ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

RULING ON "WITHOUT PREJUDICE" PRIVILEGE

CITATION: Econo Car Rentals Limited v. Akeel Lett & Capital Insurance Company Limited

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 63 of 2013

DELIVERED ON: Friday 20th September 2013

CORAM: Her Worship Magistrate Nalini Singh
St. George West County
Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. St. Clair O'Neil appeared for the claimant.
Ms. Lindsay I. Webb appeared for the first named defendant.
Mr. Reshard Khan appeared for the second named defendant.

TABLE OF CONTENTS

1.0 THE INTRODUCTION

1.1 I have before me an application which raises a relatively short but important point concerning the scope of the "without prejudice" rule. The substantive matter has not yet commenced but I feel that it is convenient to treat with the application at this stage since it will impact on the conduct of the substantive matter. Indeed there are cases such as **Chocaladefabriken Lindt and Sprungli v. Nestle Co [1978] R.P.C. 287** and **Finch v. Wilson May 8th 1987 (unreported)** which speak to the desirability of determining admissibility issues related to "without prejudice" material prior to the trial and I am guided by same.

1.2 The background to the application, shortly stated runs thus. The substantive matter is based on a motor vehicle accident which occurred on the 29th March 2009. Econo Car Rentals Limited (hereinafter referred to as "the claimant") alleges that motor vehicle registration number PAO 7569 driven by Akeel Lett (hereinafter referred to as "the first named defendant") and insured by Capital Insurance Company Limited (hereinafter referred to as "the second named defendant") dangerously and negligently reversed from the compound of Island Finance unto the Eastern Main Road and collided with the claimant's motor vehicle registration number PCF 4281.

1.3 In their statement of defence which was dated and filed on the 20th June 2013, the first named defendant stated that he drove PAO 7569 with the permission of the insured Glenroy Lett. Further, since there is no evidence that the policy agreement restricted the first named defendant from driving PAO 7569, the second named defendant is responsible for the third party claim by

virtue of **Section 10(1) of the Motor Vehicle Insurance (Third Party Risks) Act Chapter 48:51.**

1.4 The material filed in support of the defence of the first named defendant reveals that there were early discussions between the second named defendant and the insured. Under the date of the 21st December 2011, the secretary in the second named defendant company wrote to the insured Glenroy Lett as follows:

> "We refer to the above accident in which the driver of your vehicle number PAO 7569 was Mr. Akeel Lett who was not authorized to drive the vehicle.
>
> We wish to advise that the restrictions on the policy covering vehicle number PAO 7569 states that the vehicle is to be driven by the Policyholder, Glenroy Lett, Only.
>
> As a result of this, it was observed that the vehicle at the relevant time was driven contrary to the terms, conditions and restrictions placed on the policy.
>
> Any amounts paid by us in this claim, will have to be repaid by you by Law under the Motor Vehicle Insurance (Third Party Risks) (Amendment) Act No. 38 of 1996 or will seek to recover from you through Court.
>
> You are hereby advised to act responsibly and settle any claims at an early stage so as to avoid litigation.

Kindly call in immediately at our office at the above address to discuss the third party's claim and oblige"

This letter which was marked as "AL1" is relied upon by the first named defendant as an acknowledgement by the second named defendant of its statutory obligation.

1.5 Additionally, under the date of the 18th October 2012, the secretary in the second named defendant company wrote to the insured Glenroy Lett as follows:

"Reference is made to the above accident in which you are liable to reimburse the Company for the claim paid to the owners of vehicle number PCF 4281.

To date, you have reimbursed the sum of $1,000.00.

Since the owners of PCF 4281 have agreed to accept settlement of their claim in the sum of $2,400.00, you are required to come in to our office immediately to reimburse the sum of $1,400.00, being the balance of the claim.

Please do not delay as payment would not be made to the third party until you have settled this outstanding balance".

This letter which was marked "AL2" is relied upon by the first named defendant as proof that a settlement had been reached between the claimant and the second named defendant whereby the claimant had agreed to accept the sum of $2,400.00 in full and final settlement of the matter.

