

**Insights**

## **WITHOUT PREJUDICE PRIVILEGE**

HIGH COURT GUIDANCE ON THE SCOPE OF PRIVILEGE PROTECTION FOR PARTIES ATTEMPTING TO RESOLVE A DISPUTE

Oct 04, 2024

### **SUMMARY**

The High Court has reaffirmed the strength of protection given to parties seeking to resolve a dispute through reliance on the ‘without prejudice’ rule during negotiations. In *FW Aviation (Holdings) 1 Limited v Vietjet Aviation Joint Stock Company*, the Court confirms the extraordinary nature of the ‘unambiguous impropriety’ exception and clarifies the ways in which ‘without prejudice privilege’ can be waived.

Clare Reeve Curatola and Sanjay Lohano outline the nature and scope of the rule, providing practical tips for commercial parties looking to rely on this privilege whilst negotiating the settlement of a dispute.

### **REMINDER: WHAT IS ‘WITHOUT PREJUDICE PRIVILEGE’ (“WPP”)?**

WPP is a form of privilege which can be relied on to prevent certain communications being used in court. This rule is primarily founded on “*the public policy of encouraging litigants to settle their differences rather than litigate them to the finish*” (Lord Griffiths, *Rush & Tompkins Ltd v Greater London Council*).

The ‘without prejudice’ label is often deployed broadly in sensitive commercial communications. To gain the protection of WPP, however, the communications must represent a genuine attempt to settle or resolve an existing genuine dispute. If this legal test is not met, simply labelling correspondence as ‘without prejudice’ will not prevent your counterparty relying on it, should the dispute escalate to court proceedings.

In contrast to legal professional privilege, a lawyer does not need to be involved in WPP communications, and WPP communications are not confidential as between the parties to the

dispute. The less obvious differences relate to how WPP can be waived and the exceptions to the WPP rule.

*FW Aviation (Holdings) 1 Limited v Vietjet Aviation Joint Stock Company* provides a helpful confirmation of how WPP can be waived and closely examines the exception of ‘unambiguous impropriety’.

## THE FACTS

This case concerned a dispute over four Airbus aircraft leases. The lessee, Vietjet (the “Defendant”) defaulted on their loan obligations. The lessor, FW Aviation (the “Claimant”), forfeited the leases, demanded possession of the aircraft and sought payment of the debt and damages. The main trial on liability was held in June 2024, with the Court deciding in favour of the Claimant.

[See the full judgment >](#)

After litigation had commenced but before the main trial was held, the parties held WPP discussions which the Claimant sought to rely on in their submissions. The issue of whether these WPP discussions were admissible was decided in a hearing held in May 2024.

The Claimant sought to rely on the following statements by the Defendant’s agent:

*“You can wait till you go to court and get an English judgement and then go to Singapore too and Vietnam and get another judgement. I cannot speak for the Vietnamese government but my sense is they are not going to collaborate with anyone from the UK or Singapore or anywhere else, and this could go on for years, but that’s not a threat, that’s just an observation”*

*“You can go through a court process in the UK to obtain [vindication of your rights]... you will probably fairly quickly get a judgement in your favour, then you will have to go through a process in Vietnam and you will soon discover how Vietnam works”.*

**(“Defendant’s Statements”)**

## ISSUES

The Claimant argued that it was able to rely on the Defendant’s Statements because:

1. an exception to WPP applied (the ‘unambiguous impropriety’ exception); and/or
2. the WPP had been waived because i) the Defendant had filed a witness statement (in response to the Claimant’s attempt to rely on the WPP statements) which contained an account of the privileged communications at issue and ii) the WPP statements were not confidential, having been reported in the media.

## DECISION

### UNAMBIGUOUS IMPROPRIETY

There are several exceptions to WPP. This exception is applicable where a claim of privilege would *'act as a cloak for perjury, blackmail or other unambiguous impropriety'* or, to put it more broadly, would lead to an *'unequivocal abuse of a privileged occasion'*.

The Court rejected the Claimant's arguments. The remarks did not constitute blackmail or a threat in what was clearly a 'without prejudice' conversation. A warning of difficulties of enforcement is not to be equated with blackmail.

The Court clarified that the party relying on the exception must be able to pass:

- a. An evidential test, whereby the conduct relied on must be unambiguously proved to have occurred; and
- b. A qualitative test, whereby the conduct must be unambiguously improper in character.

Applying this test, the Court found that:

- a. There was real room for doubt about what was in fact said. The standard is written statements or recorded conversations, not notes written by one party after an oral conversation.
- b. The contents of the statements at issue here did not amount to threats within the meaning of this exception. The judge held, at paragraph 22, that the remarks (if true) were *"more naturally interpreted as a warning as to difficulties of enforcement in Vietnam, rather than threats."*

### WAIVER

Unlike legal professional privilege, WPP does not belong to one single party but rather it belongs, collectively, to the parties to the communication. Therefore, it can only be waived with the consent of all parties.

The Court held that there was no waiver of the right to claim privilege by the Defendant. The service of a witness statement, asserting that privilege and designed to show that the privilege had not been lost for some other reason, cannot be construed as a waiver of the privilege.

Further, the Court considered that the Defendant's delay in objecting to the use of WPP material did not constitute waiver. This was because of the general principle that silence does not amount to consent and waiver of privilege is not to be inferred lightly. Similarly, the Court dismissed the fact that the media was aware of the WP communications as irrelevant.

[See the full judgment of the interim trial >](#)

## PRACTICAL TIPS

Whilst there is no 'new law' in this judgment, it is a helpful reminder of the rules on privilege.

Our takeaway points to note for those engaging in negotiations or discussions to settle a dispute:

- **Be cautious using the 'Without Prejudice' label:** the privilege will only ever apply when communications are a genuine attempt to settle an existing dispute.
- **Consider speaking notes or a summary sheet for WPP discussions** setting out the parameters for discussion (approved by Legal): even a failed application (challenging privilege) can be embarrassing, a distraction, and increase litigation costs.
- **Discuss high-risk WPP conversations orally, or record them in agreed written minutes** (depending on whether you might want to avoid or rely on this exception to the WPP rule).
- **Caution: unilateral waiver does not apply to WPP** but beware of inadvertently committing an act of waiver (e.g. sharing communication with a third party) that the other party could then elect to affirm to use the communication against the other party in litigation.

---

This article was written with trainee solicitor Sanjay Lohano.

## RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Investigations
- Regulation, Compliance & Advisory
- Aviation, Aerospace & Defense

## MEET THE TEAM



### **Clare Reeve Curatola**

London

[clare.reevecuratola@bclplaw.com](mailto:clare.reevecuratola@bclplaw.com)

+44 (0) 20 3400 3326

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.