COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

Claim No. 2022/CLE/gen/00031

**IN THE MATTER** of the International Business Companies Act, Ch. 309 (as amended by the International Business companies (Winding Up Amendment) Act, 2011

**AND**

**IN THE MATTER** of the Petition of **WIN BUSINESS ENERGY CAOFEIDIAN LIMITED (FORMERLY KNOWN AS KERR-MCGEE CHINA PETROLEUM LTD)**

**AND**

**IN THE MATTER** of a Statutory Demand under Section 188 of the Companies Act (O. 2, r. 2) The Companies Act, Ch. 308

B E T W E E N

**WIN BUSINESS ENERGY CAOFEIDIAN LIMITED**

**(formerly known as KERR-MCGEE CHINA PETROLEUM LTD.)**

Petitioner

AND

**ANADARKO PETROLEUM CORPORATION**

First Respondent

AND

**ANADARKO CHINA HOLDINGS 2 COMPANY**

Second Respondent

Before Hon. Madam Justice Simone I Fitzcharles

Appearances: Mr. Tara Cooper-Burnside KC with Mr. Rhyan Elliott for the Applicant

Mr. Sean Moree KC with Ms. Vanessa Smith for the First and Second Respondent

Hearing Date: 08 February 2024

**RULING**

FITZCHARLES, J.

1. Where parties negotiate genuinely to achieve a settlement of their dispute, their negotiations are generally protected from being given in evidence, unless they agree otherwise. The privilege is bestowed upon such communications where the parties' willingness to compromise is clear. This is the thrust of the 'without prejudice' rule. There are exceptions to this rule. One exception is where the withholding of such communications from the court will 'act as a cloak for perjury, blackmail or other unambiguous impropriety'. These are the principles which underlie the issues in this application.

2. This is my decision on the Summons filed on 3 July 2023 (the "Respondents' Summons"), by the 1st Respondent – Anadarko Petroleum Corporation ("APC") – and the 2nd Respondent – Anadarko China Holdings 2 Company ("ACH2"), (collectively the "Respondents"). By their Summons, the Respondents sought, in part:

   **"1.2 An order that the 'without prejudice' privilege attaching to correspondence from the Chairman of the Petitioner's parent company dated 14 November 2022 and 28 November 2022 ("the Letters") be lifted and dispensed with so that the Letters can be adduced into evidence by the Respondents should the Respondents apply to wind up the Petitioner if it fails to pay the Statutory Demand dated 20 April 2022 ("the Statutory Demand")**…".

3. The Respondents' Summons is supported by the First Affidavit of Tee Su Mien filed on 03 July 2023 ("TSM1"). It is important to note that by its Summons filed on 08 December 2023, the Petitioner – Win Business Energy Caofeidian Limited (formerly known as Kerr-McGee China Petroleum Ltd) (the "Petitioner") sought to strike out several parts of TSM1 including those in which the affiant referred to the Letters (as defined in the Respondents' Summons) and their contents. A key reason the Petitioner gave for the application to strike out those parts of TSM1 was that 'without prejudice' privilege applies to the Letters, and as such, they are inadmissible.

4. By way of background, the parties were engaged in certain arbitration proceedings before the London Court of International Arbitration (Arbitration No. 153051). In those proceedings, on 12 March 2019, the Tribunal issued a Partial Award on Liability (the "Partial Award") whereby the Respondents' claim for restitution of the value of a certain Tax Benefit from the Petitioner succeeded.

5. On 13 October 2021 the arbitral tribunal decided on quantum and costs ("the Final Award") to be paid by the Petitioner to the Respondents. (Both the Partial Award and the Final Award are collectively referred to as "the Awards").

6. Pursuant to the Awards, the Respondents served on the Petitioner a Statutory Demand under section 188 of the Companies Act dated 20 April 2022. By the Statutory Demand the Respondents claimed, as creditors, that the Petitioner owed them the sum of US$172,381,206.40 as at the date of their Statutory Demand by their calculation of the sums awarded to the Respondents in the Final Award. The Statutory Demand was signed by Vincent A Alspach, a director of APC and ACH2.

