Without prejudice correspondence—does silence constitute a statement? (Jones and another v Lydon and others)

This analysis was first published on Lexis®PSL on 03/09/2021 and can be found here (subscription required).

Dispute Resolution analysis: This judgment deals with a discrete issue arising in a speedy trial between members of the punk rock band Sex Pistols. It concerns admissibility of without prejudice correspondence, said to give rise to estoppel, and the fact of silence in response to this communication. Sir Anthony Mann analyses leading authorities on exceptions to without prejudice privilege, including the estoppel exception, and concludes that silence will only exceptionally qualify as the clear and unambiguous statement required to satisfy the test.

Written by Anastasia Tropsha, associate at PCB Byrne LLP.

Jones and another v Lydon and others [2021] EWHC 2322 (Ch)

What are the practical implications of this case?

Practitioners and litigants are reminded of the policy considerations behind without prejudice privilege and of the fact that there is no magic in marking an email 'without prejudice' or omitting to do so. The court will consider communications about the dispute in the same chain covered by the privilege unless there is a clear indication otherwise.

The estoppel exception to inadmissibility of without prejudice correspondence requires the following to be established:

- clear and unambiguous statement in without prejudice correspondence—silence is not ordinarily sufficient as such a statement
- by or on behalf of a party
- which was objectively intended to be relied upon by the opposing party
- was so relied upon by the opposing party
- to the effect that it would be unconscionable for the first party to act contrary to the statement, and
- inadmissibility of the correspondence containing the statement would make a trial issue not fairly justiciable

Parts of without prejudice communications cannot be admitted into evidence on the basis that they appear to relate to a separate topic than the remainder.

What was the background?

This action concerns the exploitation of the rights arising out of the activities of the punk band Sex Pistols and the question of whether an agreement reached in 1998 between its members (the 'BMA') is still effective so as to bind the first defendant (Mr Lydon) to accept a majority vote of the other band members as to whether or not to consent to the use of the band's music in a TV series.

Mr Lydon's case is that the BMA does not bind him due to estoppels said to arise out of historic incidents of unanimous decision-making. One of such incidents arises out a chain of correspondence, all but the last one of which are marked 'Without prejudice', although this last communication is alleged to be the most significant and the lack of response to the position expressed in it—giving rise to estoppel.

Once 'without prejudice' negotiation has been instituted, it continues on that basis until an intention to depart from it is clearly marked, as set out in the Court of Appeal in *Unilever plc v Proctor and Gamble Co* [2000] 1 WLR 2436, at 2449. However, Lord Justice Walker identified an exception in *Unilever*, whereby without prejudice correspondence gives rise to an estoppel if contrary behaviour would have been unconscionable (p 2444E, and also *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178, 191 (not reported by LexisNexis®UK).

The claimants relied on the *Hodgkinson* case as well as the decision of Mr Justice Roth in *Berkeley Square Holdings v Lancer Property Asset Management* [2020] EWHC 1015 (Ch) in relation to claims which are not 'fairly justiciable' without admitting 'without prejudice' material to argue that without prejudice correspondence and silence in response are admissible evidence.

What did the court decide?

Although the communication in question was not expressly marked 'without prejudice' it continued in the chain of correspondence to deal with the extant dispute. Any departure from such status ought to be appropriately signalled. Accordingly, this correspondence was without prejudice and any response to it, including silence was inadmissible unless one of the exceptions applied (paras [49]–[51]).

The judge advised a cautious approach to this exception. In *Berkeley*, the alleged estoppel arose out of a silence in the face of statements made in without prejudice mediation (para [15]). Roth J held it fell outside the estoppel exception, saying it was 'a very far cry from' the 'clear and unambiguous statement' Mr Justice Neuberger referred to in *Hodgkinson* (para [62]).

Having rejected the unilateral waiver argument, the judge considered the 'not fairly justiciable' exception and held that the email did not evidence anything useful about consensuality of the band's acts and so the point was perfectly triable without it. The silence in response was held not to be admissible as evidence of acceptance of the email's position. There was no clear and unambiguous indication by or on behalf of the claimants that a without prejudice statement or document can be relied on (with the objective intention that it is relied on); and silence did not amount to an implied statement to the same effect, especially given the history of disagreement. (See Lord Justice Aikens in *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA Civ 1572 as to silence not sufficing for objective unequivocal representations.)

Sir Anthony Mann also rejected the argument that a communication can be divided into parts covered by without prejudice privilege and parts not so covered (para [23]).

Case details

- Court: Chancery Division, High Court of Justice
- Judge: Sir Anthony Mann
- Date of judgment: 23 August 2021

Anastasia Tropsha is an associate at PCB Byrne LLP.

If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.