



Farore Law

- Mini Guide -

WITHOUT PREJUDICE

What is the 'without prejudice' rule?

Communications between parties that are 'without prejudice' are inadmissible as evidence in court. The reason for this rule is to encourage the resolution of matters through allowing parties and their lawyers to speak freely knowing that their comments cannot then be disclosed in court should a settlement attempt be unsuccessful. The communications can be written or oral.

When is a communication 'without prejudice'?

For a communication to be without prejudice, it must be part of a genuine attempt to resolve a dispute. In other words, there are two elements that must be met:

- (1) there must be a genuine dispute to be resolved; and
- (2) the communication must be a genuine attempt to resolve it.

A communication can be spoken or written.

If a party makes a without prejudice offer, the privilege will also attach to the response – whether it be a counter-offer, a request for more information, or even an outright rejection.¹

¹ *Vestergaard Frandsen v Bestnet Europe* [2014] EWHC 4047 (Ch)

Exceptions to the without prejudice rule

There are a number of exceptions. The without prejudice rule does *not* apply to communications relating to:

- **concluded compromise agreements** (when the issue is whether without prejudice communications have resulted in one);
- **misrepresentation, fraud, or undue influence** (when communications must be shown to demonstrate that a concluded agreement should be set aside on this ground);
- **estoppel** (in essence, when communications must be shown to prevent a party from going back on their word);
- **unambiguous impropriety** (when communications must be shown to prevent them from acting as “a cloak for perjury, blackmail or other unambiguous impropriety”);² for example, where one party uses without prejudice communication to threaten a party in a way that would amount to an abuse of process.
- **delay or apparent acquiescence** (when communications must be shown as evidence of this); or
- **costs issues** (when communications must be shown to enable a court to make a costs decision; however, generally speaking the communication should be labelled “without prejudice subject to costs.”).

Note that this is not a comprehensive list.

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² An expression used by Hoffman LJ in *Foster v Friedland*, 10 November 1992 CAT 1052 (and recently cited in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436).



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