7. By a Petition filed on 19 May 2022 and subsequently amended, the Petitioner seeks to set aside the Respondents' Statutory Demand. The Amended Petition put forward several grounds of contest which fall mainly under the following broad headings:

   (1) pursuant to section 189(1)(a) of the Companies Act, there is a bona fide substantial dispute as to whether the alleged debt is due or owing;

   (2) the Awards are not entitled to recognition or enforcement in The Bahamas (for reasons set out in the Amended Petition); and

   (3) substantial injustice would be caused if the Statutory Demand is not set aside (for reasons enumerated in the Amended Petition).

8. The Petition to set aside the Statutory Demand is scheduled by this Court to be heard in June 2024. The Respondents seek to refer to the Letters during a hearing of a winding up petition, should the Petitioner fail to pay the Statutory Demand. A copy of the correspondence which they seek to produce in evidence, as objected to by the Petitioner, has been tendered provisionally to this Court in chambers in camera to facilitate the Court's consideration of this application only.

## The Respondents' Position

9. Counsel for the Respondents (by Respondents' Skeletal Submissions dated 08 December 2023) asserts that of the Letters, the Respondents apply in particular in relation to the letter of 28 November 2022 from the Chairman of the Petitioner's parent company (the "Letter"), which is marked 'Without Prejudice'. The Respondents hold the position that the Letter should be admitted into evidence on the basis that to exclude it would act as a cloak for perjury. This submission is made on the basis the Letter is covered by the privilege, but ought to be disclosed.

10. The Counsel acknowledges the general rule that for there to be a waiver of without prejudice privilege, the consent of both parties is required. However, there are several exceptions to the general rule. In accordance with Robert Walter LJ in **Unilever v. Proctor & Gamble** [2001] 1 All ER 783 ("**Unilever**"), a party may be

permitted to adduce in evidence communications exchanged by the parties during negotiations if to exclude those communications would act as a cloak for perjury, blackmail or other "unambiguous impropriety".

11. The Court is invited to consider the case of **Re Daintrey Ex p. Holt** [1893] 2 Q.B. 116 where the question arose as to whether a document fell within the protection of the privilege. There, a debtor sent his creditor, who subsequently sued for the debt, an offer to compromise the debt but also said that the debtor could not pay his debts and would suspend payment unless the compromise was accepted. In that case, the English Court of Appeal ruled that the document in question was not within the 'without prejudice' rule. The sender of the document was said to have committed a clear act of bankruptcy and the rule did not apply to a document which may prejudice the recipient.

12. Counsel (by Reply Submissions dated 4 January 2024) alternatively raises the question whether the privilege attaches to the Letter at all. He submits the propositions set out below.

    (1) Even if the Letter is not, in and of itself, evidence of a certain fact which is inconsistent with the Petitioner's case as pleaded in the Amended Petition, it is highly persuasive that the Petitioner believes the fact stated in the Letter. This means that the Petitioner is therefore deliberately misleading the Court in its Amended Petition. Counsel asserted that there could not be a more unambiguous impropriety than in this instance.

    (2) The Letter is a statement by the Petitioner against it to prove a fact contrary to that which it asserts in its Amended Petition. The public policy rationale of the 'without prejudice' rule is only directed to admissions and not to statements which are relevant otherwise. Reliance is placed upon **Muller v Lensley & Mortimer** [1994] EWCA Civ 39.

