Things which surveyors write at the top of letters and notices

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"Without prejudice"

The words "without prejudice" when written in a letter in the context of an existing dispute, mean "without prejudice to the position of the writer of the letter if the terms he proposed for the resolution of the dispute are not accepted". This is so whether or not any formal steps have been taken to institute proceedings for the resolution of the dispute. If the terms proposed by the writer of the "without prejudice" letter are accepted by the other party, then a contract is established and the dispute is compromised.[1] If the recipient of the letter does not accept the proposed terms, and the dispute comes to be heard before a court or tribunal, then the effect of the "without prejudice" marking on the letter is that it prevents the recipient of the letter from relying on any admissions or concessions made by the writer in the letter. The rule that "without prejudice" negotiations may not be relied upon as admissions in proceedings is based upon public policy. It is in the public interest that parties to a dispute should be encouraged to settle their differences rather than to litigate them to the bitter end. They should not be discouraged from frank negotiations by knowing that anything that is said in the course of such negotiations (including a failure to reply to an offer as much as an actual reply) may be used to their prejudice in the course of proceedings.[2] "Without prejudice" communications contained in documents are, accordingly, legally privileged from having to be disclosed in litigation.

There must be a dispute between the parties if the "without prejudice" marking is to have effect of conferring privileged status upon the document. Thus, where a debt was undisputed, and the debtor sought a concession from the creditor, the letter seeking a concession could be relied upon by the creditor as amounting to an acknowledgment under section 29 (5) of the Limitation Act 1980 whether or not it bore the "without prejudice" marking.[3] A letter consisting merely of an assertion of a party's rights, or a statement as to what his case is, is not a "without prejudice" letter, irrespective whether it is marked as such. Therefore, writing "without prejudice" at the top of a letter will not have the effect of conferring privilege upon it if, when properly construed, the letter is not an offer to negotiate, or a response to such an offer, or it does not form part of the negotiations for the settlement of a dispute. In a case where there is a dispute as to whether a document attracts privilege on the ground that it is "without prejudice" the court has to consider the document and determine whether it has the necessary characteristics of a "without prejudice" letter.[4]

In the case of a trigger notice given by a landlord under a rent review clause contained in a lease, it has been held that for the landlord to mark the notice "without prejudice" will invalidate the notice,[5] but this case may have been wrongly decided, since even a "without prejudice" offer to review the rent to the figure proposed by the landlord may be accepted by the tenant so as to give rise to binding contract. It is, however, undoubtedly safer not to mark a landlord's trigger notice "without prejudice."[6] Nevertheless, it has been held in one case that a landlord's trigger notice headed "subject to contract and without prejudice" was a valid notice, since in context the words "subject to contract" were held to be meaningless.[7] A tenant's counternotice headed "without prejudice and subject to contract" was, however, held to be completely ineffective to alert the landlord to the fact that the tenant wished to elect to have the rent determined by an expert,[8] but a tenant's counternotice headed "subject to contract" was held to be a valid counternotice where the consequence of the giving of the notice was that the parties became obliged

to negotiate in good faith, and there was to be a reference to an expert only if such negotiations failed to reach agreement.[9] In that case, the reasoning was that the reasonable recipient of the notice could not be in doubt that the tenant had in the notice stated his opinion as to the market rent, without thereby making that statement of opinion into an offer capable of acceptance by the landlord. These decisions demonstrate that the particular words of the rent review clause in the lease, and the rent review machinery itself, must be considered when deciding the effect of the words of a landlord's trigger notice or those of a tenant's counternotice, and that each decision of the court turns on the particular words used in the lease and in the disputed notice.[10]

If there is a dispute in existence between the parties, and discussions take place between the parties or correspondence passes between them for the purpose of resolving the dispute, then such discussions or correspondence are not admissible in evidence, and the documents are privileged, even if the words "without prejudice" are not used,[11] and it follows that the recipient of a "without prejudice" letter cannot make his reply into an "open" letter by omitting to mark his reply "without prejudice". The privilege which attaches to documents which are "without prejudice" is a joint privilege, which cannot be waived by only one party.[12]

"Without prejudice save as to costs"

