



## Careless Talk Costs - You Never Know Who's Reading

When negotiating difficult trust matters, candid correspondence can lower temperatures and enable parties to work constructively to resolve disputes.

One way to share information safely during disputes is the use of Without Prejudice communications. Such correspondence ordinarily attracts privilege from production in court. As a matter of public policy this allows information to be provided to and shared between the parties involved in a dispute without fear that that information might be used against them in court later.

There are, however, situations when a party might wish to disclose Without Prejudice correspondence in court, for example when a trustee might be under a duty to make full and frank disclosure. This tension between protection and duty necessitates careful thinking before corresponding under the cloak of Without Prejudice privilege. To that end a recent Royal Court case has considered the status of Without Prejudice correspondence in the context of administrative applications by Guernsey trustees.

In *In the Matter of the "R" Trusts*<sup>1</sup> the Trustees of several discretionary trusts applied to the court for the blessing of a momentous decision under the *Public Trustee v Cooper*<sup>2</sup> doctrine. The blessing sought related to the division of the trust assets to effect a separation of the Settlor's daughter's interests from those of the other beneficiaries.

The daughter objected to the Trustees' proposals and applied for extensive disclosure of evidence. In response the other beneficiaries resisted this and made their own cross-application to admit certain materials into evidence, including Without Prejudice communications between them all. The daughter objected on grounds that the materials were privileged from production in court.

The other beneficiaries argued that, as the application for blessing was administrative rather than contentious, it was not a matter that attracted the operation of Without Prejudice privilege at all since the court was not actually determining a dispute. They further contended that, even if such privilege could apply to such applications, the communications ought properly to be produced since the Trustees were under a duty of full and frank disclosure to the court to provide it with all materials relevant to the decision they sought to bless.

The Royal Court disagreed. It found that the materials were inadmissible, as the blessing of a decision would fix the parties' subsequent substantive rights and, as such, attempts by the parties to agree this decision may be "quite fairly regarded as an attempt to resolve a potential dispute".

Helpfully, for Guernsey trustees at least, the Royal Court also provided guidance on the scope of the Trustees' duty of full and frank disclosure in respect of such communications, finding that there was nothing "special or exceptional" about Public Trustee v Cooper applications which would justify an exception to the public policy of non-disclosure. This did not, of course, prevent a trustee from disclosing the existence of such communications, which factor the court could take into account, albeit the communications themselves would not be disclosed.

Trustees in other jurisdictions or administering non-Guernsey trusts will still need to exercise caution when entering into Without Prejudice communications with beneficiaries and third parties since these questions may still need to be determined elsewhere and there remains the potential danger that such correspondence may still end up before foreign courts. However, such clear guidance in Guernsey on the status of this important protection should mean that trustees and beneficiaries of Guernsey trusts can be confident that they can continue to use such privilege as a means of resolving their disagreements without concern that Without Prejudice communications may subsequently wind up before the court.

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<sup>1</sup> *(Royal Court Judgment 43/2017)*

<sup>2</sup> *[2001] WTLR 901*

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