    (3) The Respondents point out that although the courts in Hong Kong and the British Virgin Islands have determined that there is not a genuine and substantial dispute between the parties, they accept it is not a requirement for this application that the dispute be a genuine or substantial one. At the time of receipt of the Letter, there was pending litigation between the parties in The Bahamas in relation to the enforcement of the debt arising out of the Final Award. This was followed by the tender of the Statutory Demand and the filing of the Petition to set aside the Statutory Demand. However, the Respondents contend that the existence of a dispute is not enough to give effect to the 'without prejudice' privilege. Where the document sought to be protected is an opening shot which does no more than assert a person's claim then on the face of it, it is not protected. The Letter was merely an initiating document, and not a

negotiating document deployed in the course of negotiations in an attempt to arrive at a final resolution of the dispute. It made no offer of settlement and contemplates a future offer being made. Counsel referred to **Winston Finzi et al v JMMB Merchant Bank Ltd** [2016] JMCA Civ 34.

(4) The Letter was not sent by one of the parties to the dispute. Reliance is placed on **Standarin and another v Yenton Minister Homes Ltd and others** The Times, 22 July 1991, CA.

## The Petitioner's Position

13. In Submissions on behalf of the Petitioner dated 20 December 2023, Counsel for the Petitioner objects to the admission in evidence of the Letter because it asserts the Letter is inadmissible by operation of the 'without prejudice' privilege. The Petitioner sets out the full list of exceptions to the 'without prejudice' rule as enumerated by Robert Walter LJ in **Unilever**, and referenced with approval by Adderley J (as he then was) in **Belgravia International Bank & Trust Company Ltd. et al v CIBC Trust Company (Bahamas) Ltd** BS 2012 SC 87[1] ("**Belgravia**").

14. Counsel points out that in **Belgravia** the defendant took the position that it needed the plaintiffs' assistance to provide fuller accounts. In upholding the without prejudice privilege, the Court refused to admit certain evidence that may have been relied upon by the plaintiff to rebut that position taken by the defendant. In other words, even although the defendant invoked the privilege to protect communications which may have been contrary to their position before the Court, the privilege was upheld by the Court. Counsel for the Petitioner refers to **Ofulue v Bossert** [2009] 1 AC 1021, which influenced Adderley J (as he then was) in **Belgravia**.

15. Counsel also cited the principles expounded in relation to 'unambiguous impropriety' in **Berry Trade Ltd and Another v Moussavi and Others** [2003] EWCA Civ 715, where Peter Gibson LJ drew together references to key English authorities, and illustrated the basis of the 'unambiguous impropriety' exception and the mode of its application by courts. The Petitioner felt it was quite important to note in the authorities the consistent pronouncement that the protection of admissions against one's interest is the most important effect of the rule.

16. The Petitioner's Counsel also contended that **Re Daintrey** is distinguishable from the present case on the basis that in **Re Daintrey**, at the time the communication contended to be protected by the privilege was sent, there was no dispute as to the debt amongst the parties in that case.

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[1] See https://justis.vlex.com/vid/belgravia-international-bank-trust-792604905

17. The Petitioner adheres to the position that the Letter is not admissible as proof of the statement or admissions made therein unless the Respondents can show that one of the settled exceptions to the rule applies.

18. To the argument of the Respondents that the Letter was simply an 'opening shot' and not a negotiating document, the Petitioner answers that an inspection of the Letter itself demonstrates otherwise. The Court is invited to consider the Letter and find that it was a part of ongoing negotiations between the parties in a genuine attempt to resolve a dispute inter alia as to the alleged tax benefit sum under the Awards. Petitioner's Counsel also draws the Court's attention to the fact that an opening letter was sent dated 14 November 2022.

19. To the Respondents' argument that the Letter was not sent by one of the parties to the dispute, Counsel for the Petitioner answers that it is notable the Respondents have not led any direct evidence of the parties who received the Letter (which are neither the Petitioner nor the Respondents).

20. I note that the Petitioner (in Supplemental Submissions dated 26 January 2024) asserts that the Respondents "clearly accept" in their Summons and Skeletal Submissions that the Letter is in fact subject to 'without prejudice' privilege. The Petitioner therefore contended that the Reply Submissions of the Respondents represented a *volte face* of this position. In light of the alternative and new position taken by the Respondents that no privilege attached to the Letter, the Court considered the Supplemental Submissions of the Petitioner, which were proffered in response to the new arguments of the Respondents.

