HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)

2. Instructions in relation to the Mini-Trial

3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

As will appear from the evidential material, United Importers Limited ("UIL"), a company incorporated in Hong Kong, has instituted action by way of writ in the Court of First Instance, Hong Kong, on 20 February 2015. The defendant in the action is a company called Home World Limited ("HWL") based in the United Kingdom, which is a manufacturer and vendor of toasters. A brief summary of the parties' respective substantive cases is contained in the Instructions for the Mini-Trial.

As will further appear from the evidential material below, there were also separate District Court proceedings between the same parties. Months before the scheduled trial of the action in the High Court, with a view to save time and costs in the separate District Court proceedings, the parties' legal representatives engaged in correspondence marked "without prejudice" to settle the District Court proceedings.

In the High Court proceedings, upon the exchange of witness statements, UIL discovered that one of the witness statements of HWL had disclosed and referred to matters stated in the aforesaid correspondence between the parties. UIL therefore applied to the High Court at the Pre-Trial Review of the High Court proceedings to strike-out and expunge those materials in the witness statement on the ground that they were subject to "without prejudice" privilege.

For the purpose of this contested interlocutory application, you may refer to the following evidential material which is to be used in this application only and should not be used in the mini trial:

1. Inter partes summons for expunging the "without prejudice" materials

2. Supporting affirmation of Mr. John Smith, CEO of UIL

3. The alleged "without prejudice" letter disclosed by HWL in the witness statement

The evidential material to be used in the mini-trial consists of the following witness statements:

1. The witness statement of John Smith for the plaintiff;

2. The witness statement of Angela Wong for the plaintiff;

3. The witness statement of Stacey Lee for the defendant;

4. The witness statement of Alexander James for the defendant.

In addition, certain evidence and matters have been agreed or are not contested in the interim application. The matters as agreed between the parties and other procedural background are as follows:

1. The listing judge of the High Court directed that the striking-out application issued by the plaintiff be listed before a different Judge so that the PTR/Trial Judge will not have to deal with the alleged "without prejudice" materials contained in the witness statements.

2. The parties have agreed that pending the outcome of the striking-out application, the alleged "without prejudice" materials contained in the defendant's witness statements be provisionally redacted.

3. The Judge hearing the striking-out application, namely the Honourable Madam Justice Briggs, has given directions that the hearing be conducted in chambers not open to public.

4. The parties have also agreed that since the judgment/ruling of the Hon Briggs J may have to refer to the alleged "without prejudice" correspondence between the parties, the judgment to be handed down by the Hon Briggs J should only be made available to the parties themselves and will not be published on the Hong Kong Judiciary website until the judgment of the main trial is handed down by the Trial Judge.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. Evidential material set out below for the purpose of this striking out application

ii. The following case authorities, copies of which are attached:

a. *Crane World Asia Pte Ltd v Hontrade Engineering Co Ltd, HCA 109/2014 (20 May 2015) (B. Chu J.)*
b. *Standard Chartered Bank (Hong Kong) Limited v Ma Lit Kin, Cary, HCA 62/2006 (22 January 2007) (Reyes J.)*
c. *Crane World Asia Pte Ltd v Hontrade Engineering Co Ltd [2016] 3 HKLRD 640 (Lam V-P and Barma JA)*
d. *Rush Tompkins Ltd v Greater London Council [1989] AC 1280*

iii. Hong Kong Civil Procedure (the Hong Kong White Book).

Evidential Material

A. <u>Summons for expunging the "without prejudice" materials from HWL's witness statements</u>

HCA 1234/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 1234 OF 2015

BETWEEN

UNITED IMPORTERS LIMITED *Plaintiff*

and

HOME WORLD LIMITED *Defendant*

<u>INTER-PARTES SUMMONS</u>

Order 38 rule 2A of the R.H.C; Inherent Jurisdiction

LET ALL PARTIES concerned attend before ***THE HONOURABLE MADAM JUSTICE BRIGGS*** *in Chambers (not open to the public) sitting at the High Court of Hong Kong, 38 Queensway, Hong Kong on day, the day of 2017, at o'clock in the fore-noon on the hearing of an application on the part of the Plaintiff for an Order that:*

1. *Paragraphs 6-9 and exhibit marked "Appendix [17]" enclosing a letter issued by Saville & Co. dated 26th November 2015 of the Witness Statement of Stacey Lee (the "**Objected Contents**") filed by the Defendant on 6th February 2016 be struck out and/or expunged on the ground that the Objected Contents contain and/or are related to "without prejudice" settlement negotiations and subject to "privilege" under Order 24 rule 5 of the Rules of the High Court; and*

2. *Costs of the application be to the Plaintiff.*

Dated the 6th day of March 2017.

Registrar

B. <u>Supporting affirmation of Mr. John Smith for UIL in support of the striking-out application issued by the plaintiff</u>

AFFIDAVIT OF JOHN SMITH

I, JOHN SMITH, of [Hong Kong address], do make oath and say as follows:-

1. *I am the CEO and a director of United Importers Limited, the plaintiff in these proceedings. I make this affidavit in support of the Plaintiff's Summons issued on 6th March 2017 which seeks to expunge and strike-out parts of the narrative of the Witness Statement of Stacey Lee filed on 6th February 2016 and also the exhibit "Appendix [17]" referred to in the narrative (defined as the "Objected Contents" in the Summons).*

2. *Unless otherwise stated, all matters deposed to in this affidavit are within my personal knowledge and true. Regarding those matters, I come to know such matters from the sources of information specifically identified below in this affidavit and such matters are true to the best of my knowledge, information and belief.*

3. *The reason for this application being made is straightforward. Stacey Lee in her witness statement filed on 6th February 2016 referred to a "without prejudice" settlement letter in respect of the resolution of separate on-going proceedings commenced in the District Court (DCCJ No. 388 of 2015) between Plaintiff and the Defendant (the "**District Court Action**").*

4. *In particular, I am referring to paragraphs 6 to 9 of that witness statement and also the exhibit marked "Appendix [17]" enclosing a letter issued by UIL's solicitors, Messrs. Saville & Co dated 26th November 2015.*

5. *In the circumstances, I humbly pray to this Court for an order that the Objected Contents in the witness statement of Stacey Lee be expunged from evidence and/or struck-out pursuant to the Court's jurisdiction under Order 38 rule 2A of the Rules of the High Court.*

***SWORN** at the office of Messrs. Cathay Pacific & Partners of Suites 2808-2810, St. George's Building, 2 Ice House Street, Central, Hong Kong this 6th day of February 2017.*)
)
)
)
)

Before me,

C. The Objected Contents in the witness statement of Stacey Lee and the alleged "without prejudice" settlement correspondences between the Plaintiff and the Defendant in this action

Extracts from the witness statement of Stacey Lee (which have now been temporarily removed from its statement pending resolution of this interim application)

Witness Statement of Stacey Lee

Paras. 6-9

6. On 26th November 2015, my solicitors Messrs. ABC & Co. who acted for HWL in DCCJ 388 of 2015, received a counter-offer for full and final settlement of the said District Court action from UIL's solicitors Messrs. Saville & Co ("the Offer").

7. In the Offer, I find that a condition imposed by Messrs. Saville & Co. did not sit comfortable with me, that is, I must not make any witness statement for HWL in the High Court action HCA 1234 of 2015.

8. From my point of view, I believe the Offer is to make me withhold the truth from the Court.

9. I see the Offer as an attempt to improperly interfere with my evidence, to say the least. Accordingly, I decided to refer to the said letter in this Witness Statement in this action for HWL.

…….

Extract from Appendix [17]

SAVILLE & CO.

BY FAX & BY POST
Messrs. ABC & Co. solicitors
Room 1008, 10/F., IFC Tower I
Connaught Road Central
Hong Kong

WITHOUT PREJUDICE SUBJECT TO CONTRACT

26 November 2015

Dear Sirs,

Re: DCCJ 388 of 2015 - UIL's claim for loss and damages

We refer to the captioned proceedings in the District Court and are instructed that your client's recent offer of HK$ 800,000 to our client as full and final settlement of the captioned proceedings is not acceptable to us and we have the following proposal to counter-offer.

Payment Terms

*In full and final settlement of the present action (**DCCJ 388 of 2015**), your client shall pay our client a lump sum of HK$ 950,000 on or before 31st December 2015.*

In so far as legal costs are concerned, we propose that each party is bear to its own costs and therefore no order as to costs.

Further, your client's employee Miss Stacey Lee shall not prepare any witness statement for the Defendant (HWL) in the High Court Action HCA 1234 of 2015.

Our client shall discontinue its action (DCCJ 388 of 2015) against your client within 14 days of the conclusion of the High Court Action HCA 1234 of 2015.

Kindly take your client's instructions on the above and revert to us at your earliest convenience.

Yours faithfully,

Messrs. Saville & Co.
Solicitors for the Plaintiff"

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that your arguments must be limited to the case authorities and the White Book.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply to submissions will be conducted.

iii. You should be prepared to deal with Judge interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

HCA 109/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 109 OF 2014

BETWEEN

CRANE WORLD ASIA PTE LIMITED Plaintiff

and

HOTRADE ENGINEERING LIMITED Defendant

Before: Hon B Chu J in Chambers
Date of Hearing: 12 May 2016
Date of Decision: 20 May 2016

D E C I S I O N

Introduction

1. The parties' disputes in these proceedings essentially concern construction tower cranes and parts which the defendant ("D") hired from the plaintiff ("P") under rental agreements.

2. The present application before this court was issued by D on 6 May 2016, to strike out certain parts of a witness statement given by one of P's witnesses, a Mr Yau Ming ("Yau").

3. P is a company incorporated in Singapore carrying on the business of providing tower cranes and spare parts for hire and sale. D is a Hong Kong company which provides crane and hoist engineering services for construction projects.

4. P has taken out a total of 3 actions against D (collectively "3 Actions"). Briefly, and among other things, in the 1st Action, HCA 109/2014, P claims for sums due under 32 rental agreements in respect of 32 cranes; in the 2nd Action, HCA 256/2014, P seeks delivery up of 6 out of the 32 cranes and parts supplied under rental agreements and 4 cranes and accessories delivered by P to D pursuant to oral contract; and in the 3rd Action, HCA 462/2014, P claims delivery up of the remaining 26 out of the 32 cranes and parts.

5. D denied P's claims in the 3 Actions. I understand that since the commencement of the 3 Actions, some of the cranes have already been returned to P, including those in the 2nd Action.

6. The 3 Actions have been directed to be heard together and fixed for a speedy trial, which will commence in less than a month's time on 13 June 2016 before DHCJ Eugene Fung SC.

HCA 655 of 2014

7. After the 3 Actions were issued, D has taken out a separate action under HCA 655/2014 ("HCA 655") against 3 defendants, being Yau, a Mr Poon Wee San alias Roger Poon ("Poon"), and Crane World (HK) Limited ("CWHK"), alleging conspiracy and collusion between them.

8. Yau is a 43.75% shareholder of D[1]. The other two shareholders are Mr Leung Ping Wah (43.75%) ("Leung") and Dr Lee Chun Yu Jimmy (12.5%) ("Lee"). Yau had said that he was a founding director of D, and according to him, he resigned as a director from D with effect from 31 October 2013. Yau said there was a common understanding between the 3 of them that Yau was to remain as a director "on paper" or on record only, to avoid banks from calling in loans and/or reducing D's credit lines.

9. Yau remained a director on record until 10 January 2014, but according to Yau, he took no part in the management of D's business of affairs after 31 October 2013.

10. Poon was/is a director of P, and from 22 November 2013, he has been a director of CWHK, a wholly owned subsidiary of P. CWHK was incorporated in Hong Kong on 22 November 2013.

11. Briefly, it is D's case in HCA 655 that in about October 2013, when Poon learnt of D's decision to end its business dealings with P, he conspired and colluded with Yau in the setting up of CWHK as a competing business of D, and that Yau was in breach of his fiduciary duties to D. This

[1] 3.75% directly, and 40% through a company Tat Ming Engineering Ltd owned jointly by Yau and his wife, see para 1.3, A:11

was in fact also one of D's defence in the 3 Actions. Yau has denied all D's allegations.

12. On 26 November 2015, D's solicitors sent a letter marked "Without Prejudice Subject to Contract" to Yau's solicitors ("26.11.15 Letter"), setting out proposed settlement terms in relation to the sale of Yau's shares in D and discontinuance of HCA 655 against Yau. Yau's solicitors replied on 1 December 2015 with their comments ("01.12.15 Letter"). Thereafter, there was a further letter sent by D's solicitors dated 22 December 2015 to Yau's solicitors and marked "Without Prejudice" ("22.12.15 Letter"). The 3 letters will be collectively referred to as the "3 Letters"[2]. The proposed settlement attempt failed.

