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# Privilege and Waiver

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## 'Without Prejudice' Privilege

January 2021

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# Privilege and Waiver

## **'Without Prejudice' Privilege**

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January 2021

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# 1. An Introduction to the 'Without Prejudice' Rule

Business communications are often titled with the phrase “*Without Prejudice*”. While the phrase seemingly advances a protection to the author of a letter or a document, it is incorrect to assume that the phrase always provides a blanket protection against any all liabilities, calling for certain exceptions to this rule. Courts across many jurisdictions have interpreted the phrase with an aim to establish a legal framework for conduct of negotiations in the business world.

Another form of privilege is the ‘without prejudice’ privilege, whereunder any admission(s) that parties have expressly consented to must not be considered relevant facts and not admissible as evidence. Therefore, such admissions are excluded from the purview of court proceedings.

The Black’s Law Dictionary defines ‘without prejudice’ as:

“

*“where an offer or admission is made ‘without prejudice’, or a motion is denied or a bill in equity dismissed ‘without prejudice’, it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided.”<sup>1</sup>*

”

The phrase ‘without prejudice’ was succinctly interpreted by the English Court of Appeal in *Walker v. Wilsher*,<sup>2</sup> to mean that the position of the writer of a letter is not prejudiced if the terms proposed by the writer are not accepted. Simply put, the contents of a letter titled with “*without prejudice*” cannot be used against the writer of the letter if the terms proposed by the writer are not accepted by the other party. If the proposed terms are accepted and a contract is entered into - the letter written ‘without prejudice’ tends to be redundant in the new contractual relationship thus established. The underline idea is to encourage parties fully and frankly to put their cards on the table.<sup>3</sup> While negotiating settlement of dispute, parties accede towards attaining common grounds by putting forth admissions in one form or the other. Such admissions are not reflective of the actual rights or interests which they are entitled to. When such negotiations are conducted with a view to a settlement and are conducted ‘without prejudice’, it is not open for one of the parties to give evidence of an admission made by another.

‘Without prejudice’ privilege protects both written and oral communications between parties that are genuinely aimed at settlement.<sup>4</sup> The underlying rationale for this privilege is best captured in Lord Denning’s opinion in the English case of *McTaggart v. McTaggart*,<sup>5</sup> wherein it was held that the role of the ‘without prejudice’ privilege is to protect “*communication during negotiations for reconciliation*”. This privilege protects parties from providing access to documents to the opposing party or to prevent them from presenting such documents in court that they already have access to.

1. Black’s Law Dictionary (4<sup>th</sup> ed.).
2. (1889) 23 QBD 335.
3. *Cutts v Head*, 1983 WL 216802.
4. *Rush & Tompkins Ltd v. Greater London Council*, [1989] AC 1280.
5. [1948] 2 All ER 754.

## 2. Waiver of ‘without prejudice’ privilege in India

‘Without prejudice’ privilege finds statutory recognition within Section 23 of the Indian Evidence Act. This privilege governs admissibility of evidence in court and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them towards a conclusion’.

While legal professional privilege is a substantive right, ‘without prejudice’ privilege is generally a rule of admissibility, either based on a contractual, or implied contractual right, or on public policy.<sup>6</sup>

An important ruling in this regard discussing the contours of ‘without prejudice’ privilege is the Supreme Court’s ruling in *M/s Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd.*<sup>7</sup> Laying down general principles on such documents, the Court observed that a genuine intent to settle, which is a precondition to the applicability of the principle, can be deduced through surrounding circumstances and clear context indicating intent to compromise. It is not necessary for documents to mention “*without prejudice*” within so long as they as part of a tangible “body of negotiation correspondence” between parties.<sup>8</sup>

Similarly, reports etc. which have may or may not been marked as “*without prejudice*” and not even shared with the other side and have nothing to do with negotiations – may not be protected by the ‘without prejudice’ rule.<sup>9</sup> In this context, reference may be drawn to the Australian Evidence Act 1995, which provides that “*a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute*” would not be adduced as evidence.<sup>10</sup> The Supreme Court of New South Wales in *Hera Resources Pty Ltd v Gekko Systems Pty Ltd.*<sup>11</sup> held that in case of a report annexed to a letter which was not provided “*as part of some process agreed between the parties to negotiate a settlement*” would not be protected by ‘without prejudice’ privilege.