## Law & Discussion

21. Where parties communicate in a genuine effort to settle a dispute, such communications whether oral or written are generally inadmissible in evidence. In **Rush & Tompkins Ltd v Greater London Council** [1989] 1 AC 1280 at 1299, Lord Griffiths opined:

> **"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence...[T]he application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission".** (Emphasis added).

22. The general rule rests upon the planks of public policy and agreement amongst the parties. By public policy parties are given a safe space so to speak to settle their differences without fear of their representations being disclosed or used against

them in court proceedings, as long as they do not abuse the privilege. In the English Court of Appeal decision of **Cutts v Head** [1984] Ch 290 at 306, the oft-quoted passage of the policy behind the rule was addressed by Oliver LJ as follows:

> **"That the rule rests at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151, 156, be encouraged fully and frankly to put their cards on the table...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.' The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."**

23. This is the general rule which would inform whether or not communications are privileged (prior to any consideration of exceptions).

***The 'Opening Shot'***

24. I address the positions of the parties on whether or not the general 'without prejudice' rule attached to the Letter in this case or whether it was merely an initiating document and not a negotiating one.

25. The Respondents rely upon **Winston Finzi et al v JMMB Merchant Bank Ltd.** It is a Jamaican Court of Appeal case in which the respondent made an application to the court to strike out certain statements made in affidavits produced by the appellants on the basis that they infringed the 'without prejudice' rule. The court found that the statements in the affidavits were not protected by the privilege in part because there was no evidence that JMMB Merchant Bank Ltd "**had made any overtures or offers to Mr Finzi, within the context of any dispute with Mr Finzi, and that the negotiations were a genuine attempt to settle such dispute with a view to avoid or settle legal action.**" There was "**no evidence the parties had engaged each other in discussions as disputants *inter se*, actual or prospective, concerning shares in CCMB**". Further, the respondent, who was relying on the protection of the privilege, could not rebut the reasonable inference that during negotiations recourse to litigation was not contemplated. This is because it was not a party to those discussions.

26. It is obvious that if there were no dispute, it would be mere pantomime to speak of a settlement and, in that context, no 'without prejudice privilege would arise. The

learned author of **Foskett's The Law and Practice of Compromise**, 4th ed (1996) stated of the issue that **"it is perhaps axiomatic that discussions cannot be treated as being aimed at settlement if at the time they take place there is no dispute (or no extant dispute) to settle"**. This is one of the reasons why in both **Finzi** and **Re Daintrey, Ex p. Holt** the communications in question were held not to be covered by 'without prejudice' privilege.

27. In my view, these cases are distinguishable from the present one where both parties have accepted that there was unresolved litigation at the time the Chairman of the parent of the Petitioner sent the Letter and the opening letter of 14 November 2022 to their addressees who are stated in submissions to be officers of the Respondents. While the Respondents have contested any characterization of the dispute as genuine or substantial, they agree there was pending litigation when the Letter was sent. They also agree that the Petitioner need not demonstrate in this application the degree to which the dispute is substantial or genuine. That matter will be aired in due course.

28. Apart from the requirement there must be an existing dispute amongst the parties, another key ingredient, in determining whether or not an opening salvo is protected by the rule, is some expression in that communication of an intention to negotiate. The point was illustrated in the English Court of Appeal decision in **South Shropshire District Council v Amos** [1986] 1 WLR 1271 as follows:

> **"C, as claimant, made a claim for compensation against the district council pursuant to section 120 of the Town and Country Act 1971 following a discontinuance order in respect of the business use of premises occupied by C. C's agents submitted a substantial document to the district council's District Valuer containing full particulars of the claim with submissions in support of the claim. It was headed "without prejudice". The submission of this document had been preceded by a direct communication from C to the district council which stated that he wished the amount of compensation "to be negotiated with his agent". The Court of Appeal held that, given C's expressed subject of negotiation before referral to the Lands Tribunal and a concession that there had been an ongoing dispute prior to the submission of the document, the document was protected by the without prejudice privilege even though it was an "opening shot".**[2]

