"Anything you do say may be given in evidence"

Some practical tips on the rules of evidence in the context of property litigation and the pitfalls to avoid.

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Introduction

1. I have taken as my topic this morning, the rules of evidence in the context of property litigation. I will endeavour to offer some practical guidance as to how to avoid some common pitfalls that arise frequently in practice.

2. I appreciate that this is not, perhaps, the most obvious topic since it is one, I imagine, which conjures up thoughts of dry and arcane rules, primarily of interest only to lawyers and not to property professionals more generally. It is also a topic which has given rise to innumerable learned tomes and is not easily reducible to a short, general talk.

3. Nevertheless, I offer three reasons in justification. First, experience suggests that the vast majority of disputes which proceed to trial are decided upon the facts. Relatively few cases turn on novel points of law or issues of statutory construction and the like. Far more often, the critical questions upon which the outcome of the case will turn are

factual; who said what, to whom and when. Understanding what materials will be deployed to determine those questions is therefore important.

4. Second, in litigation the written word is king. Judges inevitably treat unsupported oral evidence given from the witness box with a degree of scepticism. Recollections are diminished and skewed by the passing of time and coloured by the context of the dispute. On the other hand, contemporaneous material such as emails, letters and other notes can safely be relied upon. Judges, therefore, trust documentary evidence much more.

5. Thirdly, the volume of documentary evidence available in most commercial property disputes has expanded exponentially in recent years. The revolution in digital communications and data storage creates serious problems for the management of evidence in trials (as well as opportunities for fun in cross-examination). All of us now receive and send 100s of emails every day. These communications bounce around in forwarded emails and chains. Many cases can now turn on a single injudicious email said to reveal the true state of mind of the protagonist, contrary to the professions now made in a witness statement. The best prepared witness and the strongest cases can be holed below the water by a rogue admission, the maker of which never imagined would be deployed in court.

6. Litigators would, of course, be delighted if their clients never wrote an email without running it past them and kept detailed diaries of every single telephone conversation or meeting (and not only because of the additional fees that would incur). However, in the real world, of course, no-one can spend their working lives under the shadow of prospective litigation, second guessing every communication on the basis of how it

might later appear to a judge in the cold light of a trial under forensic cross-examination.

7. Nevertheless, I consider that it might help to avoid providing the ammunition for a devastating cross-examination by counsel for the tenant, if a few basics of the rules of evidence are kept in mind.

8. I have, therefore, set myself the tasks of addressing three of the most important rules concerning the admissibility of evidence in a civil trial, the without prejudice rule, the concept of legal professional privilege and, finally, the tricky problem of confidential information.

9. I have chosen these topics because they come up all the time in commercial property litigation and, I think it is fair to say, are frequently misused or misunderstood. I do not intend to descend into the technical details of these doctrines, but rather, I hope, provide some practical tips which might serve to avoid prejudicial or embarrassing slips.

10. I will attempt to offer a working guide to the material that will be before the court should a dispute give rise to litigation. My general theme is that a little knowledge of the relevant rules, will be useful in avoiding embarrassment if and when you or your client become embroiled in litigation.

The rules of evidence – what is admissible?

11. The rules of evidence in a criminal trial involve some serious mental gymnastics. Very complicated principles have evolved to ensure absolute fairness is afforded to the Defendant. Arcane rules such as bad character evidence and hearsay are complex and are, in many cases, of critical importance in the outcome of a trial.

12. Fortunately for property lawyers and their clients, the basic rule of evidence in civil litigation is simple straightforward. In general terms any documentary material which is relevant to the issues in dispute between the parties will be admissible as evidence in the trial of a property dispute. It is some of the exceptions to that general rule which I intended to consider today. A working knowledge of those limited circumstances where material is excluded from consideration by the judge is, I would suggest, of some importance for anyone working in the field of property management.

i) The without prejudice rule

13. I turn, then, first of all to the privilege accorded to communications that are made "without prejudice". The principle that communications which are made "without prejudice" cannot be received in evidence is, perhaps, the best known rule governing what evidence is admissible in a civil court and, no doubt, one with which most of you are already familiar. It is, however, also widely misunderstood and can cause serious problems in litigation.

14. The rule is of considerable vintage. In Dickens' Bleak House, the oleaginous legal clerk, Mr Guppy prefaced his proposal of marriage to the heroine Esther Summerson as being "without prejudice". Asked to explain, he says:

> "*It's one of our law terms, miss. You won't make any use of it to my detriment... If our conversation shouldn't lead to anything, I am to be as I was and am not to be prejudiced in my situation or worldly prospects.*"

15. The quotation is, in so far as it goes, an accurate description of the principle as applied by the courts today. Distilled to its essence, the without prejudice rule enables parties to a dispute to engage in negotiations with a view to resolving their dispute by compromise, without revealing those negotiations to the court. It is a rule based on policy. The courts recognise that it is conducive to settlement if the parties are able to make offers which will not be seen by the judge conducting the trial. Otherwise, offers to settle might be perceived as a sign of weakness or a lack of faith in the strength of their case by the party making the offer.