Yau's 2nd witness statement

13. Yau has provided two witness statements for P in the 3 Actions. Yau's 2nd witness statement was dated 24 March 2016 and filed in court on 6 April 2016[3].

14. In paragraph 5 of Yau's 2nd witness statement, he referred to a discussion with Leung in 2015 in which Yau had asked Leung to settle the court cases between P and D and to realize Yau's shareholding but the matter never reached any meaningful conclusion[4]. Then in paragraphs 8-15 under the heading "The Problematic Offer on 26 November 2015", Yau went on

[2] A:60-65
[3] A:44-65
[4] A: 45-46, paras 5, 8-15

to set out the contents of the 3 Letters and further attached copies of the 3 Letters as part of Appendix [36] to his 2nd witness statement.

15. The above paragraphs of Yau's 2nd witness statement and Appendix [36] enclosing the 3 Letters are the parts objected to by D ("Objected Contents").

16. So far as I could gather, the essential terms of the proposed settlement by D as set out in the 26.11.14 Letter were:

(1) Yau was to sell his 43.75% shareholding in D to Leung and Lee at a consideration of HK$12m ("Consideration"), to be paid as follows:

(i) Yau to assign his director loan of HK$7,957,920.63 (as at June 2015) to Leung and Lee, and this sum to be set off from the Consideration, and the assignment was to be executed at the same time as the bought and sold notes for the transfer of the shares;

(ii) The balance of the Consideration (ie HK$4,042,079.37) to be held by the solicitors for Leung and Lee as stakeholders pending the conclusion of the 3 Actions, and in the event of any adverse judgment and/or costs orders against D in the 3 Actions, Yau was to be responsible for 43.75% thereof and such sums would be deducted from the balance of the Consideration before release to Yau.

(2) There were then three "Additional Matters" ("Additional Matters") set out, namely:

(i) Yau not to prepare any witness statements for P in the 3 Actions ("1st Additional Matter");

(ii) Leung and Lee to procure D to release Yau's two properties from the banking facilities with DBS Bank within 2 months from date of execution of the bought and sole notes for the transfer of the shares ("2nd Additional Matter");

(iii) D to discontinue HCA 655 against Yau within 14 days of the conclusion of the 3 Actions ("3rd Additional Matters").

The parties' respective case

17. D's present application is based on the ground that the Objected Contents contained and/or related to "without prejudice" settlement negotiations and were subject to privilege ("WPP").

18. D opposed P's application on the ground that WPP does not apply to the Objected Contents because:

(i) There was unambiguous impropriety on the part of D in the proposed terms of the 26.11.15 Letter; and/or

(ii) There was no genuine or *bona fide* attempt on the part of D to settle the dispute between D and Yau.

General Legal Principles on WPP

19. Mr Richard Khaw and Mr Adrian Leung appeared for D, and Mr Derek Chan and Mr Michael Lok appeared for P at the hearing before this court.

20. On the basic principles concerning WPP, Mr Khaw has referred this court to *Re Jinro (HK) International Ltd* [2002] 4HKC 90, (unrep, 18.07.02) where Kwan J, as she then was, held as follows on WPP:

> "(1) A party claiming without prejudice privilege on communication would have to show that the communication was made (i) at a time when there was an existing dispute between the parties; (ii) legal proceedings in relation to the dispute had commenced or were contemplated; (iii) the communication was made in a genuine attempt to settle the dispute and (iv) the communication was made with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties.
>
> (2) It was not necessary for a 'without prejudice' stamp to be expressly applied to the negotiation if it was clear from the surrounding circumstances that the parties were genuinely seeking to compromise the dispute…"
>
> (3) …
>
> (4) …
>
> (5) In exceptional circumstances, evidence that would otherwise be protected by without prejudice privilege would be rendered admissible if the exclusion of the evidence would act as a cloak for perjury or other unambiguous impropriety. This exception would be applied to the clearest of cases so as not to impair the value of the without prejudice rule. …."

21. Mr Chan has also referred this court to what were said by Reyes J in *Standard Chartered Bank (Hong Kong) Limited v Ma Lit Kin, Cary* HCA 62/2006 (unrep, 22 January 2007), as follows:-

> "(1) For a claim of 'without prejudice' privilege to succeed, the party claiming it must show that the communication was made:-
>
> (a) in a bona fide attempt to settle a dispute between the parties; and,

(b) with the intention that, if negotiations failed, the communication could not be disclosed without the consent of the party making the communication.

(2) In establishing that there was a bona fide attempt to settle a dispute, the party seeking to assert privilege must show that, at the time of his communication:-

(a) a dispute existed between the parties in respect of which legal proceedings had commenced or were contemplated; and,

(b) the communication was made in an attempt to further negotiations to settle that dispute.

(3) The mere fact that a communication concerns a dispute between the parties is not sufficient to confer privilege.

(4) The communication need not be expressed to be 'without prejudice', if it is clear from the surrounding circumstances that the parties were generally seeking to compromise their dispute.

(5) But there is an exception to the 'without prejudice' privilege. This exception applies where the exclusion of the evidence would act as a cloak for perjury or other 'unambiguous impropriety'. This exception should only apply in the clearest of cases, since otherwise it could undermine the 'without prejudice' privilege altogether."

22. To summarise, from what was said by Kwan J and Reyes J above, a person asserting WWP over his communication must show that at the time of his communication :

(i) a dispute existed between the parties in respect of which legal proceedings had commenced or were contemplated;

(ii) the communication made was a genuine or *bona fide* attempt to further negotiations to settle that dispute; and

(iii) the communication was made with the intention that, if negotiations failed, the communication could not be disclosed without the consent of the party making the communication.

23. The issue of whether without prejudice communications between parties to litigation are protected from disclosure to other parties in the litigation has also been considered in *Rush & Tompkins Ltd and Greater London Council* [1988] 3 WLR 939 HL. In that case, the plaintiff had entered into a building contract with the 1st defendant for a housing development and had engaged the 2nd defendant as subcontractors for certain of the works. Correspondence marked "without prejudice" between the plaintiffs and the 1st defendant resulted in their reaching a compromise agreement, and the plaintiff discontinued their action against the 1st defendant. The 2nd defendant sought disclosure by the plaintiff of the "without prejudice" correspondence, and when refused, applied for an order for specific discovery. The 2nd defendant's application was refused by the judge at first instance, but allowed by the Court of Appeal. The plaintiff's appeal to the House of Lords was then allowed.

24. It was held by the House of Lords that (1) in general the "without prejudice" rule made inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement; and that admissions made to reach settlement with a different party within the same litigation were also inadmissible whether or not settlement was reached with that party; and (2) the general public policy that applied to protect genuine negotiations from being admissible in evidence also applied to protect those negotiations

from being disclosed to third parties; and that accordingly the judge's decision dismissing the application for discovery should be restored[5].

25. There was no real dispute between the parties on the above general basic principles on WPP.

Whether WPP applies to the Objected Contents

26. Mr Chan's submissions placed much emphasis on the issue of "unambiguous impropriety". I accept, however, Mr Khaw's submissions, that the correct approach should be for this court to decide whether WPP applies in the first place to the Objected Contents, before considering whether the exception of "unambiguous impropriety" applies.

27. Mr Chan has argued that the Objected Contents were not part of a *bona fide* attempt to settle ongoing disputes between D and Yau, and further the condition in the 1st Additional Matter, namely requiring Yau not to prepare any witness statement for P in the 3 Actions was clearly intended to "*sabotage*" the presentation of P's case, with a view of "*short-circuiting*" the 3 Actions.

28. Mr Chan has further submitted that it is almost central to D's defence in the 3 Actions that it was P's wrongdoing (involving a conspiracy with Yau) which had prevented D from performing the rental agreements and leasing out of the tower cranes, and thus Yau would clearly be a relevant

[5] See Holdings, at pg 939

witness for P. Further, the absence of Yau would bring about two possible repercussions for the trial of the 3 Actions:

(i) The burden of proof would rest squarely on P and the absence of a key witness would very likely undermine P's ability to prove its case;

(ii) In the absence of a relevant witness, adverse inferences could be drawn by the trial judge against P.

29. However, on (i) above, even if Yau is a relevant and/or key witness for P, Yau will still have to be subjected to cross examination during the trial, and ultimately whether Yau's evidence will be accepted by the trial judge or indeed whether his evidence will assist P's case is a matter which awaits to be seen. Further, P will be calling 3 other witnesses who had dealt with D including Poon. In any event, the burden of proving that it was P's wrongdoing that had prevented D from performing the rental agreements should fall on D. Even if the presence of Yau and his evidence would assist P's case, I see no sufficient evidence that his absence would very likely undermine P's ability to prove its case, as submitted by Mr Chan. As regards (ii), whether the absence of a relevant witness would attract adverse inferences being drawn would depend on a number of factors including whether there was a reasonable explanation for the absence of the witness, and the absence of a witness would not necessarily mean that an adverse inference would be drawn.

30. Mr Chan has also submitted that the offer contained in the 26.11.15 Letter was not a genuine/*bona fide* offer to effect a settlement, but

an "*instrument*" to "*sabotage*" P's case and that this was reinforced by the following indicia:

(i) The 26.11.15 Letter emerged *after* a summary judgment application was made and settled on the day of the hearing itself (as seen from the order dated 25 August 2015[6]). In addition to the pleadings filed, there were affirmation and affidavit evidence filed in that application which would have made clear to D as to what the issues at trial would be, as well as the relative strengths and weaknesses of the parties' cases. The 26.11.15 Letter was therefore made *after* D was fully informed of the significance of Yau's evidence to P's case.

(ii) The 26.11.15 Letter referred to "*the conclusion*" of the 3 Actions as the yardstick, *after which* HCA 655 would be discontinued. D thus had in mind the disposal of the 3 Actions when setting out the terms of the 26.11.15 Letter, and this reinforced the fact that D intended to use the offer in the 26.11.15 Letter as an instrument to sabotage P's case in the 3 Actions – with the discontinuance of HCA 655 held back until it was confirmed that Yau had indeed *not* provided a witness statement *and* that the 3 Actions had ended. This is particularly so, given that Yau would merely be a witness in the 3 Actions, and not any one who could *bona fide* reach a settlement with D on behalf of P.

(iii) When Yau's solicitors queried the relevance of the 1st Additional Matter, D's solicitors' response was simply to assert that (i) it was relevant; and that (ii) it was Yau's actions which had led to the proliferation of disputes between D and P. D's

[6] [A/167-171]

solicitors' response did not justify the relevancy between (i) the sale of Yau's shares in the context of negotiations in the HCA 655 and (ii) Yau giving of evidence in the 3 Actions.

31. First of all, I note P's application for summary judgment was made on 20 March 2015, and the matter came before this court on 25 August 2015 when the parties agreed that the 3 Actions should go to a speedy trial, rather than the parties incurring time and costs arguing about summary judgment.

32. Whether D would have known from the affirmations filed in connection with the summary judgment the significance of Yau's evidence to P's case by the summary judgment hearing on 25 August 2015 or not, the fact is that the 26.11.15 Letter did not "*emerge*" immediately after the hearing, but was sent 3 months afterwards.

33. Further, to put it in proper context, what can be seen from the evidence is that after the hearing on 25 August 2015, (i) D had served a statutory demand on Yau on 27 October 2015 over Yau's outstanding director's loans to D of some HK$7.9m[7]; (ii) Yau's solicitors had written to the DBS Bank on 2 November 2015 to try to release Yau, his wife and/or their company Tat Ming Engineering Limited from their respective guarantees and to release their two properties from legal charges/mortgages provided to the bank as security for D's general banking facilities; (iii) DBS Bank replied to Yau's solicitors on 12 November 2014 refusing to release Yau and/or his wife and/or their company and their properties and informing them that the outstanding loan balance of D was about HK$8.6m as at 11

[7] A:58

November 2015[8]; (iv) notwithstanding all the litigations, Yau remained a 43.75% shareholder of D.

34. In the above circumstances, it would appear to be as much in Yau's interest as well as D's interest for all their differences to be resolved.

35. Yau said in his 2nd witness statement that in 2015 Leung had discussed with him in person and that Yau had asked Leung to settle the court cases and to realize Yau's shareholding, but the matter never reached any meaningful conclusion[9]. The 26.11.15 Letter had referred to "recent discussions" between D and Yau concerning the sale of Yau's shareholding. From the evidence, there had clearly been some discussions between D's side and Yau and these had not been disclosed to the court. It was thus not quite clear as to how or why the 26.11.15 Letter, or the proposals therein "*emerged*". In any event, I do see that there was sufficient basis to say that the fact that the letter emerged 3 months after the summary judgment hearing was any indication that it was sent to sabotage P's case in the 3 Actions.