29. Similarly, in **Sampson v John Boddy Timber Ltd** (1995) CAT 552), where counsel sought to rely upon an initial letter in which the defendant's insurers made overtures for preparing to negotiate, the Court of Appeal held that the letter was to be regarded as 'without prejudice' even though not so marked. A helpful summary is extracted from **Foskett's The Law and Practice of Compromise** as follows:

> **"In Sampson v John Boddy Timber Ltd...an issue arose in a wasted costs application as to the status of a letter written by D's insurers. P had been injured at work and, through**

[2] Digest as set out in Foskett's The Law and Practice of Compromise, 4th ed, (1996) 9-22.

**solicitors, intimated a claim against D. D's insurers, in a standard form letter, sought details of the claim which P's solicitors provided promptly. After a delay of some weeks P's solicitors wrote to D's insurers asking if they "were prepared to deal with the matter", failing which an application for legal aid would be made. D's insurers wrote back in the following terms: "We have now completed our investigations into the circumstances of your client's accident and confirm that we are prepared to negotiate a settlement on a compromise basis, arguing that your client ought not to have used the platform as a means of access. If you will provide us with a copy of any medical evidence you have in this case...our representative will arrange to discuss [the case]". P's solicitors responded saying that they looked forward to meeting the insurers "and engaging in further negotiations". Eventually, some negotiations took place, but no agreement was reached. At the trial, at which liability was contested by D, P's counsel sought to rely upon the initial letter as an admission of liability subject to an argument about contributory negligence. The Court of Appeal held that the letter was to be regarded as "without prejudice" even though not marked as such. Per Sir Thomas Bingham MR: "...the letter was a bona fide offer by the insurers to explore the possibilities of settlement on a compromise basis...". Per Evans LJ: "...the letter was intended as an acknowledgement and as an offer to negotiate". Per Aldous LJ: "...the use of the words 'negotiate a settlement on a compromise basis" indicate that the writer was attempting to negotiate a settlement".**[3]

30. In contrast, in **Standarin**, the Court of Appeal held that the party who sent the communication merely asserted his claim. There was no clear indication of a willingness to negotiate. The outcome is similar to that of **Buckinghamshire County Council v Moran** [1990] 1 Ch 623. If an opening shot simply states a person's claim and does not also indicate a desire to negotiate a compromise, then on the face of it, it is not privileged.

31. In light of the authorities, having examined the Letter and considered the contextual matrix in which it was tendered, it is my view that even if classified as an 'opening shot', it adequately bears the necessary expression of invitation to negotiate to qualify as a document protected by the initial 'without prejudice' privilege under the general rule. It is clear from the language used in the Letter that the author believed that the parties were in negotiations. As such, any information or position ventured in the Letter appears to have been offered in that context. Further, even after a careful reading of TSM1 and its exhibits, I cannot come to the conclusion at this stage that the negotiations by the Letter were not genuinely aimed at seeking settlement.

32. On the point that the Letter was not sent by a party to the dispute, I agree with the Petitioner's Counsel that none of the parties to this action is named either as sender or receiver of the Letter, and there is no direct evidence of the parties who received the Letter. Each side appears to suffer a degree of vulnerability in these matters. However, on the evidence and the parties' representations, the Court accepts from each side that the sender – Chairman of Brightoil Petroleum Holdings Limited, the

[3] Ibid

parent company of the Petitioner (who also is the sole director of Petitioner), and the recipients – officers of the Respondents, have acted in these communications on behalf of the respective parties to this action with whom they are plainly connected. In these circumstances, the Court finds that the Letter does not lose the protection of the general rule of 'without prejudice' privilege by reason that the Respondents are not named as recipients and the Petitioner is not named as sender therein.

