who seek to settle their differences in contemplation of litigation.

- There is no policy reason why the contractual process should be conducted on a without prejudice basis. If a court must subsequently determine whether there has been a variation and the value of that variation, then the court will be assisted by knowing the earlier positions adopted by the parties.
- The parties could have run two parallel processes: the open contractual process and another separate "without prejudice" negotiation.
- A reasonable person would understand the parties' joint intention to be that the process of reaching agreement should be an open process.

I was quite surprised by this decision. Reading the case, it seemed to me that the parties were trying to genuinely negotiate their differences. The fact that the agreement recorded in the June 2008 letter later faltered, suggests to me that the parties were of the view that the negotiation was continuing, and nothing was agreed until everything was agreed.

The Board relied heavily on the fact that the contract required a process for agreeing the value of variations. This process is a common feature of final account discussions, but it is not always prescribed by the contract. I wonder if a court would reach a different conclusion if the process was not expressly required by the contract.

As a side note, the Board also found that, in any event, the June Letter recorded concluded agreements, and so was subject to the well-established exception that without prejudice correspondence can be admitted to determine whether an agreement has been concluded.

In addition, Petroleum had waived any right to rely on any without prejudice privilege by referring to the letter in its pleadings and including it in the agreed bundle. This is unsurprising on the facts.

WOULD IT HAVE MADE A DIFFERENCE IF THE JUNE 2008 LETTER HAD BEEN MARKED "WITHOUT PREJUDICE"?

It is hard to say. There was one letter from April 2009 that was marked "without prejudice", but the Board found that was objectively part of the clause 7 process, and so was in fact open.

However, in addition to the public policy rationale for without prejudice privilege, there is another contractual basis for the privilege where the parties agree that their negotiations are to be conducted on a without prejudice basis. This arises where the parties expressly mark their correspondence "without prejudice", and the courts respect this as an implied (or sometimes even express) agreement between the parties (Passmore on Privilege (Sweet & Maxwell 4th edition, 2019) at paragraph 10-020).

Therefore, while labelling correspondence "without prejudice" will not always be determinative, it is definitely worth using the label if you do not want your correspondence to be shown to a decision maker in the event negotiations are unsuccessful.

This article first appeared on the Practical Law Construction blog dated 7 February 2023

RELATED CAPABILITIES

- Construction Disputes
- Real Estate

MEET THE TEAM

Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998

James Clarke

London

james.clarke@bclplaw.com
+44 (0) 20 3400 3507

should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.