36. The 3rd Additional Matter set out by D in the 26.11.15 Letter was that HCA 655 would only be discontinued by D against Yau 14 after the conclusion of the 3 Actions. First of all, I cannot see any sufficient evidence that D was trying to "*dispose of*" the 3 Actions by the 26.11.15 Letter. Also, this condition in the 3rd Additional Matter should be read in connection with the other proposed terms, in particular, the proposal in relation to the payment of the balance of the Consideration. It was D's

[8] A:59
[9] Para 5, A:45

condition that the balance of the Consideration was to be held by stakeholders pending the conclusion of the 3 Actions, and that Yau should be 43.75% responsible for any adverse judgement sum and/or costs against D. Thus, in my view, the discontinuance would appear to be timed and linked to Yau's liability for 43.75% of any adverse judgment and/or costs against D in the 3 Actions and the payment of the balance of the Consideration.

37. I therefore do not see the condition in the 3rd Additional Matter any indication that the letter was an instrument to sabotage P's case in the 3 Actions.

38. Yau's solicitors had queried in their 01.12.15 Letter the relevancy of the 1st Additional Matter to the sale of Yau's shares. In reply, D's solicitors had explained in the 22.12.15 Letter that the sale of Yau's shares had every relevance with the 3 Actions, as D took the view that it was Yau's actions which had led to the proliferation of disputes between P and D in the 3 Actions[10]. Mr Chan had submitted this explanation did not justify the relevancy.

39. Such explanation again had to be read in the context of what D's solicitors had said earlier in the 22.12.15 Letter, namely the Consideration of HK$12m was based on a valuation when Yau left the company and since then the valuation had been affected by the ensuing litigations/3 Actions, and as Yau was the causation of all the disputes between P and D, Yau should be responsible for 43.75% of any adverse judgment and/or costs in the 3 Actions, and thus D *insisted* on the balance

[10] See last para, A:64

of the Consideration to be withheld until conclusion of the 3 Actions and D also *insisted* on only discontinuing HCA 655 against Yau 14 days after conclusion of the 3 Actions.

40. It was not in fact clear from the 22.12.15 Letter whether D was still insisting on the condition in the 1st Additional Matter. However, the reality is if Yau indeed were to agree to D's proposal that he would be 43.75% responsible for any adverse judgment/costs against D in the 3 Actions, it would probably follow that he would not give any witness statement in the 3 Actions on behalf of P.

41. P's claims in the 1st Action alone were for sums over HK$10m. D's proposals meant that if an adverse judgment and costs were awarded against D, apart from him and his wife and their company being released from their guarantees and liabilities and their two properties released from the legal charges, Yau could end up with receiving nothing out of the balance of the Consideration for the sale of his shares. It was further not made clear by D in the 26.11.15 Letter or the 22.12.15 Letter whether Yau would need to make up any shortfall.

42. The proposals may not be attractive to Yau, but it does not mean that the proposals made by D were not genuine or *bona fide* proposals to settle the dispute between D and Yau. I do not see sufficient evidence that the imposition of the condition in the 1st Additional Matter, or the other conditions, meant that the 26.11.15 Letter was only an instrument to sabotage P's case at the trial of the 3 Actions. Even if Yau does not give evidence, this does not mean P's case will be sabotaged.

43. There was no complaint by Yau's solicitors in the 01.12.15 Letter about D's offer not being a genuine or *bona fide* attempt to settle the dispute between D and Yau. In fact, if Yau had felt so strongly about D's offer was meant to ask him to tell lies as he had said in his witness statement[11], there was no reason why he could not instruct his solicitors to say so in the 01.12.15 Letter, instead of only saying whether he gave any witness statement for P in the 3 Actions had no relevancy to the sale of his shares.

44. Having considered all the above, I am of the view that the proposals made by D in the 26.11.15 Letter ,and also the 22.12.15 Letter, were part and parcel of a genuine or *bona fide* attempt to settle the dispute between Yau and D.

45. The 3 Letters were sent at a time when there was an existing dispute between D and Yau and D's letters were marked "without prejudice save as to costs" or "without prejudice", and the letters were clearly sent with the intention that, if negotiations failed, they and any response from Yau, could not be disclosed without the consent of D, until when it comes to any argument on costs.

46. I am thus satisfied that WPP applies to the 3 Letters and the Objected Contents. The next issue is whether P can rely on the exception, namely whether there was "*unambiguous impropriety*".

Unambiguous impropriety

[11] See para 11, A:46

The Law

47. It has been stated in paragraph 19-39 of *Foskett on Compromise*, 8th Edition, that the expression "unambiguous impropriety" is a convenient generic description applied to a variety of things said or done during without prejudice negotiations which may, in certain circumstances, be admitted in evidence. The learned author then went on to set out a brief review of cases which illustrated how impropriety perpetrated under the cover of without prejudice discussions may properly be revealed at a subsequent trial, and the learned author then concluded in paragraph 19-46 that "*There is, however, a clear trend in the authorities reflecting the desirability of restricting the occasions when this is permissible to clear cases of "unambiguous impropriety*"[12].

48. Mr Chan has referred this court to *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436. In this case, Robert Walker LJ had set out some of the most important instances when, despite the existence of without prejudice negotiations, the without prejudice rule would not prevent the admission into evidence of what one or both of the parties said or wrote. One of these instances set out is that 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*" [13]. Walker LJ however had also pointed out that the Court of Appeal had in an earlier case warned that the

[12] At para 19-46, pg 236
[13] At 2444G

exception should be applied only in the clearest cases of abuse of a privileged occasion[14].

49. Walker LJ had cited the following passage from Lord Griffiths in *Rush & Topkins* :

> "… more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused[15]."

50. However, Walker LJ had then continued on to say that the expansion of exceptions should *not* be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation[16].

51. In Hong Kong, it has also been held by Recorder Jat Sew Tong SC in *Re Estate of Joachim Thomas* [2011] 5 HKLRD 538, HCMP 209/2011, 30.09.11, following *Unilever*, *Re Jinro*, and other cases that the rule is designed to encourage frank exchanges and the exception of "unambiguous impropriety" to pierce the veil of WPP should only be applied in the clearest cases of abuse of a privileged occasion[17]. (emphasis added).

P's case

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[14] At 2444H

[15] At 2449C

[16] At 2449-2550

[17] See Holding(1), at pg 538

52. P's case is that the Objected Contents revealed unambiguous impropriety, namely they revealed a clear and blatant attempt to pervert the course of justice and/or to act in contempt of court by improperly interfering with a potential witness in the 3 Actions, namely Yau.

Attempting to pervert the course of justice

53. Mr Chan has referred this court to a number of cases on the offence of attempting to pervert the course of justice. As seen from *HKSAR v Wong Shing Yim* [2002] 3 HKLRD 1046, the common law offence of perverting the course of justice was committed when a person: (a) acted or embarked on a course of conduct; (b) which had a tendency to; and (c) was intended to pervert; (d) the course of public justice[18]. The course of justice is perverted if the capacity of a court to do justice is impaired[19]; there does not need to be an actual interference with the administration of justice, as the fact that the defendant's action(s) has a tendency to have that effect is sufficient to comprise the offence[20].

54. In particular, Mr Chan referred the court to two Court of Final Appeal cases, both involving lawyers making approaches to a witness or prospective witness. In *HKSAR v Egan* (2010) 13 HKCFAR 314, Ribeiro PJ stated that :

> "The act of approaching a witness (a term I use to include a prospective witness) may or may not have a tendency to pervert the course of justice depending on the circumstances. In most

[18] Holding (1), 1047

[19] See *HKSAR v Wong Chi Wai* (2013) 16 HKCFAR 539, para 142

[20] *HKSAR v Egan* (2010) 13 HKCFAR 314 at para 123

> cases where the offence is charged, the position is straightforward. Thus, where the accused seeks to induce a witness to give false evidence or not to give evidence by using force, bribery or improper pressure, there is no doubt that the act is culpable as an attempt to pervert the course of justice[21].
>
> …an approach to a witness would obviously be unlawful if its object were, for example, to persuade the witness to give false or perjured evidence or to refrain from telling the truth. In such cases, it is unnecessary to consider the means used. It is no defence to say that the accused merely threatened the witness with the exercise of a legal right. The unlawfulness of the object is sufficient to found the offence[22]."

55. In *HKSAR v Wong Chi Wai* (2013) 16 HKCFAR 539, Ribeiro PJ stated that what conduct constitutes "improper pressure" on a witness is a matter of fact and degree; "in some cases, in deciding whether the pressure acquired the prohibited tendency, it may be useful to ask whether it had the tendency to prevent the witness making a free and voluntary choice as to whether to give evidence and what evidence to give"[23].

56. Mr Chan has also referred this court to *Connolly v Dale* [1996] QB 120 where it was held, among other things, that interference with witnesses, actual or potential, by threat, promise or subsequent punishment amounted to a contempt of court, and extended to interference with proper and reasonable attempts by a party's legal advisers to identify and interview potential witnesses; that interference with a solicitor in the discharge of his duties could also constitute contempt[24].

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[21] At para 128

[22] At para 137

[23] At para 33(h)-(i)

[24] See Holding in Headnote, pg 120

57. As Lord Denning MR had said in *Harmony Shipping Company SA v Saudi Europe Line Limited* [1979] 1 WLR 1380:

> "So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena. That was laid down by the Law Society in 1944 and published in the "Short Guide to Professional Conduct and Etiquette" [25]…."

58. Mr Chan has submitted that if a party is improperly prevented from taking a witness statement from a prospective witness, the fact that a witness may nonetheless be subpoenaed to testify later on at trial (such the Court is technically not "deprived" of the witness' evidence) does not amount to a valid defence and in this respect, he has referred to *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 581.

59. What Christopher Clarke J said in *Versloot*, after referring to the *Connolly v Dale* and the *Harmony Shipping* cases was as follows[26]:

> "19. I accept, as I have already said, that the facts of these cases are different, but they seem to me to embody a wider principle. That principle is that it may be a contempt to interfere with attempts to interview a potential witness, or to prohibit the other side from getting the facts from him. Whether or not there is a contempt depends on whether interference is improper. If it is, it does not cease to be so because the witness in question is scheduled to appear

[25] Between G and H, pg 1384

[26] At paras 19, 20, pg 6

> the trial at the behest of the opposing party and may be subject to cross-examination thereat.
>
> 20. It is, therefore, in my judgment, no answer in the present case to the claimants' application to say that Mr Garvendeel's evidence will be available at trials. Improper interference with access to a witness may mean that, although the witness is called at trial, the entirety of the evidence that he could give is not in fact elicited, because it has not been elicited by the party who called him, and because the opposing party was not aware, or not fully aware, that that witness had such evidence to give, with the result that the best evidence is not available to the court. That seems to me good reason for not confining the dicta in these cases to circumstances in which the witness in question is not to give evidence at trial."

60. Clarke J then went on to say that whether there has been improper interference with a witness or the evidence-gathering process is fact sensitive, and because it is fact sensitive, it is not possible to be prescriptive as to what circumstances will, and what circumstances will not, constitute improper interference. He then said[27]:

> "21. Some matters can, however, be specified. Threats or promises made in order to persuade a witness to decline to be interviewed would be improper …"
>
> 22. What a solicitor is not entitled to do, or indeed a party, is to order or instruct a witness or a potential witness not to attend an interview with the opposing solicitor or to tell him that he has no real choice in the matter, or to put pressure on him not to comply …"

61. It was Mr Chan's submissions that the 26.11.15 Letter , in particular the condition in the 1st Additional Matter unambiguously

[27] At para 21, pg 6, and para 22, pg 7

amounted to an attempt to prevent Yau from preparing a witness statement for P and was clearly unlawful in that[28]:

(a) The letter was a clear attempt to interfere with P's proper and reasonable attempt to elicit and rely on Yau's evidence in the 3 Actions. If successful, the trial judge in the 3 Actions would very likely be deprived of the evidence of Yau, which would clearly be of key relevance to the resolution of the issues arising in those actions, and the capacity of this court to do justice between the parties to the 3 Actions would likely be impaired.

(b) There was no proper basis (eg confidentiality agreements/undertakings, privilege etc) on which D could lawfully or properly prohibit Yau from providing a witness statement to P.

(c) The settlement terms offered to Yau were clearly in the nature of a bribe and/or improper pressure. Yau was offered financial incentive (in terms of a buy out of his shares and settlement of HCA 655) if he was not to provide a witness statement to P, which effectively prevented him from testifying in the 3 Actions. At the very least the settlement terms served to impose improper pressure on Yau, particularly in light of D's proposal that the discontinuance of HCA 655 be held back until after the conclusion of the 3 Actions – ie until it was confirmed that Yau had indeed not provided a witness statement and that the 3 Actions had ended.

(d) The 26.11.15 Letter "had the tendency to prevent the witness making a free and voluntary choice as to whether to give evidence and what evidence to give".

