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Welcome

Time. Never seems to be enough of it! This month is about shortcuts. Time pressure can make shorthand expressions which achieve the desired result useful tools, but are such expressions always used correctly? We look at the expressions "subject to", "notwithstanding" and "without prejudice to" with which you will be familiar, but what do they really mean? Read on as we explain the difference. We also look at the use of the expression "Subject to Contract" in negotiations and highlight a recent case where the failure to use it, rather than its use, proved fatal. We also refer to the general principles relating to the use of the expression "Without prejudice" in communications between parties.

Andrew Nickels

"Subject to," "notwithstanding" and "without prejudice to" – what do they all mean?

Undoubtedly, you all will have used these expressions from time to time, but have you tried explaining their meaning to your client in plain English? Not as easy as you may think! They are used in situations involving the interaction of two or more clauses. Depending on which expression is used, one or other of the clauses will take priority. Thus, they clearly have a substantive impact on the interpretation of a contract. Used incorrectly, they can have unintentional consequences.

A word of warning: these expressions must not be used in consumer contracts as the Unfair Terms in Consumer Contracts Regulations 1999 requires such contracts to be in plain, clear language.

"Subject to"

"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be "subject to". It tells the reader which clause takes priority where there is an overlap.

Example: Clause 1 starts – "Subject to clause 2…."

- Clause 1 states that the parties' entire liability under the contract is capped at £10million.
- Clause 2 sets out the types of loss that cannot be limited or excluded, (such as death or personal injury caused by negligence.)

As clause 1 is stated to be subject to clause 2, whilst clause 1 sets out a cap, this does not apply to the types of loss set out in clause 2 as clause 2 takes priority. Liability for the types of loss set out in clause 2 is therefore unlimited.

One means of expressing the priority in plain English would be for clause 1 to read "Except as set out in clause 2…"

"Notwithstanding"

"Notwithstanding" looks back to the main rule. It is used in a clause that is to take priority over another clause. It tells the reader that the subject clause overrides the clause(s) to which it refers. It is, in effect, the opposite of "subject to".

Example 1: Clause 1 starts – "Notwithstanding clause 2…"

- **Clause 1** states that the Seller can increase the price of certain goods by giving the Buyer seven days' prior written notice.
- **Clause 2** states that the price of the goods referred to in the contract is set out in Schedule 2.

Clause 1 is stated to be "notwithstanding" clause 2. Although clause 2 sets out the exact price of the goods (by reference to a schedule), clause 1 overrides clause 2 and provides a mechanism for the price of certain goods to be increased.

One means of expressing the priority in plain English would be "Despite clause 2" or "Clause 1 overrides clause 2 in respect of…"

A wider formulation of this expression, such as "Notwithstanding any other provision of this agreement ….", is used where the fee-earner drafting the provision does not have the time or is otherwise unwilling to review the entire contract for potential clashes of clauses. It is used to give priority to a main overriding principle. It can be regarded as a lazy way of drafting, but sometimes necessary, for example, due to lack of time, but should be avoided where possible – better to specifically refer to the correct clause numbers rather than the entire agreement. For obvious reasons, if more than one clause in a contract begins "Notwithstanding any other provision of this agreement…", and the terms of those clauses conflict, one of them must be wrong!

Example 2: Clause 1 begins "Notwithstanding any other provision of this agreement…"

- **Clause 1** gives one party to the contract the right to assign the benefit of the contract to a specified third party without the prior written consent of the other contracting party.
- The agreement contains an express prohibition on assignment by either party without the prior written consent of the other party.

Although the agreement contains an express prohibition on assignment without consent, clause 1 has carved out an exception that overrides the prohibition.

One means of expressing the priority in plain English would be "Despite anything else to the contrary in this agreement…"

"Without prejudice to"

"This expression is used in a clause where there is to be no priority given over another clause. It tells the reader that the clause in which the expression appears does not affect the clause to which it refers."

Example: Clause 1 starts "Without prejudice to clause 2…"

Clause 1 requires the supplier to comply with specific obligations and restrictions on the processing of personal data.