The purpose of these words is to preserve in proceedings the privileged or inadmissible status of the document until after the substance of the dispute has been resolved, but, when it has been resolved, to permit the tribunal to refer to the document when deciding what costs order to make. The practical effect of these words arises in the case of a party whose case may appear to have substantially succeeded when the dispute came to be determined by a tribunal. *Prima facie*, the successful party is entitled to have his costs paid by the other party. When the tribunal determines what costs are to be paid and by whom, if the other party can refer to an earlier "without prejudice save as to costs" offer, which, if the apparently successful party had accepted it, would have given him the same as, or more than, he obtained at the hearing before the tribunal, the tribunal determining costs could properly conclude that the apparently successful party had gained nothing by rejecting the without prejudice offer and proceeding to a determination. In that case, the tribunal might properly order that he should not be paid any costs from the time he received the "without prejudice save as to costs" offer, and also that he should pay the other party's costs from the same time. This practice first received judicial approval in 1975 in the context of ancillary relief proceedings on divorce.[13] This was at a time when, under the Rules of the Supreme Court, express provision for obtaining protection against adverse costs orders applied only in cases in which a defendant could make a payment into court of a money sum representing damages or a debt. Protection against costs in claims for other kinds of relief could not be obtained by making a payment into court. But in other forums, such as arbitrations or tribunals, there was a long-established practice that a party could make a "sealed offer" or "sealed bid", the substance of which could only be disclosed to the tribunal after it had reached its decision on the substance of the claim.

In *Cutts v. Head*[14] the court recognised that the policy of encouraging parties to settle their differences was promoted in other tribunals by sealed offers, and affirmed that it could be relied upon generally in court proceedings. Since 1999, Part 36 of the Civil Procedure Rules has made comprehensive provision for the making of offers to settle all kinds of claims in civil litigation, which, if followed, have certain consequences in costs. But in cases where the procedure is not strictly followed, the Civil Procedure Rules require a court to take into account the fact that a "without prejudice save as to costs" offer has been made,[15] and it will clearly be a very important factor for the court, in exercising its discretion as to costs, to take into account. In arbitrations, "without prejudice save as to costs" offers are an important means of promoting settlement, and an important means of protecting a party's position on costs.

"Without prejudice to the validity of [.....]"

These words have a completely different significance from the two formulations set out above. In many cases in which one party has to serve a notice on another party in order to instigate proceedings or a dispute resolution process, the notice must comply with particular requirements whether of substance or form in order for it to be

valid. If the party serving it has any doubt about the validity of the notice, he may wish to serve a second (or subsequent) notice to protect his own position in case the earlier notice is held to be invalid. The purpose of giving notice is in order for the reasonable recipient of the notice to understand it.[16] Therefore, by serving a second (or subsequent) notice expressly on the basis that it is "without prejudice to the validity of" the first or previous notice or notices served, the server of the notice makes clear that he relies, in the first place, on the validity of the first or previous notice or notices, but if the first or previous notice or notices is or are invalid, then he will rely on the validity of the second or subsequent notice or notices. It is important to specify upon which earlier notice or notices the notice giver intends to rely in priority to the notice being served. If the words "without prejudice to the validity of ..." on the notice being served might themselves invalidate it, not being included in prescribed form which the notice must take, then these words should be included in a covering letter accompanying and referring to the notice being served. The use of these words therefore enables the server to rely on a subsequent notice before the invalidity of the previous notice has been determined. More importantly, these words prevent the recipient of more than one notice from contending that he (or any reasonable recipient) was unable to understand which notice the server of the notices was intending to rely upon, and, therefore, that no effective notice was given.[17]

"Subject to contract", "subject to lease"

In negotiations for the sale and purchase of land or of an interest in land, the use of the phrase "subject to contract" has long been recognised as having special significance. An offer made "subject to contract" means that the matter remains in a state of negotiation until a formal contract has been executed, and, until that time, the parties are not legally bound and may withdraw from the negotiations without incurring liability.[18] This was of considerable importance before the change in the law as to the formalities required for contracts for the sale of land implemented by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Before then, a contract for the sale of land could be made orally, but it was not enforceable unless it was evidenced in writing and signed by the party against whom it was sought to be enforced.[19] This meant that, unless the words "subject to contract" appeared on a document brought into existence in the course of negotiations, an incautious, and otherwise unenforceable oral agreement could become transformed into a legally binding contract by the existence of correspondence between the parties, or even a brief written memorandum, as long as it set out the parties, the property, the price and any other specific terms, and it was signed by the party against whom proceedings to enforce the contract were brought. Once the words "subject to contract" appeared on a document, however, it was unnecessary for them to be repeated on subsequent documents, since their significance was that legally enforceable liability would be triggered only once the formal execution of a contract or the exchange of contracts had taken place. The words had the same effect in relation to a transaction not involving the sale or other disposition of an interest in land, even though there may have been no statutory requirement that any agreement be in writing or evidenced in writing. Thus, a "subject to contract" offer to compromise a claim arising under the covenants in a lease would imply that until a formal compromise agreement was executed, neither party would be bound.[20]

