With or Without Prejudice?

By Roger Franklin, Partner, Head of Insurance Litigation, Edwin Coe LLP

It is a truth universally acknowledged, that a loss adjuster in defence of a fortune, must understand the basic principles of without prejudice privilege.

In practice that is not difficult, because the issue usually arises in the context of a dispute between an insured and insurer where offers and counteroffers are made which neither party wishes to be seen as admissions. However, what is the status of those communications in subsequent litigation involving a third party? For example, in the course of a subrogated claim?

The without prejudice rule

The standard formulation of the without prejudice rule is that it prevents statements made in a genuine attempt to settle an existing dispute, whether made orally or in writing, from being put before the court as evidence of admissions against the interest of the party that made them. Where the rule applies, the statements are not generally admissible either in the substantive dispute or on questions of costs. "*Admission*" does not mean a formal admission, but comprises a statement made by a party against his or her own interest.

There can be a debate about when the rule applies. This issue will generally be decided on the facts of the case, but there has to be a real dispute and a genuine attempt to settle it. The use of the phrase "*without prejudice*" is a clear indication of an intention to apply the rule, but is not determinative. Similarly, the fact that a communication is headed "*without prejudice*" does not prevent that communication from being admitted in evidence. Thus, for example, an initial communication by a loss adjuster to an insured concerning the values at risk might not benefit from without prejudice privilege if no dispute had arisen at that stage.

The origins of the rule are largely based on public policy: the parties to a dispute are encouraged to resolve their differences without the intervention of the courts, and settlement discussions are facilitated if the parties can speak freely without fear that any admissions they make to try to settle the matter may be used against them should the settlement discussions fail.

There is authority for the principle that without prejudice communications cannot be referred to in a subsequent, connected dispute with a third party. In Rush & Tompkins Ltd v Greater London Council [1989] 1 AC 1280 it was held that "*....the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement*".

The Exceptions

There are, however, a number of important exceptions to the without prejudice rule which are relevant in the insurance context. For example, without prejudice communications have been admitted in evidence in the following circumstances:

- Where the issue is whether the without prejudice communications have resolved in a concluded settlement agreement.
- As evidence of misrepresentation, fraud or undue influence.
- Where a statement may have given rise to an estoppel.
- To explain delay.
- As evidence about the reasonableness of a settlement.

The exception concerning the reasonableness of a settlement is often referred to as the 'Muller exception' and derives from the case of *Muller v Linsley & Mortimer* [1996] 1 PNLR 74.

In Muller, the question was whether solicitors could obtain documents evidencing negotiations of a settlement by their client in circumstances in which the client had brought proceedings against them alleging that their negligence had caused the settlement to be at a lower level than it otherwise would have been.

The court held that the communications should be produced. The claimant had put the reasonableness of his own attempt to mitigate his loss in issue and therefore could not both assert the reasonableness of the settlement and claim privilege for the documents by which it was achieved. Accordingly, the without prejudice rule did not apply.

The Muller case proceeded on the assumption that it would be possible to separate material relevant to the issue of reasonableness of the settlement from material that went to the question of admission. Subsequent cases have questioned that assumption, not least because it is likely to be difficult to separate out statements without undermining the very privilege relied upon.

In *Briggs & Other v Clay & Others [2019] EWHC 102 (Ch)*, the court concluded that, for the Muller exception to arise, it must be necessary for the material to be admitted in order to resolve an issue raised by a party to the without prejudice negotiations, in circumstances where this did not adversely affect the legitimate protection given to the negotiating party. The court concluded in Briggs that the content of the without prejudice material was inadmissible, but the fact of the without prejudice negotiations could be referred to.

Conclusion

So where does this leave us? Notwithstanding that a number of recent cases post Muller appear to undermine the reasoning for it, Muller remains an exception that can be relied upon in certain circumstances. Those circumstances arise when a party to settlement negotiations has put those negotiations in issue in the subsequent proceedings, which means that he cannot say that the without prejudice discussions concerning those negotiations should be excluded.

Unfortunately, what exactly is meant by putting the negotiations in issue remains unclear. In the insurance context, where the insurer has entered into lengthy negotiations with its insured prior to reaching a settlement, it will be the defendant party to the subrogated claim that puts the negotiations in issue, usually in relation to an argument that the claimant has failed to mitigate its loss. In that scenario, it is unclear why the protection of without prejudice privilege should be lost when the fact of the agreement is not in dispute and the documents surrounding it are properly disclosable.