33. Also, the way the Respondents have argued this point reveals an inconsistency. If they contend the Chairman was not acting on the Petitioner's behalf in preparing and sending the Letter, then it seems inconsistent with that position to submit or at the very least imply that the Petitioner believed the matters set out in the Letter it sent. (See para 8 of the Respondent's Reply Submissions).

***The 'Cloak for Perjury' Exception***

34. Now I turn to the exception to the general without prejudice rule upon which the Respondents rely to argue that the privilege which attaches to the Letter should be waived. Exceptions to the 'without prejudice' rule were enumerated by Robert Walker LJ in **Unilever Plc v The Proctor & Gamble Co** [2000] 1 WLR 2436 in part at 2444C-G:

> **"Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.**
>
> **"(1) As Hoffmann LJ noted in Muller's case, when the issue is whether wihout prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables Ltd* [1969] q WLR 1378 is an example.**
>
> **"(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.**
>
> **"(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178, 191 and his view on that point was not disapproved by this court on appeal.**
>
> **"(4) Apart from any concluded contract or estoppel, <u>one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"</u> (the expression used by Hoffmann LJ in *Forster v***

> ***Friedland*** **(unreported), 10 November 1992; Court of Appeal (Civil Division) Transcript No 1052 of 1992). Examples (helpfully collected in *Foskett's The Law & Practice of Compromise*, 4th ed (1996), para 9-32) are two first-instance decisions, *Finch v Wilson* (unreported) 8 May 1987 and *Hawick Jersey International Ltd v Caplan,* The Times, 11 March 1988. But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (unreported), 25 February 1993, Court of Appeal (Civil Division) Transcript No 205 of 1993, warned that the exception should be applied only in the clearest of cases of abuse of a privileged occasion."**

35. It is with the 4th exception from **Unilever** that we are concerned. In this regard, the Court considers the paramount assertions by the Respondents, that the application of the without prejudice rule would serve as a cloak for perjury because the Petitioner makes a certain representation in its Amended Petition which is wholly inconsistent with a representation it made to the Respondents on the same issue in the Letter. The Respondents say it is difficult to think of a more "unambiguous impropriety".

36. Helpfully, there are cases in which courts have treated with the application of, or refusal to apply, the "unambiguous impropriety" exception to the 'without prejudice' rule. I have found instructive the examination of relevant cases by Peter Gibson LJ in **Berry Trade Ltd. and another v Moussavi and others** [2003] EWCA Civ 715. In that case Berry Trade Ltd alleged that Mr Moussavi and one Mr Ghadimi misappropriated oil belonging to the claimant. Mr Ghadimi filed a defence and counterclaim in which he put the case that the claimant had agreed that in consideration of his supervision of the transport of the oil, Berry Trade would pay him $9 per tonne. The claimant filed a summary judgment application on Mr Ghadimi's counterclaim. There followed meetings amongst the parties to negotiate a settlement during which Mr Ghadimi admitted certain facts. His admissions in the meetings showed that his defence and counterclaim were dishonest. Berry Trade sought to have those admissions put in evidence as the without prejudice privilege over them would act as a cloak for perjury. At first instance, Steel J applied the unambiguous impropriety exception and allowed the admissions to be adduced in evidence.

37. On appeal, the appeal was allowed. Peter Gibson LJ traversed the legal principles which govern the unambiguous impropriety exception to the 'without prejudice' rule, in part stating:

> **"33. The juridical basis of the without prejudice rule is partly based on public policy and partly on contract, viz. an implied agreement between the parties to the effect that what is said in settlement negotiations will not subsequently be relied on in court. In Muller v Linsley & Mortimer [1996] PNLR 74 Hoffman LJ pointed out that the public policy rationale is directed solely to admissions. He said at p. 79:**

> **"If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, ie independently of the truth of the facts alleged to have been admitted."**