"Subject to lease" has an analogous meaning in the context of negotiations for a lease, and, ordinarily, means that no legally enforceable relationship of landlord and tenant comes into existence until the exchange of the executed lease and counterpart.[21]

A trigger notice served by a landlord wishing to instigate a rent review marked "subject to contract" has been held to be invalid[22] because the tenant cannot know whether the landlord regards himself as bound to accept the figure proposed in the trigger notice, or whether the landlord regards the "subject to contract" marking as reserving to him the right to seek a higher figure than that proposed in the trigger notice. But in the case of a counter-notice given by the tenant, the words "subject to contract" may not invalidate the counter-notice where the rent review machinery requires the landlord and the tenant to enter into negotiations before the question can be referred to a valuer.[23]

Since section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 came into force, the requirement that the contract itself must be in writing, contain all the terms agreed by the parties, and must be signed by or on behalf of both parties has reduced the scope for one party to spring a trap on the other. But the phrase "subject to

contract" remains a useful shorthand with a well-established meaning for indicating that a transaction remains in a state of negotiation, and that either party is free to withdraw from it until a formal contract is drawn up.

"Subject to mortgage", "subject to survey", etc.

The significance of "subject to contract" and "subject to lease" is that the party on whose behalf the words are written makes clear that he does not intend that any legal obligation should arise unless and until a formal contract is entered into or a formal lease executed. Their meaning is clear. In contrast, phrases such as "subject to mortgage" and "subject to survey" are not on their face directed at the question whether there is a present binding legal obligation, and the decided cases reach different conclusions. "Subject to satisfactory survey" was held to leave matters in a state of negotiation in *Marks v. Board*,[24] but in *Ee v. Kakar*[25] it was held that the words "subject to survey of the property" constituted a condition precedent to the enforceability of the contract, but that the purchaser was obliged to procure a survey diligently, to give proper consideration to the survey report and not to reject it on capricious grounds. The purchaser was accordingly not free to withdraw unless he had obtained a survey, had considered it, and had reasonably concluded that it was unsatisfactory. Such words should accordingly be avoided, since a court may give them a different construction from that intended by a vendor or purchaser.

"Confidential"; "Privileged and confidential"; "Privileged"

Confidentiality is, on its own, not a ground for conferring on a document the status of being privileged or immune from the requirement to disclose it in litigation.[26] Nor can any document made by or on behalf of one party and communicated to the other party be confidential,[27] so the word "confidential" should be avoided in correspondence between the parties, in case the writer is under the misapprehension that the letter will thereby be privileged from disclosure. Such a letter will not be privileged from disclosure merely because it is headed "confidential".

The question whether a document is privileged from disclosure in litigation is not determined by whether the document bears the word "privileged", but by its nature and purpose. There is an important class of communication which is privileged if it came into existence when litigation is contemplated, or after proceedings have been instituted. Communications between a solicitor and a non-professional agent or a third party, which came into existence only after litigation was contemplated or commenced, and made with a view to such litigation, either in connection with seeking or giving advice in relation to it, or in connection with seeking or assembling evidence in relation to it[28] are privileged from disclosure. Where such a communication is made between the *client* and a non-professional agent or a third party, it must be shown that the dominant purpose of the author or the person under whose authority the document was produced was to obtain legal advice or to conduct or be used in the conduct of litigation which was reasonably in prospect at the time the document was produced.[29] This kind of privilege is known as litigation privilege.

It should be noted that, in the same way as the proceedings in a mediation are confidential, the documents prepared for a mediation are likewise confidential should the mediation be unsuccessful. If the dispute proceeds to be resolved in court, the mediation documents cannot be referred to, just as what passed in the course of the mediation cannot be referred to. Standard mediation agreements contain an express confidentiality provision, imposing an obligation on everyone involved in the mediation to keep confidential the fact that a mediation is taking place or has taken place, and to keep confidential all information arising out of or in connection with the mediation. In the same way as courts are prepared to look at "without prejudice" correspondence for the purpose of the enforcement of an agreement arrived at to conclude without prejudice negotiations,[30] the legally binding compromise of a dispute reached at the conclusion of a mediation can be enforced by legal proceedings.

"With prejudice"

Very occasionally, letters have been seen which are marked "with prejudice". This marking is best avoided. It confers no special status on such letters. In the course of escalating disputes, letters which are not marked

"without prejudice" can be assumed to assert the strongest possible case which the author is capable of putting forward. It is inadvisable to put a marking on a letter without knowing what its meaning and significance are, and even less advisable to put a marking on letter which has no commonly understood meaning or significance.