The privilege attached to such ‘without prejudice’ correspondence would have to be evaluated and interpreted as per the relevant facts and circumstances. For example, if the material on record indicates that the negotiations are still in progress and there is no finality on what was contained in the document marked as “*without prejudice*”, then the document so marked cannot be considered without the consent of both the parties.<sup>12</sup> Waiver of such ‘without prejudice’ correspondence can be considered at the trial only with the consent of both parties.<sup>13</sup>

Therefore, while legal professional privilege can be waived at the behest of the party entitled to the privilege, however, ‘without prejudice’ privilege can only normally be waived with the consent of both parties to the correspondence.<sup>14</sup>

In the subsequent chapter, we further explore the contours of the waiver of ‘without prejudice’ privilege whilst drawing references from common law jurisdictions such as the UK and Singapore.

6. *M/s Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd.* (2006) 12 SCC 673 (referring to Phipson on Evidence, Sixteenth Edition, pages 655-657).

7. (2006) 12 SCC 673.

8. *ibid.*

9. *ibid.*

10. Evidence Act 1995, s 131(1)(b); see *Galafassi v Kelly* [2014] NSWSC 190 at [115].

11. [2019] NSWSC 37.

12. *Oberoi Constructions Pvt. Ltd. v. Worli Shivshahi Co-op. Housing. Society Ltd.*, 2008 (5) Bom CR 855.

13. *Chairman MD NTPC v. Reshmi Construction*, (2004) 2 SCC 663.

14. *ibid* (referring to Phipson on Evidence, Sixteenth Edition, pages 655-657).



## 3. International Perspective<sup>15</sup>

### I. Waiver of 'without prejudice' privilege in the UK

English common law principles govern invocation of the 'without prejudice' privilege in the UK. Some of the crucial considerations in this regard are – whether, in the course of negotiations, the parties reasonably contemplated litigation if they could not agree,<sup>16</sup> and whether the discussions were or ought to have been seen by both parties as “negotiations genuinely aimed at settlement.”<sup>17</sup> The 'without prejudice' rule has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation. If a letter is not written to initiate or continue a bona fide attempt to effect a settlement, it is not likely to be protected by the 'without prejudice' privilege. Conversely, if it is written in the course of such a bona fide attempt, it will be protected by privilege even if there is no heading or reference in the letter to that effect.<sup>18</sup> Additionally, when a letter contains an offer made 'without prejudice', the privilege would extend to the entire correspondence.<sup>19</sup>

The leading authority to understand the applicability of this principle is *Rush & Tompkins Ltd. v. Greater London Council*.<sup>20</sup> In this case, the plaintiff was a construction company that had entered into 'without prejudice' negotiations with the defendant, Council. However, the same dispute, being based on a common cause of action, extended to another party as well that sought disclosure of the contents of these negotiations. Denying this request, the House of Lords held that documents or communications exchanged in genuine pursuance of a settlement were protected by the 'without prejudice' privilege.<sup>21</sup> However, merely labelling documents as being 'without prejudice' is not enough to attract privilege – just as the absence of the term is not necessary to waive such privilege.<sup>22</sup> The House held that courts would have to examine the relevant factual circumstances to deduce the intent of parties of parties to reach a settlement and accord privilege accordingly. Thus, a waiver in such circumstances could only occur when both parties were in agreement of such disclosure.<sup>23</sup> In some cases, the nature of the impugned communication is also a relevant determining factor.<sup>24</sup>

Waiver of 'without prejudice' privilege can also be express or implied and must be determined by examining the conduct of the parties. In cases where both parties agree to disclose such communications, it amounts to an express joint waiver and is admissible in Court. However, implied waiver by both parties can also occur. In *Hall & Another v Pertemps*,<sup>25</sup> it was observed that the two parties had, although separately, waived 'without prejudice' privilege in separate causes of action by making and denying allegations in these proceedings. However, in such cases, one party may contest the waiver of privilege by the other, hence courts are to deduce 'implied' waiver through conduct.

In the interest of justice, English Courts have created exceptions to this rule, whereby such privilege is waived to meet larger public policy objectives. Some of these occasions which may not prevent admissibility of evidence on the basis of the 'without prejudice' rule, are listed below:

15. We are licensed to practice only Indian law and the chapter on international perspective dealing with UK and Singapore laws are purely based on research and a brief overview has been provided.

16. *Barnetson v. Framlington Group Ltd.*, [2007] 1 WLR 2443.

17. *Sang Kook Suh, MI Jung Suh v Mace (UK) Limited*, [2016] EWCA Civ 4.

18. *Dixons Stores Group Ltd. v. Thames Television Plc*, [1993] 1 All ER 349 UKWQ.

19. *Paddock v. Forrester*, (1842) 3 Scott NR 715; 133 ER 1404.