1.6 Both letters are headed with the rubric "Without Prejudice".

1.7 The application is brought by the second named defendant and the claimant for an order that paragraphs 7 and 8 of the defence of the first named defendant be excised. Paragraphs 7 and 8 of the defence of the first named defendant reads as follows:

> "7. The Second Defendant acknowledged its statutory obligation and its right to reimbursement as indicated by its letter to the insured dated the 21st day of December 2011. The letter is exhibited and marked "AL1".
>
> 8. The Second Defendant also engaged in negotiations on behalf of all parties with the aim of settling the claim. A settlement was reached between the Plaintiff and the Second Defendant. The Plaintiff had agreed to the sum of Twenty-four Hundred dollars ($2,400.00) in full and final settlement as indicated by the Second Defendant's letter to the insured dated the 18th day of October 2012. The letter is exhibited and marked "AL2".

An order is also sought that the aforementioned letters marked "AL1" and "AL2" which are referred to in those paragraphs be removed from the bundle of documents annexed to the pleadings of the first named defendant.

1.8 The grounds for the application are that the material in paragraphs 7 and 8 as well as the letters relate to "without prejudice" discussions in respect of which admissibility has not been waived. The application is opposed by the first named defendant on the ground that the material is admissible in evidence. In the first place the first named defendant contends that "AL1" and "AL2" are not within the "without prejudice" doctrine at all as "AL1" simply asserts rights and "AL2" communicates information. Alternatively, proceeding from the position that they do

qualify as subject to the "without prejudice" rule, it is said by the first named defendant that the documents and references thereto are admissible as exceptions to the "without prejudice" rule on the basis that it is proof of a compromise arrived at between the claimant and the second named defendant. The limb of "unambiguous impropriety" is also relied upon.

2.0 THE ISSUES

2.1 In the premises, the issues which I have to decide on this application are namely:

1. Whether "AL1" and "AL2" are subject to the "without prejudice" rule.
2. Whether any of the exceptions to the "without prejudice" rule apply to make "AL1" and "AL2" admissible.

My decision on each of these issues are as follows.

3.0 THE LAW

1. Whether "AL1" and "AL2" are subject to the "without prejudice" rule.

3.1 The first limb of the application to strike out "AL1" and "AL2" is that "AL1" and "AL2" are "without prejudice" documents and are therefore inadmissible. I set out in detail the submissions of the claimant and the second named defendant on this point.

The submission of the claimant supporting the application to strike out "AL1" & "AL2" and all references thereto.

3.2 In his helpful written submissions furnished by counsel, Mr. St. Clair O'Neil for the claimant objects to the admissibility to "AL1" and "AL2". He submits that "AL1" and "AL2" ought not to be admitted as they are privileged documents arising out of negotiations between the

parties. In support of this argument counsel relies upon the case of **Rush & Tomkins Ltd v. Greater London Council (1989) AC 1280.** According to counsel, in this case proceedings between a claimant and the first defendant had come to an early end by means of a settlement and the claimant was pursuing remedies against the second named defendant. The House of Lords ruled that the "without prejudice" communications between the claimant and the first defendant were not disclosable in the course of proceedings between the claimant and the second defendant as it was felt that genuine negotiations with a view to settlement are protected from disclosure. Counsel then highlighted the learning set out at pages 1299-1300 of the case where Lord Griffith puts the matter in this way:

> "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".

On this basis counsel submits that "AL1" and "AL2" are inadmissible.

The submission of the second named defendant applying to strike out "AL1" & "AL2" and all references thereto.

3.3 Mr. Reshard Khan for the second named defendant joins Mr. St Clair O'Neil in objecting to the admissibility of "AL1" and "AL2". Indeed it is his submission that the "without prejudice" rule not only applies in this case but, states that it is a joint protection mechanism which can only be waived jointly by all parties relevant to the "without prejudice" communication. Counsel cites the case of **La Roche v. Armstrong [1922] 1 KB 485** as authority for this proposition. Counsel makes the point that in this case the second named defendant never waived in any manner or form, the "without prejudice" protection accorded to "AL1" and "AL2". As such, counsel submits that the documents are inadmissible.