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[28] See para 20, P's Skeleton Submissions

(e) Even if the proposed terms did not amount to a bribe or improper pressure, the object of the condition imposed on Yau not to provide a witness statement to P as part of the settlement terms in itself was sufficient to amount to an offence regardless of the means used to achieve that object, as stated in paragraph 137 of *Egan*.

62. On (a) above, I do not see that the 26.11.15 Letter was "*a clear attempt to interfere*" with P's proper and reasonable attempt to elicit and rely on Yau's evidence. As I have found earlier, the letter was a genuine/*bona fide* attempt by D to settle its disputes with Yau, namely to buy out Yau's shares/ interests in D at the Consideration, to release Yau from his outstanding loans to D, to release Yau and his wife and their company from their guarantees, to release their properties from legal charges, and to discontinue HCA 655 against Yau. In return, the essential condition was that Yau was to be 43.75% responsible for any adverse judgment and/or costs against D in the 3 Actions and the balance of the Consideration thus withheld.

63. As I have said earlier, the evidence showed that the parties had already had some discussions prior to the 26.11.15 Letter. In any event, even on Yau's own evidence in his 2nd witness statement, the letter came after the statutory demand, and after Yau's solicitors had written to DBS Bank and the reply from the bank.

64. In my view, the purpose of the 26.11.15 Letter was to propose settlement terms to resolve all outstanding matters/disputes between D and Yau, and not with the purpose to interfere with P's attempt to elicit and rely

on Yau's evidence, nor to induce Yau not to give evidence or to give false evidence, nor to influence Yau's anticipated evidence.

65. As for (b), it was up to Yau whether to accept the proposed terms of settlement. He was not "prohibited" from giving a witness statement to P. In fact he did give a witness statement for P.

66. In relation to (c), what Mr Chan said was the "*financial incentive*" was D's offer to buy out Yau's shares and discontinuance of HCA 655. As the "*financial incentive*" came with the condition that Yau would have to be responsible for 43.75% of any adverse judgment/costs against D in the 3 Actions, I cannot see how this can be said to be a "*bribe*". As for "*improper pressure*", Mr Chan submitted that the settlement terms at the very least imposed improper pressure on Yau, particularly in light of D's proposal that the discontinuance of HCA 655 was to be "*held back*" until after the confirmation that Yau had indeed not provided a witness statement and that 3 Actions had concluded. Again, there was no sufficient evidence to indicate what was submitted by Mr Chan, namely that the discontinuance of HCA 655 was "*held back*" *until it was confirmed that Yau had indeed not provided a witness statement*. As I have said earlier, the discontinuance would appear to be timed and linked to Yau's liability for 43.75% of any adverse judgment and/or costs and the payment of the balance of the Consideration.

67. As for (d), I do not see that the 26.11.15 Letter had any tendency to prevent the witness making a free and voluntary choice as to whether to give evidence and what evidence to give. As I have said earlier, there was nothing to prevent Yau from giving evidence.

68. Lastly, in respect of (e), what was in fact said by Ribeiro PJ in paragraph 137 in *HKSAR v Egan* was that an approach to a witness would obviously be unlawful *if its object were, for example, to persuade the witness to give false or perjured evidence or to refrain from telling the truth,* then in such cases, it is unnecessary to consider the means used. I have said earlier that the object or purpose of the approach by D to Yau was to settle the various outstanding disputes between them, and not for the object/purpose to persuade Yau to give false/perjured evidence or to refrain from telling the truth.

Conclusion on attempt to pervert the course of justice

69. In light of what I have said above, I do not find that the 26.11.15 Letter revealed a clear and blatant attempt to pervert the course of justice, or was unlawful, as submitted by Mr Chan.

Contempt of Court

70. A contempt of court is an act or omission calculated to interfere with the due administration of justice[29]. Conduct is calculated to prejudice the due administration of justice if there is a real risk as opposed to a remote possibility that prejudice will result[30].

71. Mr Chan submitted that in the area of improper interference with witnesses, there is little distinction between the offence of perversion and a contempt of court, and that both offences depend on whether the act

[29] *Att-Gen v Butterworth* [1963] 1 QB 696

[30] *Att-Gen v Times Newspapers Ltd* [1974] AC 273, HL

has a tendency to interfere (or a real risk of interference) with the administration of justice.

72. In light of my conclusion that there was no attempt to pervert the course of justice, it is also my view that there was no contempt of court, in that the 26.11.15 Letter did not have a tendency to interfere with the administration of justice.

Relevance of the Objected Contents

73. Mr Chan has submitted that the Objected Contents would be relevant at the trial of the 3 Actions at least towards (a) the credibility of D's witnesses; and (b) the reason for attempting to prevent Yau from giving a witness statement to P effectively depriving the trial court of his testimony could possibly be portrayed as a view taken by D's witnesses themselves of the strength of Yau's case against their case.

74. Having considered the Objected Contents, I do not see how they could be of relevance at the trial of the 3 Actions, and the effect of disclosing the 3 Letters and referring to the contents thereof was only to achieve prejudicial effect on D's case.

Conclusion

75. Having considered all the above, I am not satisfied that there was a clear case of unambiguous impropriety or any other abuse for the veil of the WPP to the 3 Letters and the Objected Contents to be uplifted.

Order

76. I therefore grant an order in terms of paragraph 1 of D's summons issued on 6 May 2016, namely that the Objected Contents be struck out and/or expunged. I direct that the parties to submit an agreed redacted copy of Yau's 2nd witness statement on or before 1 pm on 24 May 2016.

77. As costs normally follow the event, I order costs of the application be to D. This is an order nisi which shall be made final after 21 days.

78. This judgment is to be handed down in chambers not open to public and it is not to be published until after the determination of the 3 Actions.

(Bebe Pui Ying Chu)
Judge of the Court of First Instance
High Court

Mr Derek C L Chan and Mr Michael Lok, instructed by Tsui & Co, for the plaintiff

Mr Richard Khaw & Mr Adrian Leung, instructed by K C Ho & Fong, for the defendant

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HCA 62/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 62 OF 2006

BETWEEN

STANDARD CHARTERED BANK (HONG KONG) LIMITED — Plaintiff

and

MA LIT KIN, CARY — Defendant

Before: Hon. Reyes J in Chambers

Date of Hearing: 22 January 2007

Date of Judgment: 22 January 2007

J U D G M E N T

I. INTRODUCTION

1. There are 2 issues. The principal one is whether summary judgment was rightly granted in the Bank's favour against Mr. Ma. The second is whether a telephone conversation was made by Mr. Ma "without prejudice" to his liability.

II. BACKGROUND

2. Mr. Ma had an account with an overdraft facility at the Bank.

3. The Bank granted the facility by a letter dated 29 December 1999. The overdraft was repeatedly renewed under terms set out in 4 facility letters issued between March 2002 and November 2003 and in a General Customer Agreement (GCA) dated 4 January 2000.

4. The Bank now claims about $3.4 million as due from Mr. Ma on his overdraft.

5. Mr. Ma is a director of Moulin Global Eyecare Holdings Ltd. (Moulin), formerly a listed company, now in liquidation.

6. He says that the facility was thrust upon him by the Bank. He says that he did not need the extra money from the overdraft.

7. Mr. Ma alleges that, when the facility was granted, he told the Bank that:-

> "If monies were drawn down from the OD account, they would have been for Moulin's use, and would be repaid by Moulin, instead of myself."

8. Given the alleged understanding with the Bank, Mr. Ma denies liability. He admits that from time to time he signed the various facility letters as well as the GCA. But he claims that he signed these documents "upon request" and "as usual" did not read anything before signing.

9. On 23 October 2006 Master Wong gave summary judgment for the outstanding amount on the overdraft. Master Wong found Mr. Ma's defence that Moulin (and no one else) was responsible for the overdraft as incredible.

10. As part of its case, the Bank adduced evidence of a telephone conversation between Mr. Ma and Mr. Stephen Wong of the Bank's solicitors on 3 February 2006.

11. Mr. Ma initiated the call. He told Mr. Wong that he owed money to the Bank as claimed. But Mr. Ma said that he was already paying Hang Seng Bank (HSB) $30,000 a month under a debt settlement previously reached. Mr. Ma claimed that he could not afford to pay more than a total of $30,000 to HSB and the Bank every month. He proposed that HSB and the Bank discuss how they might apportion a $30,000 monthly payment as between themselves.

12. Mr. Ma never informed Mr. Wong that what was being said over the telephone was "without prejudice".

13. The telephone conversation described above was recorded by the Bank's solicitors in a letter dated 6 February 2006 to Mr. Ma's solicitors. The summary in that letter of what was said is not substantially disputed by Mr. Ma. Only the admissibility of what was said is disputed.

14. Master Wong held that, independently of his views on Mr. Ma's credibility, he would have granted judgment on the basis of Mr. Ma's clear admission of liability over the telephone.

15. Mr. Kenneth Ng (appearing for Mr. Ma) challenges Master's Wong's reliance on the call. Mr. Ng says that, even if not expressly so characterised, the telephone conversation was "without prejudice". It was thus inadmissible as evidence of anything against Mr. Ma.

16. Mr. Ng goes further. He submits that, having been presented with evidence of the call, Master Wong should immediately have recused himself. His mind having been fatally poisoned by his knowledge of the call, Master Wong could not (Mr. Ng suggests) have gone on to find Mr. Ma liable. In proceeding nonetheless, Master Wong (Mr. Ng suggests) would not be regarded by any fair-minded observer as having acted impartially.

17. To the extent then that Master Wong found Mr. Ma to be liable independently of the telephone conversation, Mr. Ng says that Mr. Ma was denied a fair hearing.

III. DISCUSSION

A. Whether summary judgment rightly granted

18. In my view, this was an appropriate case for summary judgment.

19. First, assume that there was some sort of understanding that Moulin would pay Mr. Ma's overdraft debt from time to time or, alternatively, that the Bank should look to Moulin first to pay off any overdraft. Mr. Ma's affidavit posits the former version of the understanding. Mr. Ng in submission only advances the latter, more toned-down version.

20. Neither version of the understanding could mean that Moulin was solely responsible for outstanding monies or that Mr. Ma had no ultimate liability to make good any deficit of funds. Even Mr. Ma does not

explicitly state in his affidavit that there was an understanding that Moulin and Moulin alone would be liable for the overdraft account.

21. Who remitted monies into Mr. Ma's account to pay off any debts standing due from time to time, would be of little concern to the Bank. The Bank's main concern would be to ensure that ultimately Mr. Ma was liable for any shortage.

22. Thus, any understanding that Moulin would pay off any debts is neither here nor there. It has little (if any) bearing on the real issue of contractual liability for any deficit.

23. As to such contractual liability, there can be no doubt. The fact that Mr. Ma did not read the facility letters or GCA before signing them does not constitute a defence at common law. Mr. Ma is liable to make good any overdraft in accordance with the contractual terms which he signed.

24. Mr. Ng suggests that his version of the alleged understanding gives rise to a promissory estoppel. This means (Mr. Ng suggests) that the Bank could not "pull the plug" and pursue a strict legal right of repayment until Mr. Ma had been given reasonable notice.

25. But why is there an estoppel in the first place? There is nothing inconsistent about Moulin paying off debts from time to time and being liable as primary debtor, but Mr. Ma being ultimately liable for any accrued debt in keeping with the documents which he signed.

26. Second, consider either version of the alleged understanding. Both are incredible.

27. Neither version is supported by any document. On the contrary, over the years Mr. Ma simply signed facility letters and the GCA, acknowledging personal liability, without demur.

28. Mr. Ma alleges that the reason why Moulin would pay off any overdraft debts was because Moulin operated the account. Mr. Ma claims to have signed blank cheques for Moulin to fill in as and when Moulin required funds. The impression which Mr. Ma seeks to convey is that the account was almost exclusively used by Moulin.

29. But that is plainly incorrect.

30. A perusal of the relevant bank statements shows frequent debits for payments to the Hong Kong Jockey Club, the Aberdeen Marina Club and Park 'N Shop. These debits were routinely made at times when the account was in deficit and appear to have been personal expenses of Mr. Ma.

31. The Jockey Club debits, for example, concern a Jockey Club Telebet facility which Mr. Ma operated in conjunction with his account at the Bank and which the Bank (at Mr. Ma's request) guaranteed.

32. In relation to Jockey Club expenses, Mr. Ma says that the use of the overdraft facility was "exceptional". He states:-

> "I had to use this account because the Plaintiff bank was the only bank with whom I had an account which was on the Jockey

> Club's approved list of banks. I could not use other accounts I had with other banks."

33. That is unconvincing. Perusal of the account shows that Jockey Club expenses were regularly incurred.

34. Further, the purported explanation raises more questions than it answers. Why did not Mr. Ma open his own truly personal account with the Bank or some other bank approved by the Jockey Club? Why did he instead in potential breach of his fiduciary duties to Moulin allow his personal expenses to become mixed with those of Moulin?