**"34. In Unilever Plc v Procter & Gamble Co. [2000 1 WLR 2436 Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed) said that the modern cases show that the protection of admissions against interest is the most important practical effect of the rule. He continued (at p. 2448H):**

> **"But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties (in the words of Lord Griffiths in [Rush & Tomkins Ltd v Greater London Council [1989] AC 1280,] 1300) "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."**

**"35. It is also well established that there are exceptions to the rule. The relevant exception for consideration in this case is "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"" (see Unilever at p 2444F). the term "unambiguous impropriety" was used by Hoffmann LJ in Forster v Friedland 10 November 1992 (unreported). That Lord Justice, with whom Neill and Butler-Sloss LJJ agreed, referred to two cases, Greenwood v Fitt [1961] 29 DLR1 and Hawick Jersey International Ltd v Caplan, The Times, 11 March 1998, which were cases of threats, the impropriety of which was unambiguously admitted in without prejudice negotiations. Thus the British Columbia case of Greenwood v Fitt involved the defendant threatening in those negotiations that he would give perjured evidence and bribe other witnesses to perjure themselves unless the claimants withdrew their claim. Hoffmann LJ said:**

> **"These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."**

**"36. The narrowness of this exception has often been emphasized. In Fazil-Alizadeh v Nikbin, 25 February 1993 (unreported) Simon Brown LJ (with whom Balcombe and Peter Gibson LJJ agreed) said:**

> **"There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded."**

**"In Unilever (at p 2444 G) it was said that the exception should be applied only in the clearest cases of abuse of a privileged occasion.**

**"37. This court in Fazil-Alizadeh said that the taped without prejudice conversation might be taken to contain an admission by the claimant of the payment of £10,000 although he continued in his pleadings to deny such payment, but that did not come within the exception to the rule. The exception does not apply to a mere inconsistency (see Kristjansson v R Verney & Co Ltd, 18 June 1998, and WH Smith Ltd v Colman, 20 March 2000, both unreported decisions of this court). In the latter case Robert Walker LJ said ot the without prejudice rule (in para 13):**

> **"It is not to be set on one side simply because a party making a "without prejudice" communication appears to be putting forward an implausible or inconsistent case or to be facing an uphill struggle if the litigation continues. Those are questions to be decided at trial or, if the claimant's case is strong enough, on an application for summary judgment. Either the claimant's case for summary judgment is strong enough or it is not, and it should not be bolstered up by denying to the defendant the benefit of the doubt in relation to a "without prejudice" communication."**

(After reviewing two first instance decisions, amongst others, in Merill Lynch, Pierce Fenner & Smith Inc v Raffa [2001] 1 LPr 31 and Savings & Investment Bank Ltd v Fincken [2003] EWHC 719 (Ch), Peter Gibson LJ went on to state:

**"47. We will come back shortly to the circumstances of the alleged admission in the present case. Mr Zacaroli [as he then was - Counsel for Mr Ghadimi] criticized the decisions in both cases as eroding the protection afforded to admissions made in without prejudice negotiations. It may be doubted whether Robert Walker LJ's reference to "a cloak for perjury" was intended to cover such admissions rather than the threatened perjury in a case like Greenwood v Fitt...".** (Emphasis added).

38. From the authorities, where this particular exception is invoked, I glean that a court is required to be satisfied there has been an unambiguous impropriety by reason that a privileged occasion has clearly been abused. Only in such a case may the Court deprive the party, who relies upon the 'without prejudice' privilege, of its protection in relation to communications of that party made in settlement negotiations.

39. In my judgment this application does not meet the threshold for dispensing with the 'without prejudice' privilege which currently protects the Letter from disclosure in court proceedings.

