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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

Without prejudice correspondence

Morris v Williams

[2025] EWHC 218 (KB)

Morris brought a claim for personal injuries sustained in a road traffic accident in July 2018. Negligence was not in dispute, and although Morris suffered some injuries, Williams ran a defence of fundamental dishonesty, saying that the effect and extent of the injuries had been seriously exaggerated. Williams made an application asking that a letter dated 12 May 2023, written by Morris's then solicitors, could be adduced as evidence despite being marked *"without prejudice – save as to costs"*.

The starting point for DJ Dodsworth was that without prejudice correspondence is inadmissible. In the words of Oliver LJ in *Cutts v. Head* [1984] Ch 290, 306:

> *"The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*

However, this *"without prejudice"* rule is not absolute. There are exceptions, and one of those relates to situations where to exclude material marked as without prejudice would act as *"a cloak for perjury, blackmail or other unambiguous impropriety"*, an expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052.

Williams said that the letter fell firmly within this *"unambiguous impropriety"* exception as it demonstrated that Morris accepted that he had been fundamentally dishonest in relation to at least some aspects of his case. Morris disagreed and said even if the letter did contain any such admissions, then it was not so clear as to come within the unambiguous impropriety exception.

Here the judge agreed that the letter in question was sent in an attempt to reach a settlement. Therefore, it would normally attract the privilege that attaches to without prejudice correspondence. However the letter included the following paragraph:

> *"That the Claimant will admit that he was fundamentally dishonest in respect of some of the representations made in respect of his claim. However, it should be noted that he is only prepared to make such an admission on the basis that it be contained in a non-disclosure agreement to the effect that the case cannot be discussed or reported in any way, with any third parties at all (including without direct reference to the Claimant or Minster Law by name)."*

Morris said that this was a promise to admit something (that some representations in respect of his claim were fundamentally dishonest) in the future if it was contained within a non-disclosure agreement. Williams said it was a clear acceptance by Morris that he had been, at least in part, fundamentally dishonest when presenting his claim.

The judge considered that the answer to the question was clear from the terms of the letter, which had been *"carefully"* written by an experienced solicitor:

> *"In my judgment the letter does fall within the unambiguous impropriety exception and should be admitted. I have found the Letter to be a clear admission of fundamental dishonesty on the part of the Claimant. That goes well beyond, say, an acceptance that the Claimant has over-egged his injuries, or their effects on his day to day activities, or a concession that some aspects of his case may be difficult to prove. All of those might be things said in usual exchanges in the context of without prejudice negotiations and which would fall to be protected by the without prejudice rule as they do not demonstrate unambiguous impropriety. Here the line has been crossed. If the Letter is excluded there is more than a risk of the Claimant perjuring himself, which would not of itself be sufficient to bring the exception into play, but the certainty that the Claimant's pleaded case was being put forward on a (at least partly) false basis, which is sufficient to bring the exception into play. This is an example where the public policy arguments in favour of litigating disputes with full disclosure trump the policy argument in allowing parties to speak candidly and with protection of the contents of the discussions, to encourage settlements."*

Deeds of assignment

Goldkorn v MPA (Construction Consultants) Ltd & Anor

[2025] EWHC 385 (TCC)

The question for Jonathan Acton Davis KC was whether Goldkorn had title to bring claims against MPA as the assignee of the Second Defendant's (Kazu 1) rights pursuant to a Deed of Assignment. The claims arose out of a project management contract between MPA and Kazu 1. Kazu 1 was a special purpose vehicle incorporated for the purposes of the development.

Clause 16.2 of the T&Cs provided:

> *"The benefit of this Appointment may be assigned by the Client by way of an absolute legal assignment to any person providing finance or refinance to the Client in connection with the Project or to any person (A1) acquiring the Client's interest in the Project and by (A1) to another person (A2) acquiring A1's interest in the Project. No further or other assignment is permitted and, in particular, A2 is not entitled to assign this Appointment."*

Clause 18.2 provided:

> *"Nothing in this Appointment confers or purports to confer any right to enforce any of its terms on any person who is not a party to it. Only the Client (and the Client's permitted assignees) and the Consultant can take action to enforce the terms of this Appointment."*

Construction began in May 2017. However, by 17 January 2018, Kazu 1 had terminated the Project. On 19 June 2020, Kazu 1 entered into Creditors Voluntary Liquidation. On 22 December 2020, Kazu 1 and Kazu, the parent (acting by their liquidator), entered into a Deed of Assignment in favour of Goldkorn, who had been a director of Kazu 1. Goldkorn, issued proceedings against both MPA and Kazu 1, alleging that MPA acted in breach of its duties owed to Kazu 1 under the PM Appointment.