35. By the alleged understanding, Mr. Ma is asking the Court to believe that he told the Bank in no uncertain terms that he would not be responsible or would not be responsible as primary debtor for whatever happened to the account. This would be regardless of the documents signed by him (which should then only be treated as mere formalities) and regardless of the fact that from time to time he would be using the account for his own personal matters.

36. As Master Wong cogently pointed out, a Bank would not enter into such an arrangement which defies commercial sense. If the account was to be for Moulin, the Bank would have opened it with Moulin and entered into a direct contractual relationship with Moulin.

37. Third, assume that there is some sort of promissory estoppel as Mr. Ng claims.

38. Mr. Ng accepts that the estoppel would at best be suspensory of the Bank's rights. But (Mr. Ng maintains) the Bank would have to give reasonable time for Mr. Ma to pay the amount due on the overdraft. Mr. Ng says that a reasonable period would be 6 months.

39. Mr. Ng argues that the Bank's letter of demand dated 20 June 2005 (which asked for payment by the next day) did not constitute reasonable notice. Mr. Ng says that the letter was thus invalid as a demand and since then no valid demand has been made. The Bank is thus (Mr. Ng. asserts) not entitled to bring the current action.

40. I disagree.

41. The requirement of a demand to trigger liability for repayment of Mr. Ma's facility arises from GCA clauses 1 and 9. Neither stipulate any period of time which should be allowed to the account-holder before he has to pay up. Accordingly the demand letter of June 2005 complied with GCA clauses 1 and 9.

42. If there is a promissory estoppel, the critical question is not whether the letter of demand stipulated a particular time frame for payment. The critical question is instead one of fact: has the debtor had reasonable notice that his creditor will no longer abide by the alleged understanding, but will insist on his strict legal rights?

43. The answer is self-evident. The letter of demand was issued in June 2005. The writ was not issued until January 2006. Master Wong heard the matter in September 2006. By any yardstick, at the time of the writ and the hearing before Master Wong, Mr. Ma would surely have had

ample notice of the Bank's intention to enforce its strict legal rights and reasonable time in which to pay up.

44. Indeed, on Mr. Ng's suggested requirement of 6 months, the writ itself should readily qualify as a valid demand for payment at law.

45. Consequently, however one looks at the matter, Mr. Ma has no defence to the Bank's claim. Summary judgment was rightly granted.

B. Whether admission made "without prejudice"

B.1 Law

46. It is strictly unnecessary to consider the "without prejudice" issue in light of the conclusion in Section III.A. Nonetheless, in deference to counsel's submissions, I briefly set out my views.

47. The law regarding "without prejudice" communications was recently considered by Kwan J in *Re Jinro (HK) International Ltd.* [2002] 4 HKC 90 (at §§13-18). She discerned the following principles:-

(1) For a claim of "without prejudice" privilege to succeed, the party claiming it must show that the communication was made:-

(a) in a bona fide attempt to settle a dispute between the parties; and,

(b) with the intention that, if negotiations failed, the communication could not be disclosed without the consent of the party making the communication.

(2) In establishing that there was a bona fide attempt to settle a dispute, the party seeking to assert privilege must show that, at the time of his communication:-

(a) a dispute existed between the parties in respect of which legal proceedings had commenced or were contemplated; and,

(b) the communication was made in an attempt to further negotiations to settle that dispute.

(3) The mere fact that a communication concerns a dispute between the parties is not sufficient to confer privilege.

(4) The communication need not be expressed to be "without prejudice," if it is clear from the surrounding circumstances that the parties were generally seeking to compromise their dispute.

(5) But there is an exception to the "without prejudice" privilege. This exception applies where the exclusion of the evidence would act as a cloak for perjury or other "unambiguous impropriety". This exception should only apply in the clearest of cases, since otherwise it could undermine the "without prejudice" privilege altogether.

B.2 Application of law to fact

48. Mr. Ng submits that all Mr. Ma was doing when he telephoned Mr. Wong was to ask for further time to pay.

49. This (according to Mr. Ng) would have constituted little more than an attempt to settle a then ongoing dispute without further recourse to

the Court. This case (Mr. Ng says) is thus little different from *Leung Kwok Tim v. Builders Federal (HK) Ltd.* [2001] 3 HKC 527 or *Forster v. Friedland*, unrep., UKCA (Civil Division), 10 November 1992.

50. In *Leung* the plaintiff sent invoices to the defendant. The defendant neither admitted, nor denied liability. It merely asked for more time in which to pay. Burrell J held that there was no admission in those circumstances.

51. In *Forster*, Friedland held a number of meetings with Forster.

52. Friedland told Forster that, although he regarded himself as bound in honour to acquire certain shares, he would nonetheless deny liability if it came down to litigation. Friedland said that what he really wanted was more time in which to acquire the shares.

53. After several meetings, the parties prepared a document entitled “Interim Agreement” whereby Friedland was to make periodic payments.

54. The question before the Court was whether secretly-made tape recordings of the meetings between Forster and Friedland were privileged or were admissible as evidence. The meetings were never expressly stated to be “without prejudice”.

55. The English Court of Appeal held that in all the circumstances the meetings constituted “without prejudice” negotiations aimed at settling the parties’ disputes to avoid litigation.

56. In my view, we are far away from the situations in *Leung* and *Forster*.

57. Unlike *Leung*, there was a clear admission here that Mr. Ma was indebted to the Bank. Mr. Ma simply asked for more time to pay.

58. Unlike *Forster*, the admission of liability was unequivocal.

59. It is one thing for a person to say (as Friedland did) that he feels bound to stick to an agreement as a matter of strict honour or morality. But it does not follow from such statement that the person accepts that he has a legally enforceable responsibility under the relevant contract. Friedland was merely positing that, although morally bound, he had for technical reasons no actual legal liability to buy the shares.

60. But here Mr. Ma made no qualification. He simply admitted that he owed money to the Bank and needed time to pay.

61. Thus, it cannot be said that the telephone conversation was within the policy of the "without prejudice" rule. The conversation was a frank admission of liability coupled with a confession of an inability to pay up immediately.

62. It is true that Mr. Ma asked for concessions in relation to the payment of what he admittedly owed. But, as Hoffmann LJ observed in *Forster*, "not every request for more time [to pay] is automatically to be treated as opening a negotiation without prejudice".

63. In the context of the admission of liability at the start of the telephone call, I do not think that the request for time to pay can here be characterised as part of a negotiation. It was simply pointing out the stark reality of Mr. Ma's cashflow difficulties to the Bank.

64. Mr. Ng refers to Mr. Ma not having distinguished in his mind between Moulin's debts and his own at the time of his call. Mr. Ng also suggests that at the time of his call Mr. Ma had not had sufficient opportunity to consider his position and discuss the matter with solicitors. Thus, Mr. Ng submits any admission by Mr. Ma could not have been an informed one.

65. I am unable to accept this. As a director of a listed company, it can safely be assumed that Mr. Ma would have been aware of the elementary reality of his responsibility to discharge the amount standing due on an overdraft in an account opened in his personal name. I do not for one moment believe that Mr. Ma made the admission without himself understanding all relevant facts and matters in relation to the overdraft.

B.3 Whether any unfairness to Mr. Ma

66. Assume, however, that I am wrong and the telephone communication is privileged.

67. The reasoning in Section III.A above ignores the telephone conversation altogether, but still concludes that Mr. Ma has no defence. The admissibility or otherwise of the telephone conversation is irrelevant to the question of summary judgment.

68. Mr. Ng contends to the contrary. He says that knowledge of the telephone conversation would so taint the mind of a master (or for that matter a judge) that he could not act fairly. He should instead recuse himself.

69. I disagree.

70. As part of its daily work, the Court (whether master or judge) must regularly sift through admissible and inadmissible evidence. The Court habitually excludes from its mind irrelevant or inadmissible material and comes to a conclusion based solely on admissible and relevant evidence.

71. The judge or master is different from a jury which is comprised of lay persons and which comes to a verdict without giving reasons.

72. Even if the call were privileged, the present case would be little different from a trial or other hearing where inadmissible evidence is adduced and looked at “de bene esse” by a Court. In such case, the Court (whether master or judge) simply rules the evidence inappropriate and proceeds with the hearing. There is no question of recusal or unfairness.

73. This is not an exceptional case. I reject the suggestion that Master Wong ought to have recused himself in the circumstances here.

IV. CONCLUSION

74. Mr. Ma's appeal is dismissed. I shall hear the parties on costs and consequential orders.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr. Jonathan Wong, instructed by Messrs. Tsang, Chan & Wong, for the Plaintiff

Mr. Kenneth W. H. Ng, instructed by Messrs. F. Zimmern & Co., for the Defendant

HCMP 1405/2016
and CACV 137/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 1405 OF 2016

(ON AN INTENDED APPEAL FROM HCA NO 109 OF 2014)

BETWEEN

CRANE WORLD ASIA PTE LIMITED Plaintiff

and

HONTRADE ENGINEERING LIMITED Defendant

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 137 OF 2016

(ON APPEAL FROM HCA NO 109 OF 2014)

BETWEEN

CRANE WORLD ASIA PTE LIMITED Plaintiff

and

HONTRADE ENGINEERING LIMITED Defendant

Before: Hon Lam VP and Barma JA in Court

Date of Hearing: 10 June 2016

Date of Judgment: 10 June 2016

Date of Reasons for Judgment: 20 June 2016

REASONS FOR JUDGMENT

Hon Lam VP (giving the Reasons for Judgment of the Court):

1. This urgent appeal was brought about in the following circumstances. The subject matter of the appeal is the admissibility of parts of the evidence in a second witness statement of Yau Ming ["Yau"] of 6 April 2016 filed by the Plaintiff in HCA 109 of 2014. Such evidence refers to an offer of 26 November 2015 in a letter from the solicitors for the Defendant to Yau in respect of another set of proceedings in which the Defendant advanced claims against Yau. One of the terms of the offer was that Yau had to agree not to prepare any witness statements for the Plaintiff in the present action. That offer was not accepted by Yau. The Plaintiff wishes to put forward evidence of this offer at the trial.

2. The Defendant challenged the admissibility of such evidence and contended that it was inadmissible by reason of the without prejudice privilege ["WPP"]. The Plaintiff contended that the case comes within an exception to WPP, viz that the attempt to proscribe Yau from giving a witness statement to the Plaintiff is an unambiguous impropriety which cannot be protected by WPP.

3. On 20 May 2016, B Chu J ["the Judge"] ruled in favour of the Defendant. The Plaintiff sought leave to appeal and leave was refused by the Judge on 2 June 2016.

4. As said, the matter came before us by way of urgent application. The urgency lies in the fact that the trial of the action is scheduled to commence on 13 June 2016. It is of great significance to the parties (and also the trial judge) that the admissibility of the evidence relating to the offer of 26 November 2015 is resolved before the trial.

5. We should also mention that there has been a direction for speedy trial. Hence, it is in the interest of justice that this matter should be heard by this court on an urgent basis before the trial commenced.

6. Soon after the refusal of leave by the Judge, counsel for the Plaintiff applied to this court for urgent leave to appeal and rolled-up hearing of the appeal.

7. The court gave directions to facilitate urgent consideration of the matter. After reading the written submissions lodged in the leave application, it was directed that there shall be a rolled-up hearing on 10 June 2016, viz we shall hear the appeal immediately after giving leave (if leave is granted) at the hearing. The court also required an undertaking from the Plaintiff to file and serve the Notice of Appeal as soon as practicable assuming leave is granted. Solicitors for the Plaintiff gave such undertaking by fax on 8 June 2016.

8. On 10 June 2016, after hearing counsel, we gave leave. We proceeded to hear submissions on the substantive appeal. Having considered the submissions of counsel, we allowed the appeal and ruled that the evidence is admissible. We now give reasons for our decision.

9. In light of the pending trial, we shall not repeat the factual background of the disputes between the parties which has been fully set

out by the Judge in the judgment of 20 May 2016. It suffices to note that similar issues arose in the action between the Defendant and Yau (HCA 655 of 2013, in which the Defendant was the plaintiff, suing Yau for breach of fiduciary duties to the Defendant) and the present action. However, Yau is not a party to the present action and the Plaintiff was not a party to the settlement negotiation in the letter of 26 November 2015.

10. It is also clear from the evidence filed in interlocutory proceedings that Yau is a material witness in the present action. The Defendant and those advising it were clearly aware of the significance of Yau's evidence in this action when the offer was made in the letter of 26 November 2015.

11. Thus, according to the approach in *Moriarty v London Chatham & Dover Railway Co* (1870) LR 5 QB 314, the attempt by the Defendant to suppress the evidence of Yau is relevant at the trial. At p.319, Cockburn CJ said:

> " The conduct of party to a cause may be of the highest importance in determining whether the cause … is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as shewing that the recourse to falsehood leads fairly to an inference of guilt. … So, if you can shew that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; I fully agree that it should be put to the jury, with the intimation that it does not always follow … but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts …"

12. In the modern setting, this approach was applied by the British Columbia Court of Appeal in *Greenwood v Fitts* (1961) 29 DLR (2d) 260.