The submission of the first named defendant objecting to the application to strike out "AL1" & "AL2" and all references thereto.

3.4 The arguments of counsel for the first named defendant; Ms. Lindsay I. Webb, in support of her claim to use "AL1" and "AL2" and all references thereto, is ingenious and has its attractions as an exercise in clear logic. It is this. Counsel starts off from the position that the use of the words "without prejudice" does not automatically make any document privileged. She asserts further that "AS1" in particular, cannot be considered privileged since it is not an "opening shot" as it does not stimulate any discussions with view to settling. As such the communication does not fall within the realm of negotiations which are protected by the "without prejudice" rule. Ms. Webb contends that "AL1" is only an assertion of the second defendant's rights to claim restrictions under the policy and its right to reimbursement. In this regard, Ms. Webb asserts that "AL1" is informative at best and cannot be deemed a negotiating

document. Indeed taken at its highest, "AL1" is correspondence through which the second named defendant was simply reporting to the insured.

3.5 In respect of "AL2" Ms. Webb submits that the purpose of the second letter is plainly to provide information. It informed the insured of his obligation to reimburse the second named defendant for monies paid out. It also informed the insured of the amount in which the second named defendant settled the matter with the claimant. It makes no reference to a negotiating process nor is any reference made of the insured or of the first named defendant being included in such a process. As such "AL1" and "AL2" are admissible.

3.6 I move on now to consider the law on point.

The Law on what amounts to "without prejudice" communication.

3.7 According to **Foskett, David Q.C.** ***The Law and Practice of Compromise.*** **5th ed. London: Sweet & Maxwell, 2002 at paragraph 27-02:**

> "The net effect of negotiations being "without prejudice" is that, subject to certain exceptions, a privilege attaches to the content of those negotiations rendering their content inadmissible at the trial of the action to the settlement of which they were directed".

The case of **Rush & Tomkins Ltd v. Greater London Council (1989) AC 1280** which was cited by Mr. O'Neil, makes the point that the negotiations must be "negotiations genuinely aimed at settlement" to be covered by the "without prejudice" rule. The case of **Forster v. Friedland (1992) C.A.T. 1052** states that the term "genuinely aimed at settlement" means negotiations

aimed at avoiding litigation. It follows logically that if communication is not in the nature of negotiations aimed at avoiding litigation, the "without prejudice" rule will not attach to the contents of that interchange. I have found this principle to be clearly set out in **Vaver, David. "'Without Prejudice' Communications -Their Admissibility and Effect."** ***University of British Columbia Law Review*** **Vol. 9 85 (1974): pages 85-169 at pages 135-136**:

> "Parties may be some time in investigating and revealing the facts to each other. A considerable correspondence may ensue after a dispute has arisen containing allegations and admissions of fact and law, all under the aegis of "without prejudice". Provided that the dominant intention underlying the correspondence is the settlement of the dispute, it would appear on principle that the whole correspondence ought to be protected from admissibility. An offer made during the dispute would be some evidence of such a dominant intention. It is submitted, however, that it is only at the point of time that an intention to settle emerges that the veil of inadmissibility will descend. The letter originally headed "without prejudice" may not carry protection where the writer does not have a present intention eventually to settle. If it can be shown that an early part of the correspondence does not proceed from such an intention, then it might be admissible..." (emphasis mine).

3.8 Following from this, I am of the view that the law is that if the nature of an interchange is not genuinely aimed at avoiding litigation because for example, it does no more than assert rights or state one's true position, the "without prejudice" rule will not extend to any such communication since it does not unequivocally indicate the maker's intention to negotiate. This

point was made in **Buckinghamshire County Council v. Moran [1990] Ch 623** where it was held that a communication which is not a negotiating document, but is merely an assertion of a party's rights, is not protected by the "without prejudice" rule. The facts of the case centered on a claim to adverse possession by the defendant to a plot of land owned by the council adjacent to his garden which he had treated as part of his garden. The council wrote to the defendant enquiring from him the basis upon which he was exercising rights over the plot and the defendant replied in a letter which was marked "without prejudice". This is what he said:

> "I enclose herewith a copy of the sale agreement between myself and Mr. G. Wall dated 28 July 1971, upon which I have marked the relevant part which I believe relates to the piece of land in question. I also enclose herewith, a copy of a signed statement regarding the piece of land, which I obtained from the vendor at the time of the sale. You will notice from the documents, that the previous owner laid the land to grass in April 1967 and ever since then either the previous owner or myself have occupied the land and it has therefore, been kept as part of the garden for the last 11 years. It was my understanding with Mr. Wall, that he had the right to this ground and that he only lost this right, if and when the Little Chalfont by-pass was built, so much so that as you can see I went to the trouble to get an extra declaration document from him. I notice your enclosed plan is to do with an underground cable and I believe that Mr. Wall was asked for and had given permission for this to be put under the land concerned.
>
> I do not know whether you know the property itself, but the piece of land concerned forms an integral part of the garden and the whole situation of the

house itself, in fact, without it, the house I think, would be unbearable to live in. I would reiterate, that it has always been my firm understanding that the land should be kept by the owner of Dolphin Place, if and until the proposed Little Chalfont by-pass was built. Since the owner of Dolphin Place has been the occupier of the land for the last 11 years, I have never had any doubt as to the situation indeed many local functions, mainly Conservative Party ones, which local councillors have attended, have been held there. I have not discussed this matter with my solicitor as yet and I await your reply before doing so."

Slade LJ, held at page 635 as follows:

"I think the judge was right to regard the relevant question as being whether or not the letter of 20 January 1976 could properly be regarded as a negotiating document. But I respectfully disagree with his conclusion that it could. As the judge himself said, and as the letter itself indicated, the defendant was writing the letter in an attempt to persuade the council that his case was well founded. As I read the letter, it amounted not to an offer to negotiate, but to an assertion of the defendant's rights, coupled with an intimation that he contemplated taking his solicitor's advice unless the council replied in terms recognising his asserted rights. I cannot derive from the letter any indication, or at least any clear indication, of any willingness whatever to negotiate".

The law applied to "AL1" and "AL2".

3.9 How then do the exhibits "AL1" and "AL2" stand up to scrutiny? Both of them contain the label "without prejudice" but I remind myself of the warning given by **Vaver, David.**

"'Without Prejudice' Communications -Their Admissibility and Effect." ***University of British Columbia Law Review*** **Vol. 9 85 (1974): pages 85-169 at page 134** to the effect that:

> "(i)t is first necessary to dispel the all too common impression that by prefixing any communication by the catch-phrase "without prejudice" automatic inadmissibility is thereby infallibly secured to the communication".

That said, I ask myself these questions: what does "AL1" do? Is it aimed at genuinely avoiding litigation? It seems to me that "AL1" does the following:

- State that the user of the insured vehicle was contrary to the terms of the policy.
- State that if the insurance company did disburse any sums in settlement of the claim they expected to be repaid by the insured.
- State that if the insurance company was not so repaid by the insured they would seek the assistance of the Courts to recover same from the insured.
- State that the insurance company expected the insured to settle the claim at an early stage.
- State that the insurance company expected the insured to contact the insurance company to discuss the claim.

From "AL1", it seems to me that the only thing which is open to compromise concerns who is going to pay the claim to the insured i.e. the insured or the second named defendant company. There is no suggestion that the matter of non-payment is open to compromise or is even an option. Indeed there was no suggestion that Akeel Lett's liability should even be disputed. This is not a negotiating document in the sense contemplated by *Rush & Tomkins Ltd v. Greater London Council (supra)* and at its highest, "AL1" merely communicates information. As such I find that there is nothing in this letter which entitles the claimant and the second named defendant to claim that the "without prejudice" privilege will cover it.

3.10 "AL2" on the other hand does this:

- State that the claim can be settled for $2,400.00 as it is a figure agreed to by the claimant.
- State that the insurance company acknowledges receipt from the insured of $1,000.00.
- State a balance of $1,400.00 is still expected from the insured.
- State that the claim would not be paid by the insurance company until they are fully paid by the insured before-hand.