Clause 2 requires the supplier to comply with all relevant laws relating to privacy, direct marketing and data protection.

Nothing in clause 1 will affect clause 2. "Without prejudice" is usually used as shorthand for "without prejudice to the generality of the clause" and, in our example, it means that whilst the supplier must comply with the general obligations set out in clause 2, it must also comply with the more specific obligation set out in clause 1. Compliance with the provisions of clause 1 should not affect the wider duty of compliance contained in clause 2.

One means of expressing "without prejudice to" in plain English would be "Without limiting clause 2…" or "Without affecting clause 2…".

"Subject to contract"

Settling an action just before trial or at the door of the court is commonplace in civil litigation. Agreement in principle may be reached with the intention that a formal written settlement agreement will follow. A practical problem in such circumstances is recording detailed notes of the terms agreed. This can lead to further protracted negotiation, even litigation as to the purported terms of the settlement.

In theory, it should be much simpler if an action is settled at least a few days before trial. However, the need to reach settlement quickly can mean a few tense moments as amended documents pass quickly between parties while the solicitors cross their fingers hoping that they have covered all the necessary issues and that all substantive points, usually evidenced by a chain of e-mails, have been captured in the settlement. At the back of their minds is likely to be the question "What will happen if it all goes wrong and no final written agreement is reached?"

Following the case of **Newbury v Sun Microsystems** [2013] EWHC 2180 (QB), there is now the possibility that the court may impose an agreement signed by neither party.

The claimant, Mr Newbury (Mr N), brought a claim against the defendant, Sun Microsystems (SM), for unpaid commission. Eight days before the trial was to begin, SM wrote to Mr N's solicitors offering to pay Mr N, within 14 days of acceptance of the offer, £601,464.98 inclusive of interest plus £180,000 in costs. The letter also provided that the offer was only open until 5.00pm (later extended to 5.30pm) that day and that the settlement was to be "recorded in a suitably worded agreement". Mr N's solicitors accepted the offer by e-mail the same day and stated that they would forward a draft agreement for approval the following day. A dispute arose as to the terms in which the settlement should be recorded. Mr N's solicitors applied to court for a declaration that the parties had already reached a binding agreement following SM's letter and Mr N's solicitors' reply. SM said its letter had been "in principle" only and contended that, in determining whether a binding agreement had been formed through the exchange of letters, the court should look at the conduct of the parties after that date, which showed that the parties were still negotiating and that they had not reached a binding agreement.

Lewis J granted the declaration sought. He was satisfied that, viewed objectively, the correspondence gave rise to a binding legal contract between the parties. His reasoning was as follows:

- SM's letter was expressed to be an offer to settle and it set out the terms of the offer.
- If the offer was accepted, payment would be made within 14 days.
- He held that the words "such settlement to be recorded in a suitably worded agreement" were not a reference to terms still to be negotiated. Read objectively, the letter offered to settle on certain terms and, if accepted, those terms would be "recorded", i.e. they would be committed to writing as an authentic record of what had already been agreed. Execution of the written agreement was not a condition of the creation of a binding agreement.
- The letter had not been expressed to be "subject to contract". Had those words been used, it would have been clear that the terms would not be binding until a formal agreement had been signed.
- The conduct of the parties after the exchange of letters was irrelevant. Where a contract is contained in documents, conduct occurring after the date of the documents is not a legitimate aid in determining whether those documents were intended to give rise to a binding contract.

The key principles

1. A binding contract will only be formed if the parties intend to create legal relations.
2. The use of the expression "subject to contract" in commercial negotiations creates a strong presumption that the parties do not intend to be bound.
3. Where a "subject to contract" qualification is introduced into negotiations, it can only cease to apply if the parties expressly, or by necessary implication, agree that it no longer applies.

