

Briefing Note

Supreme Court creates new exception to the rule that without prejudice documents are inadmissible in Court proceedings



Oceanbulk Shipping and Trading SA v. TMT Asia Ltd and others [2010] UKSC 44

The Supreme Court has recently handed down a judgment which provides a further instance in which “without prejudice” negotiations may lose their status as privileged from admission as evidence in subsequent Court proceedings.

Coined the “interpretation exception,” evidence of without prejudice negotiations may now fall outside the scope of privilege and be admissible in evidence if they are relevant to the interpretation of ambiguous terms of an agreement arising out of the negotiations.

The Without Prejudice Rule

The without prejudice rule is a long-established common law principle, stemming from the public policy principle that parties to litigation should be encouraged to negotiate a settlement, rather than continuing to litigate.

Communications between parties, whether oral or in writing, which are a genuine attempt to settle will not be admissible in evidence if the matter being negotiated eventually goes to Court. This allows the parties to communicate frankly and freely between each other, without fear that any admissions, assertions or offers will be used against them at a later stage in the proceedings.

Because the principle was founded upon public policy, the courts have shown a general reluctance in departing from it and allowing without prejudice documents to be admitted into evidence. They have, however, developed a number of exceptions to the rule. The Supreme Court, in this case, recognised one exception and added another.

The Court recognised the “rectification exception,” whereby a party to without prejudice discussions can rely on the negotiations to show that a settlement agreement should be rectified. The Court also introduced the “interpretation exception.”

The Interpretation Exception

The parties in *Oceanbulk* were in dispute over the meaning of a settlement agreement which had been concluded between them, the negotiations for which were conducted on a without prejudice basis. TMT sought to rely on those communications as an aid to the interpretation of the agreement. However, Oceanbulk argued that the negotiations should be excluded from evidence because they were without prejudice.

The Court held that there already exists a principle which allows pre-contractual negotiations to be admitted as evidence in determining how the parties intended a contract to be interpreted. The Court

saw no reason why this principle should not apply to negotiations simply because they had been conducted on a without prejudice basis. The Court held that it should be allowed to have regard to all background evidence in order to make an objective assessment of what the parties intended when they entered into the agreement.

This means that any without prejudice discussions may be used as evidence if the construction of a settlement agreement becomes the subject of litigation and the discussions are required to assist the Court in interpreting the agreement.

Comment

The judgment in *Oceanbulk* may mean that parties are now more reluctant to speak openly or make admissions or concessions in without prejudice discussions. However, the case should also serve to ensure that agreements are drafted with more care and precision, particularly in relation to defined terms.

Parties should be aware that the Courts will only allow without prejudice negotiations to be admitted in evidence in these very limited circumstances.

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This note does not constitute legal advice but is intended as general guidance only. It is based on the law in force on 23 November 2010

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