



# Subject to Contract & Without Prejudice Tuesday 12 March 2019

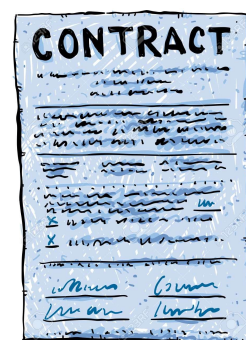
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## Introduction



1. Subject to contract – defined
2. Immingham Storage Co v Clear Plc
3. Without prejudice – defined
4. Waiver
5. Questions



## Subject to Contract



- ▶ where a party who strikes a bargain wishes to make it clear that they do not intend for there to be a binding contract until a formal contract has been documented and exchanged
- ▶ note term “subject to contract on correspondence”
- ▶ Section 2 (Law of Property Provisions) Miscellaneous Act 1989



## Proprietary Estoppel



- ▶ arises where a party (Party A) seeks to claim a right over land belonging to another (Party B) in circumstances where A has been led to believe, by a promise and/or conduct by B, that they have or can expect to acquire an interest in land
- ▶ detrimental reliance
- ▶ unconscionable (i.e. unfair)
- ▶ *Haq v Island Homes Housing Association* [2011]
- ▶ when does a valid contract arise?

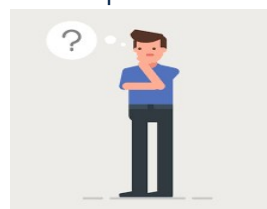


## Immingham Storage Company v Clear Plc



“Our full contract... will now be raised... and sent for your signature”:

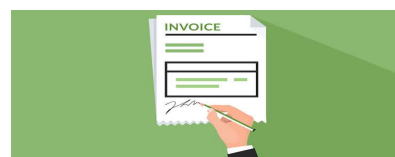
1. Clear Plc had requested availability and cost details for a petrol storage facility
2. Immingham sent an email quotation saying contract would follow and attached general conditions
3. Clear confirmed that it wanted to proceed and signed and returned the quotation
4. Immingham emailed confirmation
5. contract issued but never signed and returned



## Immingham Storage Company v Clear Plc



- ▶ invoices raised and sued for non-payment
- ▶ Clear denied that there was a binding contract
- ▶ exchange of emails had formed the contract
- ▶ signing of contract just a formality not condition of transaction
- ▶ implications



## Without Prejudice – The Early Days



- ▶ initially focussed on cases where negotiations between parties were separate to their open positions. In the event that negotiations failed and dispute proceeded, neither party would be entitled to rely upon admissions made in those negotiations
- ▶ rationale was that parties more likely to speak frankly if nothing they have said could be relied upon and therefore they are more likely to settle their dispute



## Without Prejudice – The Current Position



- ▶ the rule has now been extended so that letters and oral communications during a dispute which are expressed or shown to have been made without prejudice cannot be admitted in evidence
- ▶ not only to letter in question, but subsequent correspondence, unless there is a clear break in chain of correspondence showing that later letters are “open”
- ▶ meetings: *Suh and another v Mace (UK) Ltd [2016]* purpose rather than content of the meeting
- ▶ best practice is to mark correspondence as without prejudice and to confirm at outset of meetings so as to ensure correspondence regarded as without prejudice

## Without Prejudice



### Oceanbulk Shipping & Trading v TMT Asia [2010]

Supreme Court held that evidence of without prejudice negotiations between the parties to a settlement agreement were admissible in order to resolve a dispute as to interpretation of the agreement

The above decision significantly widened admissibility of without prejudice evidence



## Without Prejudice



The rule is justified by:

1. public policy consideration that parties should be encouraged to settle their disputes
2. the parties agreeing that their negotiations should not be admissible as evidence

Points to note:

- ▶ a communication that is not without prejudice is “open”
- ▶ Save for Part 36 offers or Calderbank offers, without prejudice discussions are not taken into account when court considers costs unless correspondence marked “*without prejudice save as to costs*”. This means correspondence and without prejudice offers marked “without prejudice save as to costs” will be seen by the court at conclusion hearing in determining costs

## Without Prejudice



In order for document/correspondence to be without prejudice:

1. there must be a genuine dispute to be resolved, i.e. a dispute as to liability
2. a genuine attempt to resolve it



A communication that sets out a party's rights or position and is not concerned with an offer to negotiate is not without prejudice, even if marked "without prejudice"



## Waiver



- ▶ privileged correspondence
- ▶ once privileged, always privileged: "without prejudice" correspondence will never go before court even at costs stage unless waived

### **Suh and another v Mace (UK) Ltd [2016]**

- ▶ court found that privilege in without prejudice discussions had not been waived
- ❖ a failure to claim privilege from production does not necessarily mean that the document will be admissible
- ❖ without prejudice documents are inadmissible unless waived by both parties
- ❖ producing or handing over a without prejudice document to the other side does not itself constitute a waiver

# Questions