"Subject to contract" – continued

The Newbury case acts as a reminder that, when negotiating the terms of any contract (not just settlement agreements), parties should be clear whether an offer is intended to be capable of acceptance or whether it is only intended to be a starting point for negotiations. In the former case, the offer should contain all of the terms on which a party is prepared to contract. In the latter case, it should make clear that further matters need to be agreed before a binding contract will be formed. Applying the label "subject to contract" is often a useful shorthand method of achieving this. However, the court will look at the substance, and not the form, of a communication and the use of a particular label may not be decisive. In exceptional circumstances, if both parties act on and take steps in respect of the terms and conditions that the "subject to contract" agreement provided for, this may support the courts concluding that the parties had reached an implied binding agreement despite the fact that a formal contract had not been executed.

What must also follow from the Newbury case is that references such as "formal agreement to follow" or "we will forward a draft for your approval" are no longer sufficient insurance against a finding that an agreement has been reached. This may well add to the pressures of settlement negotiation but the judge in the Newbury case offered a practical solution to the problem when he said "The letter is not expressed to be "subject to contract". Had those words been used, it would have been clear that the terms were not yet binding or agreed until a formal contract was agreed." The conclusion to be drawn from this is that all letters and e-mails should be headed "subject to contract" until settlement is finally concluded.

"Without prejudice"

"Without prejudice" is shorthand for "without prejudice to the maker of the statement". The expression is commonplace in civil litigation and use of the expression "without prejudice" allows communications between parties, which are **genuinely aimed at settling a dispute**, whether made in writing or orally, to remain confidential (known as the without prejudice rule). The rule prevents such communications being referred to during any related court proceedings.

Any communications which are intended to be part of a genuine settlement attempt should be clearly marked "Without prejudice" at the top of the letter. Such communications can take place before or after court proceedings have been issued but there must be a dispute. For example, general correspondence regarding how a liability is to be paid or seeking time to pay a debt would not qualify.

The important point to note is that the inclusion of the words "without prejudice" in a letter or spoken in a meeting does not offer blanket immunity and will not necessarily bring the communication within the ambit of the without prejudice rule if it is not, in substance, a communication made in a genuine attempt to settle an existing dispute. **It is a question of substance, not form**. In order for the communication to qualify for protection, it must be apparent that there has been a "concession" relating to the party's position. In this context, the term "concession" does not mean an admission of wrongdoing, but rather a statement made by a party against its own interest. For example, offering to settle a claim for a lower amount than you think you are owed, for commercial reasons – say, an offer to accept £75,000 against a £100,000 debt – would be a valid without prejudice offer, and would not prejudice your right to claim the full amount if a settlement was not reached and you had to issue court proceedings to recover the debt owed.

"Without prejudice" – continued

In practice, consider the following:

- There is an increasing tendency for solicitors, usually but not always, less experienced solicitors, who will ask to have a conversation "off the record" about a case with the solicitor on the other side. What is that supposed to mean? The solicitor on the end of this request will make an attendance note of the conversation so it will be on their file/record and if the conversation elicits any information that affects their client's case, they will tell their client. So what has asking to have the conversation "off the record" achieved? Certainly nothing of a legally recognisable nature. If you want a conversation "without prejudice" to your client's position, say so!
- A chain of letters relating to an attempt to settle a dispute may be privileged under the without prejudice rule even if only one letter is headed "without prejudice". This may "save" you in a situation where a letter has not been headed "without prejudice". Conversely it may mean a letter is privileged when in fact you don't intend it to be. Think carefully each time such a letter is written and if you don't want it to be subject to the without prejudice rule and previous letters have been written marked "without prejudice", it would be prudent to start your letter "We are writing this letter as an open letter…" or words to that effect to be on the safe side.
- Fee-earners, usually junior solicitors and trainees, can get into a habit of answering all "without prejudice" correspondence received with a "without prejudice" response. Those supervising such fee-earners should be monitoring such correspondence to ensure "without prejudice" is only used in appropriate circumstances. It may be that the correct response should be partly subject to the without prejudice rule and partly open; in such cases, two letters of response will need to be sent.

For more on privilege, "without prejudice" and "without prejudice save as to costs" see @risk September 2012.

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