16. Accordingly, all negotiations genuinely aimed at achieving a settlement, whether oral or in writing, are excluded from being given in evidence at the trial of the substantive issues (although it may be admitted when the court comes to consider the question of costs).

17. However, the rule is often misunderstood in two important ways. The principle is, in one important sense, broader than commonly believed and in another, equally important sense, much narrower.

18. The rule is broader because it applies to all communications which are made with the genuine intention of settling a dispute that has arisen between the parties to the

communication in question. It is not necessary for a document to bear the express heading "without prejudice" in order to attract protection. Rather, all *bona fide* statements which touch upon the strengths or weaknesses of the parties' cases (or which place a valuation on a party's rights forming a part of the attempt to compromise the litigation) are protected.

19. At the same time, the rule is also narrower then might be supposed. It is not possible to render a communication inadmissible in evidence by simply appending the tag "without prejudice". This is something which is frequently encountered when dealing with litigants in person (and, on occasions, it must be said, with lawyers). A letter which contains no offer of compromise, but simply makes assertions or admissions is sometimes headed "without prejudice" presumably in the belief that by attaching this label the document is protected from the view of the judge.

20. In fact, the label itself does not conclusively or automatically render the document privileged. If the status of the document is challenged, the court will consider the contents of the document to decide whether or not it is admissible or protected on the basis it amounts to a genuine attempt at settlement. The without prejudice protection cannot properly be invoked unless and until a dispute has arisen which is capable of settlement.

21. These points are of considerable importance to property professionals because the rules do not only apply to formal offers made once solicitors have been instructed. The privilege can be, and often is in practice, asserted in respect of evidence of a pre-litigation dispute and even before litigation has been threatened. It is therefore

important to make sure that admissions are not made under cover of the "without prejudice" label on the basis that this label alone will provide safety from scrutiny of the document by a judge if the matter does become litigious.

22. Take the case of Bradford & Bingley Plc v Rashid [2006] as an example. The facts are entirely commonplace. Bradford & Bingley were the mortgagee of a property. In 1991, the borrower defaulted and the lender obtained a possession order and sold the property. The proceeds did not cover the outstanding debt. The lender wanted to recover the shortfall as a personal debt but had difficulty tracing the borrower. Some 10 years later he was tracked down and asked to make an offer of repayment. After some letters were exchanged the borrower finally wrote to the bank saying that he was "willing to pay approximately £500 towards the outstanding amount as a final settlement."

23. At first sight, a letter in those terms might appear to be a clear offer of settlement and therefore a genuine attempt to settle a dispute that had arisen. The House of Lords (where the question was finally resolved) disagreed. The letter from the borrower, it was held, was a clear acknowledgment of the claim. It was, said Lord Walker, a letter designed to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. Since the debt was admitted, there was no dispute which could be settled and therefore the without prejudice principle had no role to play.

24. My advice, therefore, is to be wary both of using the label "without prejudice" and of making offers without fully considering the possible consequences. Imagine that a

tenant has made a complaint, and you want to make an offer of compensation, to appease them and stave off a possible claim, you can mark that offer 'without prejudice'. But you must still ask yourself "Is there a dispute yet?". If the court decides the matter hadn't escalated into a dispute, your offer could come out into the open later and be treated as an admission of fault.

25. It is not my intention to deter you or your clients from making reasonable offers without involving lawyers. It is perfectly possible to make an offer whilst making it clear that the offer is intended as a goodwill gesture and not an admission of any fault. My warning, rather, is to avoid using the "without prejudice" label as a panacea.

ii) Legal professional privilege

26. The second exclusion to the general principle that all relevant documents are admissible in evidence is the doctrine of legal professional privilege, more popularly known, at least in American legal dramas, as attorney-client privilege.

27. The privilege attaching to communications between a lawyer and his or her client has been described as a "fundamental right". As expressed, in the words of Lord Chief Justice Taylor:

> *"...a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent."*

28. The law has jealously protected this privilege. Communications between lawyers and their client thus have a status which is not endowed upon any other category of document. Quite why a man (or woman) must be free to tell the truth to their lawyer but not their surveyor, accountant or bank manager has not, perhaps, been fully explored.

29. In any case, there are in English law two categories of legal professional privilege. First, documents which are created by a lawyer for the purpose of giving legal advice to the client. This privilege attaches to a document even if it was created before litigation was contemplated.

30. Second, communications between a solicitor and a non-professional agent or third party which come into existence after litigation is contemplated or commenced and made with a view to that litigation.

31. For non-lawyers involved in property management, this distinction is important. Communications between property professionals and their clients before litigation is in contemplation are not privileged, even if they express an opinion on the merits of a dispute. So, for example, where a solicitor obtains a report from a surveyor with a view to giving legal advice to the client, the report is not privileged unless obtained with a view to contemplated or existing litigation. Equally, asking a managing agent to express a view on the legalities of a particular issue will not attract advice privilege, no matter how experienced and well qualified the agent might be to advise on the point.

