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The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Case update: notices and conditions precedent

Disclosure and Barring Service v Tata Consultancy Services Ltd

[2025] EWCA Civ 380

We first discussed this case in *Dispatch*, Issue 288. DBS entered into a written agreement with TCS to take over the Disclosure and Barring processes. The project did not go well. TCS brought a claim against DBS for some £125 million and DBS brought a counterclaim of over £100 million. Constable J decided a large number of issues which eventually led to a net payment by DBS to TCS of just under £5 million.

DBS appealed on one issue, whether clause 6.1 of the agreement created a condition precedent, breach of which prevented DBS from being able to recover £1.592 million by way of what were called Delay Payments.

Clause 6 was in these terms:

> *"6. DELAYS DUE TO CONTRACTOR DEFAULT*
>
> *6.1 If a Deliverable does not satisfy the Acceptance Test Success Criteria and/or a Milestone is not Achieved due to the CONTRACTOR's Default, the AUTHORITY shall promptly issue a Non-conformance Report to the CONTRACTOR categorising the Test Issues as described in the Testing Procedures or setting out in detail the non-conformities of the Deliverable where no Testing has taken place, including any other reasons for the relevant Milestone not being Achieved and the consequential impact on any other Milestones. The AUTHORITY will then have the options set out in clause 6.2.*
>
> *6.2 The AUTHORITY may at its discretion (without waiving any rights in relation to the other options) choose to:*
>
> *6.2.1 issue a Milestone Achievement Certificate conditional on the remediation of the Test Issues, or the non-conformities of the Deliverable where no testing has taken place, in accordance with an agreed Correction Plan; and/or*
>
> *6.2.2 if the Test Issue is a Material Test Issue, refuse to issue a conditional Milestone Achievement Certificate as specified in clause 6.2.1 then escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved exercise any right it may have under clause 55.1 (Termination for Cause by the AUTHORITY); and/or*
>
> *6.2.3 require the payment of Delay Payments, which shall be payable by the CONTRACTOR on demand, where schedule 2-3 (The Charges and Charges Variation Procedure) identifies that Delay Payments are payable in respect of the relevant Milestone. The Delay Payments will accrue on a daily basis from the relevant Milestone Date and will continue to accrue until the date when the Milestone is Achieved in accordance with the Correction Plan."*

At first instance, Constable J found that DBS's right to claim Delay Payments pursuant to clause 6.2.3 was conditional on DBS's compliance with clause 6.1. He rejected that claim because DBS had failed to comply with clause 6.1; in fact, they had failed to serve any Non-Compliance Reports ("NCR") at all.

Coulson LJ noted that the leading case on the principles of interpretation in the context of a condition precedent "*remained*" *Bremmer Handelsgesellscheft Schaft m.b.H v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109. Here, Lord Wilberforce had said:

> *"Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law."*

Having reviewed the authorities, Coulson LJ identified the following general principles:

> *"(a) Whether or not a party has to comply with one or more stated requirements before being entitled to relief will turn on the precise words used, set within their contractual context;*
>
> *(b) As Lord Wilberforce made clear in Bremer, to be framed as a condition precedent, a clause needs something that makes the relief conditional upon the requirement;*
>
> *(c) As with exclusion clauses or clauses which seek to limit liability, clear words will usually be necessary for a clause to be a condition precedent … That said, it is not necessary for the clause to say in terms 'this is a condition precedent': none of the clauses in the authorities noted above, which were found to be conditions precedent, used those words;*
>
> *(d) In addition to conditionality, it will usually be necessary for the link between the two steps to be expressed in the language of obligation (i.e. shall) but that will not on its own be sufficient to amount to a condition precedent …*
>
> *(e) It is not necessary for the step one condition to be expressed in a finite number of days or weeks. More flexible periods – 'timely', 'within a reasonable time' etc - have been included in clauses which courts have found to be a condition precedent …"*

Having reviewed the authorities, Coulson LJ identified the following general principles:

The appellate judge, considered that the words of clause 6.1, when seen in their context, were "*clear*". On the occurrence of one or both of two different events ("*if*"), DBS "*shall promptly issue*" an NCR. Those two events were (i) where a Deliverable did not satisfy the Acceptance Test Success Criteria; and/or (ii) where a Milestone was not achieved due to TCS's default.

The NCR was not just a "*procedural box-ticking exercise*": it provided that the NCR would categorise the Test Issues as described in the Testing Procedures or describe the non-conformities of the Deliverable where no Testing had taken place. It would also include any other reasons for the relevant Milestone not being achieved, and the consequential impact of that.