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[1]*Walker v. Wilsher* (1889) 23 QBD 335 per Lindley LJ at p. 337.
[2]*Cutts v. Head* [1984] Ch 290 per Oliver LJ at p. 306; and see *Norwich Union Life Insurance Society v. Sketchley plc.*[1986] 2 EGLR 126 per Scott J. at p. 128.
[3]*Bradford & Bingley plc. v. Rashid* [2006] 1 WLR 2066.
[4]*South Shropshire District Council v. Amos* [1986] 1 WLR 1271.
[5]*Norwich Union Life Assurance Society v. Tony Waller* [1984] 1 EGLR 126; but this decision was disapproved of by the Court of Appeal in *South Shropshire District Council v. Amos, above*.
[6]Thus, in *Maurice Investments Ltd. v. Lincoln Services Ltd.* [2006] All ER (D) 402, a letter containing the words "Subject to Contract and Without Prejudice" was held not to amount to a valid trigger notice, because a reasonable recipient of the letter could not have been sure that the landlord was instituting the rent review in the lease, and it was necessary for the trigger notice to give a clear indication sufficient to bring home to a reasonable tenant that the landlord was thereby triggering the rent review.
[7]*Royal Life Insurance v. Phillips* (1990) 61 P & CR 182; this decision was referred to in *Maurice Investments Ltd. v. Lincoln Services Ltd., above*.
[8]*Sheridan v. Blaircourt Investments Ltd.* (1984) 270 EG 1290.
[9]*British Rail Pension Trustee Co. Ltd. v. Cardshops Ltd.* [1987] 1 EGLR 127.
[10]*Woolwich Property Services v. Capital Land Holdings* (1992) P & CR 378.
[11]*Chocoladefabriken Lindt & Sprungli AG v. Nestle Co. Ltd.* [1978] RPC 287.
[12]*Somatra Ltd. v. Sinclair Roche & Temperley* [2000] 1 Lloyd's Rep 311.
[13]*Calderbank v. Calderbank* [1976] Fam 93 per Cairns LJ at p. 106; approved and applied generally in *Cutts v. Head* [1984] Ch 290.
[14][1984] Ch 290 per Oliver LJ at pp. 308-309.
[15]CPR r. 44.3.
[16]*Mannai Ltd. v. Eagle Star Assurance Co. Ltd.* [1997] AC 749 per Lord Steyn at p. 767 and per Lord Hoffmann at p. 779.
[17]Compare *Barclays Bank plc. v. Bee* [2002] 1 WLR 332.
[18]*George Trollope & Sons v. Martyn Bros.* [1934] 2 KB 436.
[19]See section 40 of the Law of Property Act 1925 (now repealed).
[20]Compare *Henderson Group plc v. Superabbey Ltd.* [1988] 2 EGLR 155 (rent review).
[21]*Derby & Co. Ltd. v. ITC Pension Trust Ltd.* (1977) 245 EG 569; but if the lessor is a company, it is important to avoid the trap created by section 74 (1) of the Law of Property Act 1925 which deems a deed to have been duly executed if the company's seal has been affixed to it and it has been attested by the company's secretary and a director: *cp. D'Silva v. Lister House Ltd.* [1971] Ch 17. The former rule ordinarily prevails, and the onus of establishing that the lease has been executed by the company as an unconditional deed lies on the other party: *Longman v. Viscount Chelsea* (1989) 58 P & CR 189.
[22]*Shirlcar Properties Ltd. v. Heinitz* [1983] 2 EGLR 120.
[23]*British Rail Pension Trustee Co. Ltd. v. Cardshops Ltd.* [1987] 1 EGLR 127.
[24](1930) 46 TLR 424; *Graham & Scott (Southgate) Ltd. v. Oxlade* [1950] 2 KB 257; *Batten v. White (No. 2)* (1960) 12 P & CR 66 to the same effect.
[25](1979) 40 P & CR 223.
[26]*Alfred Cromption Amusement Machines Ltd. v. Commissioners of Customs & Excise (No. 2)* [1974] AC 405.

[27]*Kennedy v. Lyell* (1883) 23 Ch D 387.
[28]*Anderson v. Bank of British Columbia* (1875-1876) LR 2 Ch D 644.
[29]*Waugh* v. *British Railways Board* [1980] AC 521.
[30]See *Tomlin v. Standard Telephones and Cables* [1969] 1 WLR 1378.