God Save the Queen and Without Prejudice Privilege

26 October 2021

God save the queen and without prejudice privilege. *High Court decision, involving the Sex Pistols, confirms properly constituted "without prejudice" negotiations will remain privileged unless parties indicate a clear intention to "open" discussions.*

INTRODUCTION

In the recent judgment of *Jones v Lydon* [2021] EWHC 2322 (Ch), the High Court has considered whether the latest email in an email chain benefits from the privilege attaching to prior emails labelled "without prejudice", even where that particular email has no such marking.

The Court also dealt with arguments that portions of an email in the without prejudice email chain were not subject to without prejudice privilege because they dealt with issues separate from the dispute which was the subject of negotiations.

BACKGROUND

The factual background to the dispute relates to an agreement reached between members of the punk band The Sex Pistols ("Band Members Agreement" or "BMA"). The principal issue in the case concerned the effect and enforceability of the BMA. If the BMA was effective, its terms required band members to take decisions regarding the use of their music by majority vote. The claimants, band members Mr Jones and Mr Cook, as well as the second and third defendants, Mr Matlock and Mr Button, wished to give permission to use The Sex Pistols' music in a TV series. The first defendant, Mr Lydon (The Sex Pistols' lead singer) opposed such permission.

Mr Lydon argued that the BMA was not binding. Firstly, Mr Lydon asserted that the claimants had never relied on the BMA in the past and had always made decisions unanimously. Importantly, Mr Lydon also argued that the band members were

estopped from relying on the BMA on the basis of the contents of an email sent by his solicitor, Mr Grower, which the claimants failed to reply to and which was not marked "without prejudice" (the "Unmarked Email"). Mr Lydon also sought to rely on portions of another email, which was contained within the relevant chain and was marked "without prejudice" (the "Marked Email").

It is worth noting that a speedy trial had been ordered in this case, and so the trial judge was required to rule on the issue of "without prejudice" privilege (a decision typically reserved for pre-trial hearings).

The Unmarked Email

In 2014, a disagreement broke out between the band members regarding the division of money arising out of a T-Mobile advert. This disagreement was the catalyst for the wider dispute regarding the band's decision-making process for pursuing commercial opportunities. The disagreement also spurred the start of a "without prejudice" chain of emails, attempting to resolve the members' differences.

This chain of emails ultimately resulted in the Unmarked Email, which argued that the BMA had no effect and that the band members had always agreed to make decisions unanimously. The Unmarked Email was a reply to a previous email from Mr Button (reflecting the claimant's view), which raised the existence of the BMA and argued that members were bound to make decisions by majority vote. Mr Lydon sought to rely on the Unmarked Email (and the claimant's failure to reply to it) as part of his estoppel argument. The claimants argued that the label "without prejudice" had been applied to the preceding emails in the chain, and therefore naturally applied to the last one as well. Accordingly, the claimants argued that the Unmarked Email was protected by without prejudice privilege and so it, and their lack of response, could not be relied on at all.

The Marked Email

Mr Lydon argued that the Marked Email dealt with two topics:

- the T-Mobile advert dispute; and
- the Sex Pistols' decision-making process.

Mr Lydon insisted that only the first topic was covered by without prejudice privilege, since the second topic dealt with issues separate from the advert dispute and was not the subject of negotiations. The claimants argued that Mr Lydon could not dissect the Marked Email into privileged and non-privileged parts, and so could not rely on any portion of it.

JUDGMENT

"Without Prejudice" Communications

It is well established that the effect of marking a communication "without prejudice" is that the communication is inadmissible in evidence at trial—subject to certain limited exceptions. The rule exists to encourage parties to settle by ensuring that the content of such negotiations or offers does not harm their case in any future dispute.

A failure to reply to a "without prejudice" negotiation or offer is protected in just the same way as any express communication.

Furthermore, once properly constituted "without prejudice" negotiations have commenced, discussions will continue on that basis until an intention to depart from them (to "open" negotiations) is clearly signalled.

The courts have also confirmed that it would be contrary to the underlying objective of without prejudice privilege (i.e., protection from admissions against interest) and create huge practical difficulties (i.e., parties monitoring their every word) if parties could dissect out identifiable admissions and withhold protection from the rest of the without prejudice communication.

The Decision

The trial judge considered that because the Unmarked Email expressly stated that it was a reply to Mr Button's email, it was a response to a "without prejudice" email. Thus, it too was "without prejudice" as part of the chain—especially since it continued to deal with the extant dispute.

The judge noted the lack of any indication from Mr Grower that his email might be an "open" response (i.e., not subject to without prejudice privilege). The only reason for supposing that it might be "open" was the absence of the "magic words", "without prejudice", from the subject line. The judge held that this was "*nothing like enough to take this letter outside the without prejudice line*" into "open" communications.

In short, the court ruled that the Unmarked Email was to be treated as a "without prejudice" communication, and so it, and Mr Button's (non-)response, could not be relied upon in the proceedings.

Furthermore, the court found that it was possible for a without prejudice document to contain material that was separate from the without prejudice negotiations and so not covered by the without prejudice rubric. However, the court held that it would not readily, and without special reason, seek to dissect a without prejudice document into

privileged and non-privileged parts. On the facts, the court found there was no such "special reason" and also considered that both topics in the Marked Email were part of the overall dispute and negotiations. On this basis, Mr Lydon was also not entitled to rely on any part of the Marked Email, since all of it was privileged.

GOING FORWARD

This decision signals that the courts will not readily find that properly constituted "without prejudice" negotiations have turned into "open" discussions unless parties demarcate a clear line in the sand.

It is also clear the courts will not willingly engage in an "editing exercise", whereby some parts of without prejudice communications are found to be privileged and others are not.

Finally, it appears the absence of the "magic words", "without prejudice", will not always be enough to imply negotiations are no longer so protected.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Emma Laurie-Rhodes
elaurierhodes@debevoise.com

Blaise Matthews
bmatthews@debevoise.com

Callum Murphy
(Trainee Associate)
cmurphy@debevoise.com