So this letter in essence seeks payment from the insured. In this letter, as in "AL1" there is no contest that the claim should be repaid and in these circumstances it does not qualify as an offer to negotiate in any sense that attracts the "without prejudice" privilege.

3.11 In my view then, the "without prejudice" rule has no application to a situation such as this where the only thing that got discussed in both letters was repayment of an apparently accepted liability as separate and distinct from negotiations and a compromise of a disputed liability. Indeed in neither letter were statements or offers made with a view to settling a dispute. It appears that the debt of $2,400.00 was admitted and the second named defendant was seeking through the letters to have the insured repay them any sums disbursed by them in settlement of the claim. This is a far cry from the insurance company making an offer of sorts to the insured or even the claimant in the midst of a dispute. I am fortified in my position by the case of **Coombs v. Le Blond Estate [2013] BCWLD 5369 at paragraph 23** where D.A. Betton J said this:

> "The act of marking a document with the clause "without prejudice" alone is insufficient to determine whether a document is privileged. Rather, the two

conditions stated in Belanger must be present for a "without prejudice" letter to be privileged. There must be:

(a) a dispute or negotiation between two or more parties, and;

(b) terms of settlement offered"

Since neither an offer to compromise a dispute nor a concession could realistically be construed from "AL1" and "AL2", the "without prejudice" rule has no application to them.

3.12 Coming back to the submissions in support of the application to strike out "AL1" and "AL2", I find that the principles advanced by the Mr. O'Neil and Mr. Khan in support of their application are sound in law, but regrettably, it is my humble and respectful view that they do not apply to the facts of the instant matter. I am inclined to agree with Ms. Webb that the letters are not negotiating documents. The label "without prejudice" was used rather superficially by the authors of "AL1" and "AL2" and falls to be conveniently ignored.

2. Whether any of the exceptions to the "without prejudice" rule apply to make "AL1" and "AL2" admissible.

3.13 In the event that I am wrong on this point, I move on to resolve the question of whether, if the exhibits are covered by the "without prejudice" rule, they can nevertheless be admitted under one of the exceptions to the general rule.

The submission of the first named defendant objecting to the application to strike out "AL1" & "AL2" and all references thereto.

3.14 Ms. Webb argues in the alternative that "AL2" in particular falls within two of the eight exceptions to the "without prejudice" rule set out in **Unilever Plc v. Proctor & Gamble Co. [1999] 1 All ER (D) 1166** and is therefore admissible. According to counsel, this case illustrates eight possible exceptions to the "without prejudice" rule. They are:

> " (1) As Hoffmann LJ noted in the first passage set out above, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 13 78 is an example.
>
> (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.
>
> (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.
>
> (4) Apart from any concluded contract or estoppel, 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" (the expression used by Hoffmann LJ in *Foster v Friedland,* 10 November 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed, para 9-32) are two first-instances decisions, *Finch v Wilson* (8 May 1987) and *Hawick Jersey International v Caplan* (The Times 11 March 1988). But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin,* 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, 338, noted this exception but regarded it as limited to "the fact that such letters have been written and the dates at which they were written". But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.

(6) In *Muller* (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the

negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head,* and by the House of Lords in *Rush & Tomkins,* as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parties in deciding questions of costs). There seems to be no-reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts v Head Fox LJ* said (at p.316) "what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to use in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after".

(8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation: see *Re D* [1993] 2 AER 693, 697, where Sir Thomas Bingham MR thought it not "fruitful to debate the relationship of this privilege with the more

> familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with 'without prejudice' privilege, seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 602, 610 [1978] AC 171 at 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage".

One of the relevant exceptions relied upon by counsel is that the letters show that a compromise was reached between the claimant and the second named defendant. Ms Webb submits that if the "without prejudice" rule is limited to negotiations which do not end on agreement and if the veil thus placed in front of such negotiations is lifted upon the parties reaching an agreement, then, according to counsel, that condition has been satisfied in the present case and it is therefore open to the first named defendant to rely on the terms of that agreement. The second exception relied upon is unambiguous impropriety. Counsel states that if the letter was excluded, the letter would act as a cloak for "unambiguous impropriety" on the part of the second named defendant, which is an abuse of the "without prejudice" rule. As such at the very least "AL2" ought to be admissible.