40. I observe that the Letter makes certain representations perhaps believed by its author and/or the party on whose behalf the Letter was sent, to be true. It is a

single letter in the context of apparently ongoing communications amongst the parties through their representatives. The Court has, of course, not seen (and rightly so) the rest of the 'without prejudice' communications, which may provide further context. The Letter itself speaks to the existence of certain facts as at its date, which is approximately one year before the Petitioner's Petition was filed. This raises the question whether the facts as represented in the Letter one year prior to the Petition were still true as at the date of the filing of the Petition or whether circumstances changed. But even if the Letter in fact contains an admission by the Petitioner against its interest in a 'without prejudice' setting, the law plainly prompts how a court must treat that communication.

41. A party in the shoes of the Respondents may argue that it would have been required of the Petitioner that it present evidence in this application by way of challenge in order to substantiate the matters I mention immediately above. However, following the approach of Rix LJ in **Savings and Investment Bank Ltd v Fincken** [2004] 1 All ER 1125 at [56], the Letter is not in the public domain and as such the Court ought not to know about it. In the circumstances, the Petitioner need not explain itself or face consequences. In **Fincken**, the Court of Appeal opined that while the absence of a challenge to the evidence of the applicant "may enable an applicant to establish more easily that an alleged admission is unequivocal... [t]hat is not the same thing as an unequivocal or unambiguous impropriety." In such a case, Rix LJ stated that the Court would be "reluctant to find...that an absence of challenge is a critical factor taking this case outside the philosophy of the jurisprudence expressed in the leading authorities...". Such authorities included those cited also in **Berry Trade Ltd v Moussavi & others**.

42. Importantly, it is clear from the authorities that more is required in order to establish "unambiguous impropriety" than merely making an admission in without prejudice communications which is inconsistent with one's pleaded case. That is the very thing the Respondents complain about in this case. In considering this, courts have even suggested that perhaps the 'cloak for perjury' exception was really intended to be applied in cases where threats of perjury have been made to 'blackmail' an opponent. Certainly, such cases take on a more obvious complexion of impropriety.

43. I draw on the following words of Rix LJ in **Fincken**, where the English Court of Appeal reversed the first instance ruling by which the exception was applied and the privilege lifted:

> "[56] ... I can see that the absence of challenge may enable an application to establish more easily that an alleged admission is unequivocal. That, however, is not the same thing as an unequivocal or unambiguous impropriety. I would therefore be reluctant to find in the circumstances that an absence of challenge is a critical factor taking this case outside the philosophy of the jurisprudence expressed in the leading authorities cited above.

> [57] In my judgment that philosophy is antagonistic to treating an admission in without prejudice negotiations as tantamount to an impropriety unless the privilege is itself abused. That, it seems to me, is what Robert Walker LJ meant in the *Unilever* case when he repeatedly spoke in terms of the abuse of a privileged occasion, or of the abuse of the protection of the rule of privilege (see [2001] 1 All ER 783 at 792, 795 and 796, [222] 1 WLR 2436 at 2444, 2448 and 2449). **That is why Hoffmann LJ in Forster's case emphasized that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable under the label of an unambiguous impropriety. And that is why Peter Gibson LJ in *Berry Trade* suggested, without having to decide, that talk of 'a cloak for perjury' was itself intended to refer to a blackmailing threat of perjury, as in *Greenwood's* case, rather than to an admission in itself. It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege (see the first holding in Fazil-Alizadeh v Nikbin [1993] CA Transcript 205, (1993) Times, 19 March... It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances**." (Emphasis added).

44. For the reasons given, in my judgment, the Letter is imbued with 'without prejudice' privilege. Further, there are no circumstances which sufficiently support removal of that privilege by operation of the unambiguous impropriety exception.

45. In the circumstances, I dismiss the Respondents' application to lift the without prejudice privilege from the Letters with costs to the Petitioner. If the costs are not agreed, I direct that the parties proffer their written arguments as to costs within 30 days for the Court's consideration and decision.

46. I have been careful not to repeat the contents of the Letter in this ruling. I order that those portions of TSM1 and any other pleadings which refer directly to the contents of the Letter be struck out. The Court will accept those pleadings in redacted form.

Dated 13 May 2024

Simone I Fitzcharles

Justice