13. It is unfortunate that the Judge was not referred to these authorities and she erroneously held that the evidence relating to the offer could not be relevant at the trial.

14. Before us, Mr Khaw (leading Mr Leung, appearing for the Defendant) did not advance any effective submissions against the above analysis. Instead, counsel focused on the protection by WPP. Mr Khaw submitted that the offer, albeit conditional upon Yau not giving any witness statement to the Plaintiff, could not be regarded as unlawful and as such the exception to WPP is not applicable.

15. For the Plaintiff, Mr McCoy SC (who did not appear before the Judge at the hearing of the summons, now appearing with Mr Chan and Mr Lok) submitted that it is a clear case of abuse of the privilege afforded by WPP. Counsel contended that the impropriety lies in the attempt to preclude Yau from giving evidence for the Plaintiff. In this respect, there is no material difference between a bar against the giving of witness statement to the Plaintiff and bar against testifying for the Plaintiff.

16. For present purposes, we can take the modern law on WPP from the judgment of Robert Walker LJ (as he then was) in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436. The following propositions can be derived from that judgment:

(a) WPP is a rule that rests upon public policy: 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 may be used to their prejudice in the course of

the proceedings (per Lord Griffiths in *Rush Tompkins Ltd v Greater London Council* [1989] AC 1280 at p.1299) ;

(b) Another basis for the rule is the express or implied agreement of the parties that communications in the course of their negotiations should not be admissible in evidence if a contested hearing ensues, *Unilever Plc v Procter & Gamble Co*, supra p.2442D and 2448H;

(c) The rule is not absolute and there are established exceptions when it is in conflict with other more powerful principles, p.2442E, 2444C to 2445G;

(d) The modern approach is to examine the rule with a proper analysis of the true foundation and purpose of the rule, see Hoffmann LJ (as he then was) in *Muller v Linsley & Mortimer* [1996] PNLR 74 at 77 to 80. And the public policy aspect of the rule was explained by Hoffmann LJ in these words:

> " … the privilege operates as an exception to the general rule on admissions … 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, i.e. independently of the truth of the facts alleged to have been admitted. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made…."

(e) One exception (which is the pertinent for this appeal) is put by Robert Walker LJ at p.2444F to H as follows:

> " … 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'… this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin* … warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

(f) Notwithstanding the core rationale for the public policy underpinning the rule, the protection of WPP is not confined to admissions, see p.2446B to C and Robert Walker LJ further explained at p.2448H to 2449 C,

> " …They show that the protection of admissions against interest is the most important practical effect of the rule. 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 … 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."

(g) Ultimately, the test was stated by Robert Walker LJ at p. 2449C,

> " … even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

17. *Foskett on Compromise*, 8th Edn, paragraph 19-55 had this to say on the approach of the court:

> " … The court will doubtless have to adopt a pragmatic approach, balancing the primary consideration of ensuring protection for parties involved in true settlement negotiations against the need to ensure that the privilege afforded by the rule is not abused."

18. The "unambiguous impropriety" exception and the kind of abuse that the court should have regard to was further explained by Rix

LJ in *Savings & Investments Bank Ltd v Fincken* [2004] 1 WLR 667 at paragraph 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 *Unilever* 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 at 2444G, 2448A and 2449B. That is why Hoffmann LJ in *Forster* emphasised 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 v Fitt*, 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,* described in para 47 above). 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."

19. It is also important to highlight what was said in two earlier English Court of Appeal authorities cited by Robert Walker LJ in terms of the exception only applies in the clearest cases of abuse, lest what we shall say in this judgment be mistaken as a relaxation of the protection afforded by WPP. We must emphasize that we whole heartedly adhere to these observations of their lordships. Since those were unreported judgments, it may be helpful if we can take the relevant dicta from the judgment of Rix LJ in *Fincken*:

> " 46. *Forster v Friedland* (10 November 1992, unreported) was the first of a series of cases in this court which discussed the exception, but held that it did not apply. The defendant

admitted that he considered himself honour bound by an agreement, but said that if it came to litigation he would deny any legal obligation. On the facts, this was held to be "very far from blackmail". On the law, Hoffmann LJ described *Greenwood v Fitt* and *Hawick Jersey v Caplan* as examples of cases which show that a party cannot use the without prejudice rule "as a cloak for blackmail". He pointed out that in the former case the defendant had said that unless the claim against him was withdrawn, he would give perjured evidence and would bribe other witnesses to perjure themselves. Having reviewed these cases, he 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.’

47. *Fazil-Alizadeh v Nikbin* (CA, 19 March 1993, unreported) was the second of the series of cases in this court. Again there were secret tape recordings of without prejudice meetings: the litigation was as to who owned the beneficial interest in a house. Two matters were sought to be put in evidence, the first an admission of payment of £10,000 as a deposit for the purchase of a flat in the house by the plaintiff – who claimed to be entitled to the beneficial interest in the whole house irrespective of such a purchase; the second was the alleged revelation of forgery of the terms of a previous settlement agreement. The alleged vice of the first admission was that the claimant continued to deny such payment on his pleadings. The alleged vice of the second admission was the continued cover-up of a past crime. As to the first, this court held that even if the admission was established, it could not be held against him "despite his continued denial of such payment on the pleadings". As to the second, it held that the test of unambiguity had not been met. But Simon Brown LJ continued:

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

> eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likely to have participated in discussions with half a mind at least to their litigious rather than settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitably it must, against the prospects of successful settlement.' "

20. In Hong Kong, it can be seen from our Mediation Ordinance Cap 620 that a similar policy is adopted in relation to disclosure of mediation communications as set out in Sections 8 to 10 of that Ordinance. As submitted by Mr McCoy, mediation is a form of neutral assisted without prejudice negotiation. Before the enactment of the ordinance, mediation communications were protected by WPP, see *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD 897. The Ordinance provides generally for two different broad categories of permitted disclosure of mediation communications: (a) Section 8(2) provides for permissible disclosure without leave of the court; and (b) Section 8(3) provides for disclosure with the leave of the court. In the present context, it is relevant to note that under Section 8(3)(c) that the court may grant leave for a purpose that it considers justifiable in the circumstances of the case. Under Section 10(2), in considering whether leave should be granted, the court must have to regard to the matters set out in that sub-section. For our purposes, it should be noted that one of the relevant matter is set out in Section 10(2)(b): whether it is in the public interest or the interests of the administration of justice for the mediation communication to be disclosed or admitted in evidence.

21. In the application of that particular criteria under Section 10(2)(b), bearing in mind the affinity of mediation communication and WPP, we agree with Mr Khaw that the court must have regard to the

public policy considerations pertaining to WPP. The public interest and the interests of the administration of justice in upholding confidentiality of mediation communication and WPP is the same. Likewise, the exception for disclosure in respect of unambiguous impropriety under common law should also inform the court in deciding whether there should be disclosure of mediation communication in a similar context when it consider an application under Section 10 of the ordinance. Like the WPP rule, the court will not permit mediation confidentiality to be used as a cloak for unambiguous impropriety when it is clear that the cloak of confidentiality was abused. At the same time, the court must also have regard to observations of Hoffmann LJ, Simon Brown LJ and Rix LJ in the authorities cited above on the need to exercise caution and leave should only be granted in the clearest type of cases so that the primary policy of upholding confidentiality will not be undermined.

22. The key issue in the present appeal is whether the Defendant's attempt to preclude Yau from giving a witness statement to the Plaintiff in consideration of the settlement of HCA 655 of 2013 is an unambiguous impropriety.

23. Mr McCoy referred to some authorities showing that it is improper to bind a witness from giving evidence by contract (*Harmony Shipping Co v Saudi Europe* [1979] 1 WLR 1380 at p.1386D to E; *Versloot Dredging BV v Hdi Gerling Industrie Versicherung AG* [2013] EWHC 581 (Comm) and that a solicitor acts improperly if he tries to prevent a witness from making a statement for the other side (*The Hong Kong Solicitor's Guide to Professional Conduct* 3rd Edn, paragraph 10.12 proposition 5).

24. The following passages from these authorities are pertinent in the present context:

> " Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting facts from him and from calling him to give evidence or from issuing him with a subpoena … "
> (per Lord Denning MR in *Harmony Shipping*, supra)

> " What a solicitor is not entitled to do, or indeed a party, is to order or instruct a witness or a potential witness not to attend an interview with the opposing solicitor or to tell him that he has no real choice in the matter, or to put pressure on him not to comply. Nor must he make it appear that the witness can only be interviewed if the solicitor or his principal consents."
> (per Christopher Clarke J in *Versloot Dredging*, supra)

25. We agree with Mr McCoy that in the context of modern litigation practice, an attempt to prohibit a witness from giving a witness statement to the other side is effectively an attempt to prevent such person from giving evidence for that opponent. Such an attempt clearly infringes the stricture imposed in these authorities. As illustrated by *Connolly v Dale* [1996] QB 120, a deliberate attempt to prevent the opposing party from having full and unimpeded access to a potential witness, even with a benign intent, is improper conduct.

26. In this connection, we respectfully disagree with the Judge in her reasoning that as it was up to Yau to decide whether to accept the offer, he was not prohibited from giving a witness statement to the Plaintiff and the terms of the offer did not have a tendency of preventing the witness from making a free and voluntary choice. With respect, the question is not whether the letter in fact achieved what the Defendant set out to do. The question is whether the terms in the offer were an attempt to oblige Yau to refrain from giving a witness statement to the Plaintiff as

the price for settling HCA 655 of 2013. In our judgment, the answer to this question is in the affirmative. It does not matter that the Defendant failed to achieve that outcome in the end.

27. The Judge devoted parts of her judgment to the consideration of the law on attempt to pervert the course of justice and discussed some of the cases on the topic. Before us, Mr Khaw submitted that the unambiguous impropriety which triggers the exception to WPP must be some unlawful acts.

28. Whilst blackmail and threats can amount to criminal conducts, we do not think the Plaintiff needs to establish that the Defendant was guilty of the offence of perverting the course of justice or other offence before it can satisfy the requirement of unambiguous impropriety. The Canadian case of *Greenwood v Fitts*, supra was cited by Hoffmann LJ in *Forster v Friedland* as an example of unambiguous impropriety. In that case, during pre-trial settlement negotiations, the defendant told the plaintiffs if they brought action against him he would perjure himself, induce others to do so and would leave the country to defeat judgment. The British Columbia Court of Appeal held that such statement was admissible as evidence and WPP did not give protection to it.

29. Mr Khaw was unable to demonstrate what legitimate interest the Defendant had in preventing Yau from giving a witness statement to the Plaintiff. There is no property in witnesses. If the Defendant thought Yau's version was in its favour, it could have asked Yau to give a witness statement to it to support its defence against the Plaintiff. Alternatively, if it envisaged that Yau's version would be inconsistent

with the defence case, it was lawful for the Defendant to show Yau its evidence and ask Yau to reconsider his evidence in light of that. However, what the Defendant could not lawfully do was to obtain a blanket promise from Yau not to give a witness statement to the Plaintiff in consideration of the settlement of HCA 655 of 2013.

30. The Judge took the view that the other terms in the offer were a legitimate offer for settlement and as such the offer was not made with the purpose to interfere with the Plaintiff's attempt to elicit evidence from Yau and the terms of the offer could not constitute improper pressure. With respect, we cannot accept this analysis. The Judge failed to ask the more pertinent question: whether the Defendant had any legitimate interest in including this particular term as a term of settlement. If there is no legitimate interest, and we have held there is none, the offer is improper irrespective of the legitimacy of the other terms. In this connection, in *HKSAR v Wong Chi Wai* (2013) 16 HKCFAR 539 at paragraph 33(f), Ribeiro PJ said:

> " In contrast, if the object of the approach is to get the witness to … refrain from telling the truth, the offence [of attempting to pervert the course of justice] is committed even if the means used involve no more than exercising or threatening to exercise a legal right …"

31. The Defendant did not explain in its evidence filed in support of its summons why it saw fit to include such a term in its offer. It is not for us to say in this appeal whether the conduct of the Defendant amounted to an attempt to pervert the cause of justice. All we need to say is that we have no doubt that on the evidence before us the Plaintiff satisfied us that this is a case of unambiguous impropriety. Therefore the Defendant cannot preclude the admissibility of the evidence on account of WPP.