Clause 6.1 went on to state that DBS "*will **then** have the options set out in clause 6.2*" [emphasis added], one of which (clause 6.2.3) was to require Delay Payments. The appellate judge said that the words in clause 6.1 meant that, on the happening of one or both of those events, a detailed NCR must be provided promptly by DBS and: "*then – and only then – can the clause 6.2 options, including the levying of Delay Payments, be exercised*". The result was that the clause was a condition precedent, and DBS's failure to comply, by failing to provide any NCRs at all, meant that they were not entitled to exercise the option at clause 6.2.3.

It was plain that clause 6.2 could only be sensibly operated if clause 6.1 had already been complied with. The ability to levy Delay Payments was only one of three different remedies available to DBS under clause 6.2. The first, at clause 6.2.1, allowed DBS to issue a conditional Milestone Achievement Certificate. That would be conditional on the remediation of the Test Issues or the non-conformities of the Deliverable where no testing has taken place. Both the Test Issues and/or the non-conformities would be identified in the NCR. Without an NCR, therefore, clause 6.2.1 simply would not work. Coulson LJ concluded that:

> *"I consider that the words in clauses 6.1 and 6.2 are sufficiently clear to amount to a condition precedent. They are expressed clearly in the conditional, and leave the reader in no doubt that the steps in clause 6.1 must be fulfilled before the particular options in clause 6.2 can be exercised. The provision by DBS of an NCR was not simply a procedural step, but an important element of the contract machinery."*

Without prejudice discussions

Mornington 2000 LLP (t/a Sterilab Services) v The Secretary of State for Health and Social Care

[2025] EWHC 540 (TCC)

This is a long running dispute arising out of a contract for the supply of COVID-19 lateral flow test kits. We considered some questions about disclosure in *Dispatch*, Issue 290. Here, Smith J had to decide whether an audit report commissioned by the defendant when the parties were engaged in without prejudice negotiations had to be disclosed. Following a mediation, the Parties discussed conducting an audit and the scope of that audit. The audit was then carried out on behalf of, and funded by, the defendant, who refused to disclose the report because it had been: "*produced as part of the confidential and without prejudice process and any documents disclosed in that process, including the Intertek audit report, are covered by without prejudice privilege*".

Smith J, having reviewed the authorities summarised the key principles in this way:

> *"a. The [Without Prejudice Rule ('WP Rule')] is a rule governing the admissibility of evidence and is founded in the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (Rush & Tompkins Ltd v GLC [1989] 1 AC 1280 ... In Ofulue v Bossert [2009] 1 AC 990 ..., Lord Hope put it thus at [12]: '[t]he essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie'.*
>
> *b. The WP Rule therefore applies 'to exclude all negotiations genuinely aimed at settlement whether orally or in writing from being given in evidence' and its underlying purpose is 'to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement' (Rush & Tompkins) ... The WP Rule is not limited to admissions made against a party's interest, although the protection of admissions against interest is its most important practical effect ...:*
>
> *d. In addition to finding its justification in public policy, the WP Rule may also be founded in the agreement of the parties ... one party cannot unilaterally impose an extension of the ambit of the WP Rule on another – there must be agreement.*
>
> *e. ... unless the parties make some agreement to narrow or broaden its effect (as they are entitled to do ... the scope of the privilege is a matter of general law and is not based on the supposed boundaries of a notional agreement between the parties (Ofulue ...).*
>
> *f. Over the years, the courts have recognised certain exceptions to the WP Rule which are made when the justice of the case requires it ... none is said to apply in this case).*
>
> *g. The WP Rule is an important one whose boundaries should not be lightly eroded. The protection afforded by the rule should be enforced unless it can be shown that there is a good reason for not doing so ...*
>
> *h. The question of whether a document is truly 'without prejudice' is an objective question for the court, subject to consideration where appropriate of the factual matrix and other matters that are properly and normally admissible in connection with the construction of a written document ... The label 'without prejudice' is not conclusive ...*
>
> *i. Without prejudice privilege is a joint privilege which cannot be waived unilaterally by one party to the negotiations ... However, without prejudice discussions may become open by the parties' consent. If one party to negotiations wishes to change the basis thenceforth to an open one, the burden is on that party to bring the change to the attention of the other party and to establish on an objective basis that the recipient would have realised that a change in the basis of negotiation was being made."*

It was common ground that, but for the defendant's assertion of without prejudice privilege, the audit report would be relevant to the issues arising in the claims and, therefore, disclosable. The only issue was whether the report was "*without prejudice*".

The judge noted that the mere fact that negotiations which have referred to the procurement of a third-party report are covered by the umbrella of without prejudice privilege does not mean that there is an express agreement that the report itself will also be "*without prejudice*". Here, the defendant was suggesting that: "*against the background of the ongoing without prejudice process, the claimants' failure to object to the audit taking place at the end of February 2022 had the effect of 'crystallising' an implied agreement as to the status of the report*". Whilst it was potentially possible to identify an implied agreement from the existence of the without prejudice negotiations and/or correspondence, this argument was not made out on the facts and was rejected by the judge.

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