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Court of Appeal upholds “without prejudice” rule by **William Cecil and Helen Conybeare Williams**

Parties entering into settlement negotiations want to speak freely without the risk that what they say may be used against them later. Typically they rely on the general rule that it is impermissible to give evidence of without prejudice communications and discussions. The rule is subject to limited exceptions. The majority of the Court of Appeal in *Oceanbulk Shipping & Trading SA v. TMT Asia Limited* [2010] EWCA Civ 79 recently allowed an appeal against the decision of the Commercial Court extending these exceptions. The question was whether another exception does or ought to exist so that parties’ without prejudice communications when exploring a compromise would be admissible if there was a dispute as to the interpretation of a settlement agreement.

The decision in *Oceanbulk* gives a helpful analysis of the scope of the without prejudice rule. The underlying policy is to encourage parties to settle their disputes without the need to resort to litigation. Parties should not be discouraged or inhibited in negotiating openly by the knowledge that anything said in the course of such negotiations may be used to their prejudice in any proceedings. The rule excludes admissions as well as general statements, both oral and written, being given in evidence where these are made in the course of negotiations that are genuinely aimed at settlement. It applies whether or not the settlement is concluded. As a matter of principle, the courts have emphasised the importance of the rule and that they will be slow to lift the umbrella of without prejudice unless justice clearly demands it.

The occasions when without prejudice statements can be referred to in evidence are restricted. These were described in *Unilever Plc v Proctor & Gamble* [2000] 1 WLR 2346 as including where there are issues as to whether (i) the communications resulted in a concluded compromise agreement, (ii) an agreement apparently concluded should be set aside on grounds of misrepresentation, fraud or undue influence and (iii) a party’s statement, in the absence of a concluded settlement, gives rise to an estoppel where the other party was intended to and did act upon such statement.

The leading judgment in *Oceanbulk* (Longmore LJ) held that the rule that without prejudice discussions are inadmissible should trump the general policy of enabling the court to have the maximum possible assistance in ascertaining parties’ (objective) intentions. So the exceptions to the without prejudice rule listed in *Unilever* should not be extended to cover admissibility to aid interpretation of the terms of the settlement agreement (although it was common ground that without prejudice material would also be admissible for a claim for rectification of a settlement agreement).

However, there was an unusually vigorous dissenting judgment from Ward LJ, who considered that it was common sense to use negotiations to establish the truth of what the concluded contract means and that “*not to do so would strike my mother as ‘barmy’ .. it strikes me as illogical*” and that “*It goes to prove what every good old-fashioned county court judge knows: the higher you go, the less the essential oxygen of common sense is available to you. So I am unrepentant. With, of course, great respect to my Lords, I dissent.*”



However, notwithstanding the apparent strength of these divergent views, on a practical level, parties facing a dispute will be reassured that they can remain confident in the degree of protection afforded by the without prejudice rule so that what they discuss in settlement discussions will not be admissible in the event the terms of the settlement are later in dispute.

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