32. It should also be noted that the mere fact that a solicitor or legal executive is copied in to an email does not render it privileged. The courts are concerned with the substance of the document. Only documents in which advice is sought or provided are protected.

33. The paradigm case of advice given by a solicitor or by counsel directly to a client is easy to identify. It is at the margins of the principle, as ever, that there are pitfalls in practice. I would like to identify two particular problems.

34. First, the danger of reporting legal advice to a client. This is a question which will be of direct concern to most of you here. A communication between a client and his legal adviser need not be made directly in order to qualify for advice privilege. It is perfectly possible for a company to engage a surveyor or agent who then seeks legal advice on behalf of the company and report the contents of that advice back to the company without losing privilege.

35. However, the decision in Three Rivers District Council v Bank of England (No. 5) means that considerable caution must be exercised when seeking legal advice, particularly by large organisations. In that case, part of extremely complex and protracted litigation arising out of the Bank of England's investigation into the collapse of the BCCI banking group, the court considered the status of certain communications made by an internal committee of the Bank of England with the Bank's former and current employees involved in the regulation of the BCCI group. The communications were made for the purposes of enabling the Bank's lawyer's to

give legal advice concerning the Bank's submission to the statutory Bingham Inquiry. The issue was whether the communications were within the legal advice privilege.

36. The Court of Appeal decided that they were not protected. The basis of the decision was that legal advice privilege could not be claimed for documents other than those passing between the client and his legal advisers. Therefore internal communications within the Bank were not caught by the privilege even when made for the purpose of obtaining legal advice. The Bank was the client, not the individual employees and so the communications, though expressly directed at obtaining legal advice, did not attract protection.

37. The decision was a surprise to practitioners and has given rise to considerable, as yet unresolved, uncertainties. The practical upshot is that it is safest to treat as privileged only those communications to lawyers which are made by those charged with seeking their legal advice. The problem is identifying, particularly within a large organisation, the individuals charged with that responsibility. Communications other than between such individuals and the lawyers may not be privileged.

38. In practice, the best advice is to confine as narrowly as possible the number of people involved when legal advice is sought in order to avoid "leakage" within the organisation and the possibility of privilege being lost and the contents of advice becoming available for inspection should proceedings ensue.

39. Second, beware the problem of waiver. Although absolute in effect, legal professional privilege is fragile. If a privileged document comes into the public domain or into the hands of the other party to the dispute in circumstances where the

information can no longer be said to be confidential, then the privilege is lost. Furthermore, the waiver is not necessarily limited to the document itself, but can set-off a chain reaction, requiring the disclosure of other privileged documents relevant to the issue in question.

40. Again, the dangers of methods of instant communication are obvious; the "Reply All" or "Forward" buttons are not your friends when it comes to inadvertently waiving privilege. On the one hand, the law has developed so that if there is unintended disclosure the court will in most circumstances restrain, by injunction, the use of the inadvertently disclosed document. On the other hand, that remedy will only be effective if the mistake is identified and swift action is taken to avoid the further dissemination of the material.

41. I recently advised in a case concerning an allegation of misrepresentation in the sale of a residential property. My instructing solicitor wrote an email to the solicitor on the other side setting out the basic allegations, asserting that the contract was liable to be rescinded and asking for a response. The response duly came back by email. It was robust; nothing untoward had happened and the contract for sale was perfectly enforceable and would be enforced by the vendor, by the issue of proceedings if necessary. The robust tone was somewhat undermined by the email from the vendor himself immediately below, forwarded to my instructing solicitor as part of the reply. "Tell them to stick it, but we might have to throw them a few quid to go away". I believe the matter was compromised shortly thereafter.

iii) Confidentiality

42. The third and final issue I wish to address is the question of confidential or commercially sensitive material.

43. It often comes as a surprise to a client to be told that there is, in English law, no general principle which entitles them to withhold disclosure of a document which they regard as confidential, whether because the document contains information which is commercially sensitive or for some other reason. If the document (or part of it) is relevant to an issue which is in dispute then it must be disclosed to the other party and will be admissible in evidence. This is so even where documents and information are supplied to the disclosing party in confidence by a third party.

44. There are only limited exceptions, none of which are likely to be particularly relevant in commercial property litigation. It has been held that disclosure of confidential information which would involve a breach of a third party's rights under Article 8 of the ECHR can be resisted. A journalist can resist disclosure of their sources. Furthermore, it is possible to resist the disclosure of technical secrets such as computer source code or similar.

45. Otherwise, commercially sensitive information, if relevant, is admissible, must be disclosed and can be relied upon in open court.

46. How to deal with this issue, should it arise in practice? First, it must be kept in mind when considering whether a dispute should be brought to court at all. Is the cost of revealing any sensitive information that will come to light something that should be taken into account in offering to compromise?

47. Second, if litigation proceeds, it may be possible to redact information from documents (where it is not relevant or the relevant points, but not the detail which is sensitive) so as to limit the exposure.

48. Finally, if all else fails, the court might be prepared to order that the hearing takes place in private, but that is likely to be a last resort and will be useless in any case if the other party to the dispute is someone interested in the sensitive information.