

Insights

DOES WITHOUT PREJUDICE PRIVILEGE APPLY TO REPORTS PREPARED BY THIRD PARTIES?

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SUMMARY

The without prejudice (“WP”) rule generally prevents statements made in a genuine attempt to settle an existing dispute from being put before the court as evidence. Usually, these statements are made in communications between the opposing parties to a dispute.

Can WP privilege attach to documents produced by third parties who are not parties to the dispute? This was a question before a deputy judge of the English High Court (“Court”) in *BNP Paribas Depositary Services Ltd v Briggs & Forrester Engineering Services Ltd* [2024] EWHC 2575 (TCC)^[1].

BACKGROUND

A dispute arose out of a contract by which the claimants (“Trustees”) engaged the defendant (“Briggs”) to carry out certain renovation and building works.

A main dispute between the parties was as to the scope of their respective responsibilities under the contract in relation to the identification and removal of materials containing asbestos.

Before the court proceedings commenced, the parties engaged in WP negotiations. Although the negotiations never resulted in settlement, the Trustees, without informing Briggs, engaged a third party surveyor to carry out a survey in the hope that the resulting reports (“Reports”) would be of assistance to any further negotiations between the parties and therefore promote settlement.

Before trial, the Trustees made an application to the Court to prevent Briggs from relying on the Reports, arguing that the Reports were covered by WP privilege. (It is not explained in the judgment why litigation privilege was not asserted in respect of the Reports.)

COURT’S DECISION

The Court identified that the main legal issue was as follows: in what circumstances, if any, can documents that are not themselves communications between parties to a dispute but which are aimed at resolving the dispute, be covered by WP privilege?

The Court examined the English Court of Appeal judgment in *Rabin v Mendoza & Co* [1954] 1 W.L.R. 271^[2]. The Trustees submitted that this judgment was "*materially indistinguishable*" from the present case.

In *Rabin*, the plaintiff sued a firm of surveyors alleging negligence in the surveying of a property. Before the action was commenced, the plaintiff told the defendant, on a WP basis, that the plaintiff had encountered trouble about the survey which the defendant had made, because a building society had refused to lend money on the house. During that conversation, an understanding was reached that the defendant would enquire whether an insurance company was willing to give an indemnity against any possible risk of damage to the house so that any litigation could be avoided. A report was obtained subsequently, but no settlement was reached. The court in *Rabin* held that the report was covered under the protection of WP privilege.

When considering what had been the rationale of the earlier decision in the *Rabin* judgment, the Court observed that there were two separate issues / bases at play in *Rabin*. The first basis was whether WP privilege attached to communications in question, and the second basis was whether there was an express or implied agreement between the parties that they would not seek to rely on those communications at trial. The Court held that it was not correct to say that *Rabin* was concerned only with whether there was an effective express or implied agreement in place not to use the communications in question.

Rather, the Court emphasised that the surveyor's report in *Rabin* formed part of the parties' mutually agreed mechanics by which the parties agreed they would progress their negotiations and seek to resolve their dispute. In the Court's view, such a decision was based on the public policy underlying the WP rule, but not solely on the parties' agreement.

As such, the Court held that, as a general principle, WP privilege may attach to a party's communications with third parties if such communications form part of a dispute resolution mechanism as mutually agreed by the parties.

The Court also suggested another example where WP privilege might attach to third party communications: where the third party communications were so closely related to a prospective or ongoing negotiation that allowing one of the parties to adduce them would substantially undermine the utility of the WP rule^[3]. However, this scenario did not apply to the present case.

In light of the principles above, the Court held that the Reports in the present case were not covered by WP privilege because:

1. There was no evidence that the Report had been prepared pursuant to a mutual agreement that the Trustees would commission the Report as part of an agreed dispute resolution mechanism between the parties.
2. The Trustees unilaterally commissioned the Report without informing Briggs.

While the Court hinted that the Reports might be covered under litigation privilege, the Court did not make any determination on this point. (It appears that this point was not raised by either party.)

CONCLUSION

While the WP rule usually applies to inter-party correspondence, it can, in limited circumstances, apply also to communications with third parties, including reports prepared by them.

If a party intends that a report prepared by a third party to assist in WP negotiations should not be relied on by the other side at trial, that party should ensure that the report falls under the WP rule or is covered under litigation privilege.

[1] This judgment was handed down on 10 October 2024 but the redacted version was released for publication only on 26 March 2025.

[2] The deputy judge noted that *Rabin*, having been endorsed by the UK House of Lords, was binding on him.

[3] The hypothetical example that the Court gave was as follows: if Party A's directors exchanged emails amongst themselves, on their way to a WP meeting with Party B, discussing the settlement terms Party A will propose during the meeting, then those emails might be covered under WP.

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MEET THE TEAM



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