20. [1989] AC 1280.

21. *ibid.*

22. *ibid.*

23. *ibid.*

24. *FM Capital Partners v. Marino*, [2017] EWHC 3700.

25. [2005] EWHC 3110.

- i. Where the issue was whether the ‘without prejudice’ communications had resulted in a concluded compromise agreement.<sup>26</sup>

If the exchange of ‘without prejudice’ letters have resulted in an agreed settlement, such correspondence is admissible because the relevance of such letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. The letters are only relevant because they are reflective of the formation of the contract which has subsequently subsumed the previous dispute.<sup>27</sup>

- ii. The admissibility of ‘without prejudice’ negotiations as evidence to aid interpretation of a settlement agreement was dealt in detail in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd.*<sup>28</sup> The court observed that communications between the parties during ‘without prejudice’ negotiations which explain the surrounding circumstances to the court can be admissible in evidence for the purpose of determining how the terms of an ensuing settlement agreement should be construed.<sup>29</sup>
- iii. In cases of allegations against an agreement in that the agreement itself should be set aside on the ground of misrepresentation, fraud or undue influence - documentary evidence of negotiations prior to such an agreement can be admissible before the court.<sup>30</sup> Such admission can be made whether to set aside an agreement concluded between the parties during the negotiations on the aforesaid grounds.<sup>31</sup>
- iv. Where a statement might be admissible as giving rise to an estoppel.

In certain cases, even if there is no concluded compromise, when a clear statement is made by a party to negotiations on which the other party acts, or intends to act, it may be admissible as giving rise to an estoppel.<sup>32</sup> The basis of the exception is that a party should not be able to make an unambiguous statement in the ‘without prejudice’ negotiations with the sole intention to make the other party first rely on it and then prevent the other party from giving evidence of that statement on which he has relied on. Such communications may result in an unconscionable abuse of the ‘without prejudice’ protection.<sup>33</sup>

- v. Where the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.<sup>34</sup> Therefore, a ‘without prejudice’ letter containing a threat is admissible to prove that the threat was made.<sup>35</sup>
- vi. Where the evidence was admissible in order to explain delay or apparent acquiescence. This exception may be limited to “*the fact that such letters have been written and the dates at which they were written*”;<sup>36</sup> and not the contents thereof;
- vii. Where, in an action for negligence, the evidence was admissible to show that the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations brought by him against a third party.<sup>37</sup>

26. See *Tomlin v. Standard Telephones and Cables* [1969] 1 WLR 1378 as cited in *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

27. *Muller v. Linsley and Mortimer, Court of Appeal* [1996] PNLR 74, 81.

28. [2010] UKSC 44.

29. *ibid.*

30. *Underwood v. Cox (1912) 4 DLR 66* as cited in *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

31. *ibid.*

32. *Hodgkinson & Corby Ltd. v. Wards Mobility Services Ltd.* [1997] FSR 178, 191 as cited in *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436; *Berkeley Square Holdings and Others v. Lancer Property Asset Management Limited & Ors.*, [2020] EWHC 1015 (Ch).

33. *Hodgkinson & Corby Ltd. v. Wards Mobility Services Ltd.* [1997] FSR 178, 191, per Neuberger J.

34. *Foster v. Friedland*, November 10, 1992, CAT 1052 as cited in *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

35. See *Muller v. Linsley and Mortimer, Court of Appeal* [1996] PNLR 74, 81.

36. See *Walker v. Wilsher* (1889) 23 QBD 335, 338 as cited in *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

37. See *Unilever plc v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

The expansion of the above exceptions is not encouraged in light of the underlying principle to encourage parties in dispute to engage in frank discussions before they resort to litigation. Other cases where the 'without prejudice' material may be referred to are - when the justice of the case requires it,<sup>38</sup> and if without such proof, the claim would be non-justiciable.<sup>39</sup>

An exception to the 'without prejudice' rule may also be triggered in cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made.<sup>40</sup> Thus, when the issue is whether 'without prejudice' letters have resulted in an agreed settlement, the correspondence may be admissible considering the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted.<sup>41</sup>