32. For these reasons, we differed from the conclusions reached by the Judge. We allowed the appeal accordingly.

(M H Lam)
Vice President

(Aarif Barma)
Justice of Appeal

Mr Gerard McCoy SC, Mr Derek CL Chan and Mr Michael Lok, instructed by Tsui & Co, for the plaintiff

Mr Richard Khaw and Mr Adrian Leung, instructed by K.C. Ho & Fong, for the defendant

A [HOUSE OF LORDS]

RUSH & TOMPKINS LTD. . . . . APPELLANTS

AND

GREATER LONDON COUNCIL AND ANOTHER . . RESPONDENTS

B

1988 July 26, 27; Nov. 3

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Practice—Discovery—Privilege—"Without prejudice" correspondence between plaintiffs and first defendant—Correspondence resulting in settlement of plaintiffs' claim against first defendant—Action continuing against second defendants—Whether correspondence disclosable to second defendants

C

The plaintiffs had entered into a building contract with the first defendant for a housing development and had engaged the second defendants as subcontractors for certain of the works. In 1979 the plaintiffs began an action against the defendants claiming a declaration that the first defendant was liable to reimburse them in respect of any sums which they might be found liable to pay to the second defendants under the subcontract, and an inquiry against both defendants regarding the amount of loss and expense which the second defendants were entitled to recover from them. However correspondence marked "without prejudice" between the plaintiffs and the first defendant resulted in their reaching a compromise agreement in October 1981. In consequence the plaintiffs discontinued their action against the first defendant. The second defendants sought disclosure by the plaintiffs of the "without prejudice" correspondence. The plaintiffs, conceding that the correspondence might be relevant to the issues between them, refused on the ground that it was privileged. On the second defendants applying for an order for specific discovery, the judge sitting on official referees' business upheld the plaintiffs' claim to privilege and dismissed the application.

D

E

F

On appeal by the second defendants, the Court of Appeal allowed the appeal.

On appeal by the plaintiffs:—

Held, allowing the appeal, (1) that in general the "without prejudice" rule made inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement; and that admissions made to reach settlement with a different party within the same litigation were also inadmissible whether or not settlement was reached with that party (post, pp. 940H—941A, 943H—944A, 947H—948A).

G

Teign Valley Mining Co. Ltd. v. Woodcock, The Times, 22 July 1899 and *Stretton v. Stubbs Ltd.*, The Times, 28 February 1905, C.A. not followed.

H

(2) That the general public policy that applied to protect genuine negotiations from being admissible in evidence also applied to protect those negotiations from being disclosed to third parties; and that accordingly the judge's decision dismissing the application for discovery should be restored (post, pp. 940H—941A, 947A–E, G–H, H—948A).

Decision of the Court of Appeal [1988] 2 W.L.R. 533; [1988] 1 All E.R 549, reversed.

The following cases are referred to in the opinion of Lord Griffiths: A

Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co. (1882) 11 Q.B.D. 55
Cutts v. Head [1984] Ch. 290; [1984] 2 W.L.R. 349; [1984] 1 All E.R. 597, C.A.
Daintrey, In re, Ex parte Holt [1893] 2 Q.B. 116, D.C.
Derco Industries Ltd. v. A. R. Grimwood Ltd. [1985] 2 W.W.R. 137
Kitcat v. Sharp (1882) 48 L.T. 64 B
O'Rourke v. Darbishire [1920] A.C. 581, H.L.(E.)
Rabin v. Mendoza & Co. [1954] 1 W.L.R. 271; [1954] 1 All E.R. 247, C.A.
Schetky v. Cochrane and The Union Funding Co. [1918] 1 W.W.R. 821
Stretton v. Stubbs Ltd., The Times, 28 February 1905, C.A.
Teign Valley Mining Co. v. Woodcock, The Times, 22 July 1899
Tomlin v. Standard Telephones & Cables Ltd. [1969] 1 W.L.R. 1378; [1969] 3 All E.R. 201, C.A. C
Waldridge v. Kennison (1794) 1 Esp. 142
Walker v. Wilsher (1889) 23 Q.B.D. 335, C.A.
Waxman (I.) & Sons Ltd. v. Texaco Canada Ltd. [1968] 1 O.R. 642; [1968] 2 O.R. 452
Whiffen v. Hartwright (1848) 11 Beav. 111

The following additional cases were cited in argument: D

Aegis Blaze, The [1986] 1 Lloyd's Rep. 203, C.A.
Holdsworth v. Dimsdale (1871) 24 L.T. 360, D.C.
Knapp v. Metropolitan Permanent Building Association (1888) 9 N.S.W.R. 468
Omnium Securities Co. v. Richardson (1884) 7 O.R. 182
River Steam Co., In re (1871) L.R. 6 Ch.App 822, D.C.
Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151 E

APPEAL from the Court of Appeal.

This was an appeal by the plaintiffs in the action, Rush & Tompkins Ltd. from the judgment dated 21 December 1987 of the Court of Appeal (Slade, Balcombe and Stocker L.JJ.) allowing an appeal by the second defendants, P. J. Carey Plant Hire (Oval) Ltd. (trading as P. Carey Contractors), from the judgment dated 12 February 1987 of Judge Esyr Lewis Q.C. (sitting on official referee's business) dismissing the second defendants' application for specific discovery of documents. The Court of Appeal had ordered that the plaintiffs should give discovery of certain correspondence marked "without prejudice" which had passed between the plaintiffs and the first defendant in the action, the Greater London Council, and which led to a concluded settlement of the disputes between those two parties. F G

The facts are stated in the opinion of Lord Griffiths.

John Dyson Q.C. and *Charles Hollander* for the plaintiffs.

Richard Fernyhough Q.C. and *Rosemary Jackson* for the second defendants. H

Their Lordships took time for consideration.

3 November. LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Griffiths. I agree with it and, for the reasons he gives, I would allow the appeal.

A LORD BRANDON OF OAKBROOK. My Lords, for the reasons given by my noble and learned friend Lord Griffiths I would allow the appeal.

LORD GRIFFITHS. My Lords, this appeal raises a novel point on the right to discovery of documents. It arises out of a dispute under a building contract in the following circumstances. The appellants, Rush & Tompkins Ltd., entered into a building contract in December 1971 B with the Greater London Council ("G.L.C.") to build 639 dwellings on the Hanwell Estate in Ealing. In January 1973 Rush & Tompkins engaged the respondents, P. J. Carey Plant Hire (Oval) Ltd., as subcontractors to carry out ground works required under the main contract.

The completion of the contract was subject to much disruption and C delay and between June 1976 and January 1979 Carey put in claims for loss and expense to Rush & Tompkins. Rush & Tompkins for their part maintained that they were entitled to be reimbursed by the G.L.C. in respect of these claims for loss and expense under the subcontract. It appears that the G.L.C. would not agree Carey's claim and consequently Rush & Tompkins would not pay it. Eventually in order to resolve the deadlock Rush & Tompkins commenced proceedings in August 1979 D against the G.L.C. as first defendant and Carey as second defendant in which they claimed an inquiry into the loss and expenses to which Carey were entitled under the subcontract and a declaration that they were entitled to be reimbursed that sum by the G.L.C.

However, before these proceedings came to trial Rush & Tompkins entered into a compromise with the G.L.C. on 12 October 1981 in E which Rush & Tompkins accepted the sum of £1,200,000 in settlement of all outstanding claims under the main contract. It was a term of this settlement that Rush & Tompkins would accept direct responsibility for all the subcontractors' claims. This settlement embraced matters which ranged far beyond those raised in the action with which this appeal is concerned. Rush & Tompkins then discontinued the action against the G.L.C.

F The terms of this settlement were disclosed to Carey but the settlement did not show what valuation had been put upon Carey's claim in arriving at the global settlement of £1,200,000.

The action then went to sleep but eventually it awoke and Carey added a counterclaim to recover their loss and expense which they quantified at £150,582.86. In their statement of claim Rush & Tompkins G had pleaded that the architect had withheld consent to the settlement of Carey's claim and that the G.L.C. had stated in writing that the claim did not exceed a value of approximately £10,000. So on the face of it the gap between the parties was very wide.

Carey, however, believed that in the negotiations between Rush & Tompkins and the G.L.C. documents must have come into existence which showed the basis upon which Carey's claim was valued for the H purpose of the global settlement and they suspected that they might show that the figure was very much larger than the sum of £10,000 which had been alleged as the value of the claim in the statement of claim.

Rush & Tompkins admit that there are such documents and that they relate to the issues in the action, presumably because they cast light on the value of Carey's claim, but they maintain that Carey are not entitled to discovery of these documents because they came into existence for

the purpose of settling the claim with the G.L.C. and are thus protected from discovery by the "without prejudice" rule.

Carey took out a summons for the specific discovery of this "without prejudice" correspondence but the official referee, Judge Esyr Lewis Q.C., accepted the argument of the main contractors and refused discovery. The Court of Appeal reversed his decision and ordered discovery of the "without prejudice" correspondence passing between Rush & Tompkins and the G.L.C. holding that the protection given by the "without prejudice" rule ceased once a settlement had been reached.

The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, 306:

> "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 R.P.C. 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. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the 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. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

Nearly all the cases in which the scope of the "without prejudice" rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the "without prejudice" material for a

A variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the "without prejudice" material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point B that Lindley L.J. was making in *Walker v. Wilsher* (1889) 23 Q.B.D. 335 and which was applied in *Tomlin v. Standard Telephones & Cables Ltd.* [1969] 1 W.L.R. 1378. The court will not permit the phrase to be used to exclude an act of bankruptcy: see *In re Daintrey, Ex parte Holt* [1893] 2 Q.B. 116 nor to suppress a threat if an offer is not accepted: see *Kitcat v. Sharp* (1882) 48 L.T. 64. In certain circumstances the C "without prejudice" correspondence may be looked at to determine a question of costs after judgment has been given: see *Cutts v. Head* [1984] Ch. 290. There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in *Waldridge v. Kennison* D (1794) 1 Esp. 142. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties 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. If the compromise fails the admission of the facts made for the purpose of the compromise should E not be held against the maker of the admission and should therefore not be received in evidence.

I cannot accept the view of the Court of Appeal that *Walker v. Wilsher*, 23 Q.B.D. 335 is authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege goes, having served its purpose. In *Walker v. Wilsher* the Court of Appeal held that it was not permissible to receive the contents of a "without F prejudice" offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any possible subsequent proceedings. There are many situations when parties engaged upon some great enterprise such as a large building construction project must anticipate the risk of being involved in disputes with others engaged on the same project. Suppose the main contractor in an G attempt to settle a dispute with one subcontractor made certain admissions it is clear law that those admissions cannot be used against him if there is no settlement. The reason they are not to be used is because it would discourage settlement if he believed that the admissions might be held against him. But it would surely be equally discouraging if the main contractor knew that if he achieved a settlement those admissions could then be used against him by any other subcontractor H with whom he might also be in dispute. The main contractor might well be prepared to make certain concessions to settle some modest claim which he would never make in the face of another far larger claim. It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the "without prejudice" rule. I would therefore hold that as a general rule

the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party.

In arriving at my opinion on this aspect of the case I have taken into account the reports of two cases in "The Times" newspaper around the turn of the century. The first is a decision of Darling J. in *Teign Valley Mining Co. v. Woodcock*, The Times, 22 July 1899 which is cited in both *Phipson on Evidence*, 13th ed. (1982), pp. 374–375, 386, paras. 19-11, 20-04; and *Halsbury's Laws of England*, 4th ed., vol. 17 (1976), para. 212 as authority for the proposition that the protection afforded by "without prejudice" does not extend to third parties. The report is short and unclear, but it appears that the claim was by a company for money owed upon calls upon its shares. The defendant, Woodcock, admitted liability to the company but claimed against a Captain Rising that he held the shares as his nominee. The judge admitted in evidence terms of the negotiation between the plaintiffs and Captain Rising in which Captain Rising admitted ownership of the shares standing in the name of the nominee. The judge expressed doubts whether he should have admitted the evidence and said he did so because he had been pressed to do so by counsel. I agree with the comment of the Court of Appeal [1988] 2 W.L.R. 533, 538 that "The report is such that it is not worthy of citation as constituting authority for any proposition of law." The other case is *Stretton v. Stubbs Ltd.*, The Times, 28 February 1905. This was an action for libel and slander arising in the following circumstances. Mr. Stretton was an artist and judgment had been obtained against him in the sum of £16 in the City of London Court by a picture frame maker. That judgment had been entered by consent pursuant to a "without prejudice" agreement with the plaintiff's solicitor that no publicity should be given to the result of the action. The defendants published the judgment in "Stubbs' Weekly Gazette" and the plaintiff alleged that their canvaser had gone round to various tradesmen pointing out the importance of subscribing to the "Gazette", directing their attention to the plaintiff's name and saying that he could not be worthy of credit. The jury returned a verdict for the plaintiff of £25. As part of his case the plaintiff had relied upon the contract between himself and the solicitor for the plaintiff in the City of London Court action that the judgment should not be made public. This contract was contained in two "without prejudice" letters. The offer was contained in a letter from the plaintiff and the acceptance in a letter from the solicitor. The judge permitted the second letter to be put in evidence and read but refused to admit the first letter which had contained admissions by the plaintiff that he was absolutely insolvent. From a reading of the report it appears that the ground upon which it was submitted to the Court of Appeal that the judge had erred in refusing to admit the first letter was that putting in the second letter as part of the "without prejudice" correspondence rendered the first letter admissible. It was also submitted that it would be wrong for the plaintiff not to be allowed to be cross-examined on his assertion that he was insolvent and at the same time to allow him to put himself before the jury as being quite solvent and of good credit. The Court of Appeal allowed the first letter to be read to the court. The report does not say why Sir Richard Henn Collins M.R.

permitted it but Matthew L.J. is recorded as saying "that in his opinion a letter written with regard to an action and marked 'without prejudice' was only privileged for the purpose of that particular action." No citation of authority or reasoning is given in support of that opinion. There may well have been good grounds for admitting the first letter in that action on the ground that it was a part of a correspondence which the plaintiff had chosen to put in evidence, and possibly also on the ground of establishing an independent fact, namely, the plaintiff's insolvency, which was unconnected with the merits of the dispute about the amount owed to the frame maker and was obviously of central importance to the issue of libel or slander. I cannot however regard it as an authority of any weight for the proposition that "without prejudice" negotiations should in all circumstances be admissible at the suit of a third party.

