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After the Robots: how strong is 'without prejudice' protection?

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Speaker: Kathryn Pickard, Barrister, 11 South Square (***KP***)

Introduction

The talk considered how to deal practically with 'without prejudice' protection in light of the recent decisions in *AutoStore v Ocado* [2022] 1 WLR 561 and *Motorola v Hytera* [2021] QB 744. KP was junior counsel for AutoStore in its successful opposition to an application for interim injunctive relief in England to restrain the use in US proceedings of information arising from 'without prejudice' discussions.

KP explained that the title of the talk was inspired by the robotic warehousing technology at issue in *AutoStore v Ocado* and wondered whether the talk may become redundant with the rise of automation: might robotic lawyers one day talk to robotic judges and apply the 'without prejudice' rules without any issue?

Without prejudice protection

KP gave an overview of the 'without prejudice' rule and explained that it derives from public policy to promote settlement discussions rather than to litigate to the 'bitter end'. As the purpose of the rule is to make parties comfortable with putting their cards on the table, KP noted that the rule must be strong enough to provide blanket protection with few exceptions.

The decision in *AutoStore v Ocado* raised a point of difficulty where there was a multi-jurisdictional dispute and therefore the potential for conflict between the application of English rules of 'without prejudice' and the rules of evidence in other jurisdictions. *Motorola v Hytera* dealt with an exception to the 'without prejudice' rule, that of 'unambiguous impropriety'.

AutoStore v Ocado

AutoStore and Ocado were involved in a multinational patent dispute concerning automated warehouse technology. Proceedings were ongoing in the UK, Germany, two states in the US and before the US International Trade Commission (***ITC***).

The parties had engaged in settlement discussions which took place in London. The issue arose when, during the proceedings before the ITC, AutoStore wished to use a document that Ocado had produced during the settlement discussions. Ocado applied for interim injunctive relief to prevent the document from being used.

KP noted that the parties agreed that the discussions had taken place on a 'without prejudice' basis and that the document was marked 'CONFIDENTIAL AND WITHOUT PREJUDICE; PROVIDED

FOR PURPOSES OF SETTLEMENT NEGOTIATIONS ONLY'. However, during the meeting in which the document was produced, a lawyer for Ocado stated that "…*any US law discussions were to be governed by rule 408 of the [US Federal] rules of evidence*". FRE 408 is a US law which is similar but not identical to the English "without prejudice" rule, and which governs the admissibility of evidence in proceedings before the ITC.

The question was therefore not whether the document was admissible in the ITC proceedings, but whether the English court should grant an interim injunction preventing the evidence from being placed before the US ITC at all. In the High Court, HHJ Hacon refused the injunction; the Court of Appeal upheld this decision by a 2-1 majority.

KP explained the proposed tests for injunctive relief put forward by each party. Both the High Court and the Court of Appeal favoured the equivalent test normally used to consider the grant of an anti-suit injunction – whether there was a 'high degree of probability of success' – due to the potential for the injunction sought by Ocado to interfere with the conduct of the US ITC proceedings.

KP highlighted the decisive role of the reference to FRE 408 at the settlement negotiations. Sir Geoffrey Vos MR viewed the statement as a "*clear qualification to the overall without prejudice blanket*" which otherwise applied to the discussions. As Ocado itself had stipulated for the application of FRE 408, the Master of the Rolls considered it "*particularly unjust*" for FRE 408 not to apply in the circumstances.

Motorola v Hytera

KP introduced *Motorola v Hytera*, a case which concerned proceedings brought for the theft of trade secrets of technology for two-way digital radios. Hytera had made statements at 'without prejudice' meetings which Motorola said amounted to threats to deal with its assets in order to frustrate an adverse judgment.

Following judgment, Motorola applied for a freezing order for $345 million. In deciding the application, the court had to consider whether the exception of 'unambiguous impropriety' applied such that the 'without prejudice' statements would be admissible.

At first instance, Jacobs J held that the evidence was admissible because there was a 'good arguable case' that there was impropriety. However, on appeal, the Court of Appeal unanimously held that the correct test was instead whether the evidence itself established an impropriety with the higher standard of proof of 'unambiguity'. The statements were found not to meet the higher standard of proof and were held to be inadmissible in the proceedings.

KP emphasised that while providing colour on the correct test for the exception of 'unambiguous impropriety', the case confirmed the strength of 'without prejudice' protection in English courts. In the Court of Appeal's decision, Males LJ described how English courts have "*jealously guarded any incursion or erosion*" of the 'without prejudice' rule and that cases in which the exception applied were "*truly exceptional*".

Practice points

KP highlighted that the English 'without prejudice' rule remains strong with limited exceptions. Ocado did not come unstuck due to a fault in the English rule, but because the agreement that the English rule applied to the parties' discussions had been varied: the statement that any US law discussions were to be governed by FRE 408 varied the agreement such that the parties were held to have agreed that any questions regarding the admissibility in US proceedings would be governed by FRE 408.

KP's take home message was to stick with the English rules: make it plain that the English rules on 'without prejudice' apply (choice of law). KP suggested that one could even go further and state that any questions about admissibility should be "within the exclusive jurisdiction of English courts" (choice of jurisdiction).

Points raised in Q&A

- Although HHJ Hacon was keen to stick to the strict test for granting an injunction, comity may have played a role in the Court of Appeal's decision in *AutoStore v Ocado*. Sir Geoffrey Vos MR commented that it would be odd to withdraw a question about admissibility from a US judge and for an English court to rule on what documents could and could not be looked at by the US ITC.

- It is not essential to have something in writing to establish the footing of 'without prejudice' discussions: if the discussion is between English lawyers and takes place in England, it is implied that English law applies (although express terms will always be more certain). If the discussions take place in part in England and part elsewhere, it should be made clear that English law applies.

- One cannot assume that writing 'without prejudice' at the top of a document will mean the same thing in another jurisdiction as it does in England e.g. the Scots 'without prejudice' rule differs to the English rule.