The only question for the court was whether, on its proper construction, clause 16.2 of the PM Appointment precluded the assignment of the MPA Claim to Goldkorn.

The court held that Goldkorn had not acquired Kazu 1's *"interest in the Project"*, as this meant an interest in the actual construction works themselves. The *"Project"* was defined as *"the construction works at the site as identified in the Proposal"*. Further, the lease of the Premises had been disclaimed by Kazu 1, which meant that which remained would have reverted to the Landlord.

Goldkorn said that the restriction in clause 16.2 only applied to *"the benefit of this Appointment"*, which referred to Kazu 1's right to MPA's performance of its services but not to Kazu 1's right to the fruits of performance (including accrued rights of action in respect of MPA's breaches of its past obligations). Accordingly, the purported assignment fell outside the ambit of the restriction in clause 16.2. Again, the judge disagreed. The use of the phrase *"the benefit of this Appointment"* was intended to draw an *"appropriate contrast"* with the burden of the Appointment (which was not assignable). It did no more than that.

Finally, Goldkorn said that claims in tort fell outside the scope of clause 16.2. Again, the judge disagreed. The tortious duties were identical to the contractual duties. They, therefore, formed part of the *"benefit of this Appointment"* and were barred by clause 16.2.

Goldkorn did not have title to bring any of the claims against MPA.

Variations

Grain Communications Ltd v Shepherd Groundworks Ltd

[2024] EWHC 3067 (TCC)

Grain engaged Shepherd under a framework agreement. A dispute arose as to whether an instruction to postpone works indefinitely was a variation. "*Variation*" was defined as:

> *"any addition to, omission from or other change in the Works or the period or order in which they are to be carried out."*

Kelly J summarised the law in relation to implied terms and the variation of contracts as follows:

> *"(1) A term can be implied into a contract provided the term which a party seeks to imply is not illegal or contrary to an express term of the contract.*
> *(2) A term can be implied if it is reasonable and equitable, is necessary to give business efficacy to the contract, is so obvious it goes without saying, is capable of clear expression and does not contradict any express term of the contract.*
> *(3) The effect of a variation instruction depends on the substance of what is said in the instruction. Variation instructions are not to be read strictly or pedantically.*
> *(4) The variation must be evident from the document said to constitute a variation instruction.*
> *(5) An instruction need not contain the word postpone in postponing certain works.*
> *(6) What is required is that any variation instruction complies with the requirements of the contractual clause for variations.*

On 7 September 2023, Grain issued a work order in accordance with the framework. Then, on 23 October 2023, Grain sent a further email indicating that a pre-start meeting would be held that afternoon with the intention of starting work the following day. That did not happen. Instead, there was a phone call, where Grain told Shepherd that the works would not be starting the next day as agreed."

On 24 October 2023, Grain sent Shepherd an email which included:

> *"As discussed, it remains our current intention to continue with all Work Orders ... However, as mentioned on Monday's call ... it currently does not look like we will be able to commence Works on Site ... before the end of 2023 ... We will continue to keep in touch with you regarding our programme for the Works under these Work Orders and will let you know when anything changes."*

In February 2024, both parties sent notices of suspension, which led to an adjudication where the adjudicator agreed with Shepherd that the email amounted to a breach of contract – not, as Grain held, a variation. The adjudicator said that the email of 24 October 2023 was a cancellation of the Work Order. The reasonable recipient of the email would not understand that it was being issued either as a Variation to the Work Order or as confirmation of an oral variation to the Work Order:

> *"for the simple reason that it does not make any mention of the fact that it is being issued either as a Variation, or as a confirmation of any oral variation that may have been given in the telephone conversation held on Monday 23rd October 2023."*

The judge disagreed, considering that whilst the email did not specifically state it was a variation, Grain was entitled to make omissions from a Work Order and also to vary the period in which works were to be performed. Grain said in the email that its intention was to continue with all of the Work Orders which had been signed. Although Grain further noted the present position as being that it was unlikely that works would be able to commence before the end of 2023, it also said that it would keep in touch concerning the programme for works. The wording of the contract, as agreed between the parties, permitted Grain to postpone commencement of the works. The October discussions ad email was all that was required to do that.

Further, the terms of the Work Order did not allow the implication of a term preventing Grain from postponing the works. The proposed term would contradict the express terms of the contract if permitted. This would be contrary to the express terms within the contract. The already provided "*machinery*" allowed variations of time, including the machinery to permit commencement to be postponed. The Work Order was able to operate without the need to imply the term suggested.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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