Another consideration which may be relevant for courts while examining an implied waiver is - the avoidance of "salami slicing" discussions between clients and their counsels. This refers to the natural tendency of clients to be watchful of their words and actions in the presence of solicitors of the opposite parties,<sup>42</sup> often dissuading honest negotiations between parties. Thus, courts may assume that privilege is waived only for certain portions of the discussion. In *Sang Kook Suh v Mace (UK) Ltd*,<sup>43</sup> the claimant (representing herself) approached the respondent's solicitor to understand the progress of the case. During this meeting, the claimant made admissions, which were detrimental to her case, and left the meeting indicating that she did not intend to engage in any out-of-court meetings. The respondent sought to rely on these admissions by arguing they were admissible as there was no intention to settle, and that only communications made after the express declaration of the claimant, if any, would be protected by the without prejudice principle. Whilst rejecting this submission, the Court of Appeal found that the entirety of these discussions was protected by the 'without prejudice' principle because the facts indicated that the claimant was not aware of the availability of the principle.<sup>44</sup> The Court also noted that there appeared to be no other reason for which a claimant would personally approach a solicitor except settlement, thus attracting privilege.<sup>45</sup> In doing so, the Court referred to the overarching purpose of this privilege, i.e. 'without prejudice' privilege is concerned with justice, rather than mere examination of conduct.

A detailed correspondence between parties may contain other admissible elements apart from the privileged content privileged under the 'without prejudice' rule. The admissibility of such other elements was considered by the England and Wales Court of Appeal in *Unilever Plc v The Procter & Gamble Co.*<sup>46</sup> The Court was of the view that it would generally not be permissible to dissect documents to ascertain identifiable admissions and withhold protection from the rest of 'without prejudice' communications. Such a dissection would be contrary to the underlying objective of the 'without prejudice' rule, i.e., giving protection to the parties.

## II. Waiver of 'without prejudice' privilege in Singapore

Similar to India, 'without prejudice' privilege is embodied in Section 23 of the Singapore Evidence Act and common law principles.<sup>47</sup> The Singapore Court of Appeal has adopted the English public policy justification for this privilege

38. See *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280.

39. *Christopher James Briggs and Others. v. Alexander Clay and Others*, [2019] EWHC 102 (Ch).

40. *Muller v. Linsley & Mortimer* [1996] 1 PNLR 74 (distinguished in *Christopher James Briggs and Others. v. Alexander Clay and Others*, [2019] EWHC 102 (Ch)).

41. *ibid.*

42. *Unilever Plc. v The Procter & Gamble Co.*, [2000] 1 WLR 2436.

43. [2016] EWCA Civ 4.

44. *ibid.*

45. *ibid.*

46. [2000] 1 WLR 2436.

47. *United Overseas Bank Ltd. v. Lippo Marina Construction Pte Ltd.*, [2018] 4 SLR 391.

by expressly approving *Rush & Tompkins v. Greater London Council* [1989] AC 1280.<sup>48</sup> Thus, the principles governing determination of express and implied waiver are similar to English law.

Additionally, Singaporean Courts have considered whether documents ruled to be part of a continuous course of 'without prejudice' negotiations will be treated as being written 'without prejudice', even if some of the documents in the series are not so marked 'without prejudice.' Courts have held that this is permissible in the interests of justice<sup>49</sup> but does not operate as an absolute principle and is subject to the facts of the case at hand.<sup>50</sup>

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48. *Mariwu Industrial Co (S) Pte Ltd. v. Dextra Asia Co. Ltd.* [2006] 4 SLR(R) 807.

49. *Info-communications Development Authority of Singapore v. Singapore Telecommunications* [2002] 3 SLR 289.










50. *Re Sunshine Securities* [1975–1977] 1 SLR 282.

## 4. Conclusion

Based on interpretations adopted by courts while interpreting the 'without prejudice' rule, we note that such rule cannot be utilized as cloak for gaining privilege against any communication being relied upon by the other party in absolute terms. Further, considering that the applicability of the rule is triggered only when the parties are in dispute or negotiating such a dispute, it is critical that informal admissions (not titled "*without prejudice*") are not made by parties when negotiating an existing dispute or when anticipating a possible dispute. While engaging in documentary correspondence during such negotiations, parties are advised to make sure to title their writings with "*without prejudice*". Although courts have been inclined to grant protection to documents not titled "*without prejudice*" in light of the circumstances surrounding the transactions, it is advisable to title all such correspondences as 'without prejudice', while negotiating a settlement.

While Indian jurisprudence is still at a nascent stage in comparison with UK and Singapore in the context of legal privilege and waivers thereto, similarities may be drawn among them. Needless to say, there is scope of sufficient development, for which cues may be taken from the English and Singaporean jurisprudence.

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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

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As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular “Hotlines”, which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire ‘blue sky’ thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

[We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com](mailto:research@nishithdesai.com)



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## Privilege and Waiver

### 'Without Prejudice' Privilege