The only issue that now survives in the present litigation is the subcontractors' counterclaim. For the reasons I have given the contents of the "without prejudice" correspondence between the main contractor and the G.L.C. will not be admissible to establish any admission relating to the subcontractors' claim. Nevertheless, the subcontractors say they should have discovery of that correspondence which one must assume will include admissions even though they cannot make use of them in evidence. They say that the correspondence is likely to reveal the valuation put upon the claim by the main contractor and the G.L.C. and that this will provide a realistic starting point for negotiations and therefore be likely to promote a settlement. This is somewhat speculative because for all we know the subcontractors' claim may have been valued in the "without prejudice" correspondence at no more than the figure of £10,000 pleaded in the statement of claim leaving the parties as far apart as ever. However, it is of course a possibility that it appeared at a much higher figure.

It was only at a late stage in the argument for Carey that the distinction between discoverability and admissibility was taken. In the courts below the question appears to have been considered solely on the question of admissibility. But the right to discovery and production of documents does not depend upon the admissibility of the documents in evidence: see *O'Rourke v. Darbishire* [1920] A.C. 581.

The general rule is that a party is entitled to discovery of all documents that relate to the matters in issue irrespective of admissibility and here we have the admission of the head contractors that the "without prejudice" correspondence would be discoverable unless protected by the "without prejudice" rule. There is little English authority on this question but I think some light upon the problem is to be gained from a consideration of the decision in *Rabin v. Mendoza & Co.* [1954] 1 W.L.R. 271. In that case the plaintiffs sued the defendants for negligence in surveying a property. Before the action commenced a meeting had taken place between the plaintiffs' solicitor and a partner in the defendants' firm of surveyors to see if the matter could be settled without litigation. The defendants agreed at the meeting to make inquiries to see if they could obtain insurance cover against possible risk of damage to the house so that litigation could be avoided. After the interview the defendants obtained a report from another surveyor for the purpose of attempting to obtain insurance cover. No settlement was reached and the action commenced. The defendants disclosed the existence of the report in their affidavit of documents but claimed

privilege from production on the ground that it was made in pursuance of a "without prejudice" discussion between the plaintiffs' solicitor and the defendants'. The master, the judge and the Court of Appeal all upheld the defendants' claim to privilege. Denning L.J. after referring to *Whiffen v. Hartwright* (1848) 11 Beav. 111 said, at pp. 273-274:

> "The Master of the Rolls there affirms the undoubted proposition that production can be ordered of documents even though they may not be admissible in evidence. Nevertheless, if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made. This case seems to me to fall within that principle. This report was clearly made as a result of a 'without prejudice' interview and it was made solely for the purposes of the 'without prejudice' negotiations. The solicitor for the plaintiff himself says in his affidavit that at the time of the interview it was contemplated that steps such as these should be undertaken. I find myself, therefore, in agreement with the decision of Master Burnand and the judge that this is not a case where production should be ordered."

Romer L.J. put the matter even more strongly saying, at p. 274:

> "It seems to me that it would be monstrous to allow the plaintiff to make use—as he certainly would make use—for his own purposes as against the defendants of a document which is entitled to the protection of 'without prejudice' status."

This authority shows that even as between the parties to "without prejudice" correspondence they are not entitled to discovery against one another.

In Canada there are conflicting decisions. In *Schetky v. Cochrane and The Union Funding Co.* [1918] 1 W.W.R. 821 the Court of Appeal in British Columbia ordered oral discovery to be given to a defendant of negotiations between the plaintiff and another defendant in the action but held that on the trial there would be no higher right to use the statements or admissions than that which a party to the negotiations would have who sought to introduce them in evidence. This decision was followed in British Columbia in *Derco Industries Ltd. v. A. R. Grimwood Ltd.* [1985] 2 W.W.R. 137 in which Lambert J.A. said, at p. 142:

> "to the extent that there is a rule that prevents the production of documents that were prepared in the course of negotiations leading to a concluded settlement, it is my opinion that the rule does not extend to the prevention of the production of those documents at the instance of a litigant who was not a party to the settlement and whose claim for production comes under the rule in [*Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.*, (1882) 11 Q.B.D. 55]."

Schetky v. Cochrane and The Union Funding Co. was not followed by the Court of Appeal of Ontario in *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.* [1968] 2 O.R. 452. The Court of Appeal in a short judgment upheld a long reasoned judgment by Fraser J. who expressed the following opinion [1968] 1 O.R. 642, 656:

A "I am of opinion that in this jurisdiction a party to a correspondence within the 'without prejudice' privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against the third party."

I suspect that until the present decision of the Court of Appeal the general understanding of the profession was that "without prejudice" B negotiations between parties to litigation would not be discoverable to other parties and that admissibility and discoverability went together. For instance in *The Supreme Court Practice 1988* under "Discovery and Inspection of Documents" Note 24/5/17 reads:

"Without prejudice communications—Any discussions between the parties for the purpose of resolving the dispute between them are C not admissible, even if the words 'without prejudice' or their equivalent are not expressly used (*Chocoladefabriken Lindt & Sprungli A. G. v. Nestlé Co. Ltd.* [1978] R.P.C. 287). It follows that documents containing such material are themselves privileged from production."

I would refer also to the critical note on this decision of the Court of D Appeal written by one of the Law Commissioners, Mr. Brian Davenport Q.C., in volume 104 of the Law Quarterly Review p. 349 in which he states that the decision will be received "with surprise and dismay by many practitioners."

I have come to the conclusion that the wiser course is to protect "without prejudice" communications between parties to litigation from production to other parties in the same litigation. In multi-party E litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing F would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.

If the party who obtains discovery of the "without prejudice" correspondence can make no use of it at trial it can be of only very limited value to him. It may give some insight into his opponent's general approach to the issues in the case but in most cases this is likely to be of marginal significance and will probably be revealed to him in G direct negotiations in any event. In my view this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should H also be extended to protect those negotiations from being discoverable to third parties. Accordingly I would allow this appeal and restore the decision of Judge Esyr Lewis Q.C.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree with it and would allow the appeal for the reasons which he has given.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Griffiths. I agree with it and, for the reasons he gives, I would allow the appeal.

Appeal allowed with costs.

Solicitors: McKenna & Co.; Wray Smith & Co.

J. A. G.

[HOUSE OF LORDS]

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* READ

1988 July 19, 20, 21, 25; Nov. 3

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Prisons—Prisoner's repatriation—Sentence—Spanish court passing minimum sentence of 12 years for offence—Secretary of State adapting sentence to statutory maximum of 10 years for similar offence committed in England or Wales—Whether sentence "incompatible" with United Kingdom law—Whether power to reduce sentence—Convention on the Transfer of Sentenced Persons 1983 (Cmnd. 9617), arts. 10(1)(2), 12—Repatriation of Prisoners Act 1984 (c. 47), ss. 1(1)(a), 3(1)(c)(3)

The prisoner was arrested and detained in custody in Spain in November 1984 in respect of an offence of introducing counterfeit currency into Spain. In October 1985 he was convicted with two others by a Spanish court and sentenced to the minimum term of imprisonment for that offence under the Spanish Criminal Code of 12 years and one day. When passing sentence the court stated that it would recommend to the Spanish government that the sentence should be reduced to six years and one day because it was excessive for the sum involved of £4,500. The prisoner applied in January 1986 to serve his sentence of imprisonment in the United Kingdom. In February 1987 the transfer took place pursuant to a warrant issued by the Secretary of State under section 1 of the Repatriation of Prisoners Act 1984[1] and the Convention on the Transfer of Sentenced Persons 1983[2]. By the terms of the warrant the prisoner was to serve a term of imprisonment of 2,847 days and, subsequently his earliest release date was determined by the Secretary of State as April 1992. The Secretary of State determined the period of sentence to be served by adapting the

[1] Repatriation of Prisoners Act 1984, s. 1: "(1) . . . where—(*a*) the United Kingdom is a party to international arrangements providing for the transfer between the United Kingdom and a country or territory outside the British Islands of . . . [a prisoner] . . . the Secretary of State shall issue a warrant providing for the transfer of the prisoner into . . . the United Kingdom."
S. 3(1)(*c*): see post, p. 951E–F.

[2] Convention on the Transfer of Sentenced Persons 1983, art. 10: see post, pp. 952G–953A.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

For the purposes of the mini-trial only, it is to be assumed that the Plaintiff United Importers Limited ("**UIL**") was successful in its application to strike out portions of Stacey Lee's witness statement and the exhibit marked "Appendix [17]".

In these proceedings, UIL is a distributor of home appliances in Hong Kong. UIL purchases products from companies abroad and sells them to retailers in Hong Kong. The Defendant Home World Limited ("**HWL**") is a manufacturer of toasters in the United Kingdom.

UIL claims that, by an oral contract dated 16 February 2014 between Ms Angela Wong on behalf of UIL and Ms Stacey Lee on behalf of the Defendant Home World Limited ("**HWL**"), HWL agreed to sell UIL 15,000 toasters to be delivered to Hong Kong by 1 October 2014. In the event, HWL was only able to provide 5,000 toasters to UIL, which UIL on-sold to retail and department stores. Subsequently, all 5,000 toasters sold by HWL to UIL were prone to overheating. After numerous complaints, UIL had to recall the toasters from the retail and department stores.

In defence, HWL denies the alleged oral contract of 16 February 2014. HWL claims that it was only on 1 September 2014, when UIL issued a written purchase order to HWL, that there was a contract concluded between UIL and HWL. This contract was only for HWL to sell 5,000 toasters to UIL to be delivered to Hong Kong by 1 October 2014. HWL admits that its toasters operated at higher than normal (but still safe) temperatures, and denies that the toasters were defective. HWL contends that, before HWL sold the toasters to UIL, Mr Alexander James of HWL told Ms Wong of UIL that HWL's toasters operated at higher than normal temperatures, and he also provided Ms Wong with a specification sheet containing details to that effect.

UIL has conceded that if HWL can prove that it had drawn UIL's attention to the fact that HWL's toasters operated at a higher than normal temperature, HWL would not be liable for breach of contract in providing UIL with defective toasters.

For the purpose of the exercise, it is not necessary to address the question of quantum or damages. The agreed factual issues are:

1. Whether UIL and HWL had entered into the oral contract dated 16 February 2014 for 15,000 toasters.

2. Whether UIL's attention was drawn to the fact that HWL's toasters operated at higher than normal temperature.

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses (one witness for the plaintiff and one witness for the defendant) will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Mr John Smith, the founder and chief executive officer of UIL.

2. Ms Angela Wong, the buyer for Europe for UIL.

In paragraph 12 of Ms Wong's witness statement, she reproduces what she wrote in her notebook after returning to her hotel room. You may assume that the notebook has been disclosed in discovery, and that all the relevant information has been fully and accurately described in Ms Wong's statement.

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Ms Stacey Lee, the head of operations of HWL.

2. Mr Alexander James, the head of marketing and sales of HWL.

In paragraphs 13 and 17 of Ms Lee's witness statement and paragraphs 11 and 13 of Mr James's witness statement, they refer to a specification sheet and an email dated 17 December 2013. These were both disclosed in discovery. You may assume that all the relevant information in the specification sheet and the email is fully and accurately described in Ms Lee's and Mr James's statements (as the case may be).

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

DURING the Mini-Trial

You will be required to:

- Make an opening speech (max 5 minutes).
- Examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that their statement does not stand as evidence in chief.
- Cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief.
- Deal with any interventions made by the advocate representing the opposing party.
- Make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party.
- Deal with any Judicial interventions/questions as and when they arise.