Without Prejudice Communications

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IN the course of our works, many engineers will no doubt receive letters, or sometimes even issue letters, that have the words "without prejudice" or even "strictly without prejudice" prominently marked on them. What do these words mean? What is the status of those letters with these words marked? Do these words have their intended effect?

These series of questions are in fact interlinked. They can be answered by first appreciating the meaning of the "without prejudice" tag. Generally, those words are intended to convey the senders' intention that the ***letters shall not be produced in a court of law***.

The general thrust of this can be seen from the wordings in section 23 of our Evidence Act 1950. This section reads as follows:

> "In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

The rationale of this can be easily appreciated. It is stated by Lord Griffiths in the House of Lords (i.e. the highest judicial authority in the United Kingdom) in the case of *Rush & Tomins Ltd* v. *Greater London Council & Anor* [1988] 3 All ER 737 at pp. 739 – 740:

> "The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate to the finish."

In the course of negotiations between two parties with a view of settling a dispute, compromises and concessions can sometimes be given and required to be put in writing. However, and this is true sometimes as a commercial reality, those compromises and concessions may still not lead to both parties reaching a consensus. Contrary to common intuition, the party that has made the compromises and concessions should not be taken to be limited to the compromised position. It is perfectly legitimate, and some may say fair, for such a party to pursue what it sees as its full entitlements and rights, notwithstanding the compromises and concessions made earlier. This makes sense, for it facilitates parties coming to agreement.

The section of the Evidence Act reproduced above is thus set for this purpose. It relates to what has been referred to as without prejudice communications. In the case of *Oh Kuang Liang* v. *Associated Wood Industries Sdn Bhd* [1995] 4 MLJ 390, Mr Justice Abdul Malik Ishak said on p. 394:

> "I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence."

Section 23 of Evidence Act 1950 can be read in greater detail. It seeks to exclude an admission (or a compromise or concession freely given) and renders this irrelevant in court if that admission is made on either of the two circumstances below:

(a) if the admission is made "upon an express condition that evidence of it is not to be given"; and
(b) if the Court can "infer that the parties agreed together that evidence of it should not be given".

By stating that a particular communication or admission or concession is made "without prejudice", this constitutes the "express condition" mentioned in section 23.

The saving grace is that the Court may also infer, in the absence of this tag, to exclude any admission if the Court can gather that the evidence of the admission should not be admitted in Court.

With the rationale of "without prejudice" so appreciated, it follows that if an agreement has been reached after negotiation, or where there is no evidence of any negotiation, or where circumstances are such that the parties could not have intended exclusion, an admission cannot be excluded. That also means that the "without prejudice" tag loses its originally intended purpose even if the communications are so marked.

It is thus amazing to see that certain parties have gone overboard to mark "without prejudice" on their letters of award or letters of acceptance (which give rise to enforceable contracts). I have also seen payment vouchers rubber-stamped with "without prejudice". Clearly, these do not have their intended effect. The "without prejudice" tags are superfluous in these cases. Parties' agreement for their exclusion in court proceedings cannot be inferred.

Recently, Judicial Commissioner Datin Zabariah binti Mohd. Yusof of the High Court had decided in the case of *Duta Tegas Sdn Bhd* v. *Maju Holdings Sdn Bhd* [2009] 5 AMR 410 that a payment certificate in a construction contract does not "fall within the category of documents written with a view of settlement a dispute to render it inadmissible ..." (at p. 418). The payment certificates in question had been marked "without prejudice". Despite their production in court being challenged, the learned Judicial Commissioner referred to them and arrived at her decision accordingly. ■