The submission of the second named defendant applying to strike out "AL1" & "AL2" and all references thereto.

3.15 Regarding the matter of "AL2" falling within the exceptions relied upon by Ms. Webb, Mr Khan says this. Counsel agrees that "without prejudice" material is admissible if the issue is whether or not negotiations have resulted in an agreed settlement. He relies on the case of **Walker v. Wilshire (1889) 23 QBD 335** in support of this proposition. Mr. Khan argues

however that in the matter at hand, the claimant filed proceedings i.e. Petty Civil Court Action No. 63 of 2013 to recover damages against both the first and second named defendants. As such he submits that it is indubitable that no agreed settlement has taken place between the second named defendant and the claimant.

3.16 Regarding the matter of impropriety, Mr. Khan concedes that protection will not be afforded to "without prejudice" material which, if revealed, would show that such material was used as a cloak for perjury, blackmail or other "unambiguous impropriety" -a point which according to counsel is made in the matter of **Fazil-Alizadeh v. Nikbin (1993) The Times 19th March CA.** Counsel submits that the point about this case is that there is no evidence before the Court that the second named defendant acted with such impropriety in their conduct of this claim as is necessary to fulfill the requirements of this exception. Counsel therefore submits that this exception will not apply.

3.17 For these reasons Mr. Khan's view is that "AL2" does not fall within the exceptions relied upon by the first named defendant and as such, said letters should be struck out and removed from the first named defendant's defence.

3.18 I deal now with each of the exceptions relied upon in turn.

The law on admitting "without prejudice" material as proof of an agreement.

3.19 According to **Foskett, David Q.C. *The Law and Practice of Compromise.* 5th ed. London: Sweet & Maxwell, 2002 at paragraph 27-20:**

> "... the contents of a "without prejudice" document can be revealed and considered by the court if an issue arises as to whether an agreement has been concluded. The whole purpose of the privilege would be negated if it were not possible to lift the veil on the negotiations to determine whether an agreement had crystallised".

It follows that when the issue in dispute is whether the "without prejudice" correspondence resulted in a concluded compromise agreement, "without prejudice" material may be admissible. The case of **Tomlin v. Standard Telephones and Cables Ltd. [1969] 3 All ER 201** is authority for this proposition. On the facts of this case, the plaintiff claimed damages for personal injuries sustained. In the course of negotiations, the defendant's insurers wrote, in letters headed "without prejudice," that they would accept fifty per cent liability. The plaintiff's lawyers wrote agreeing to this and said that that left only the issue of quantum to be disposed of. In later correspondence the insurers referred to this as an "agreement". No agreement on quantum was reached and the plaintiff proceeded to issue a writ, contending that there was a binding agreement. The defendant stated that such correspondence did not create an agreement as it was simply negotiations for a settlement of both liability and quantum and could not be a partial settlement restricted to liability only. It was held on appeal by the defendant that the letters were admissible as the court could only determine whether there was a binding agreement by looking at them. It was held further that a binding agreement had in fact been reached on liability. In particular at pages 203 to 204 Danckwerts L.J. stated:

> ""What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms

> proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."
>
> That statement of Lindley, L.J., is of great authority and seems to me to apply exactly to the present case if in if act there was a binding agreement, or an agreement intended to be binding, reached between the parties; and, accordingly, it seems to me that not only was the court entitled to look at the letters although they were nearly all described as "Without Prejudice", but it is quite possible (and in fact the intention of the parties was) that there was a binding agreement contained in that correspondence".

Similarly, in **Cross, Colin. *Evidence.* 6th ed. London: Butterworths, 1985 at page 410** it is stated that:

> "Once negotiations have been completed as the result of without - prejudice interviews or letters, a binding contract has been brought into existence and this may be proved by means of the without - prejudice statements".

3.20 On the facts of the instant matter, based on what appears on the face of "AL2", it seems to be the case that there was an agreement that the claim would be settled for $2,400.00. On the other hand it is the clear submission of counsel for the second named defendant that there was no agreement as evinced by the fact that Petty Civil Court proceedings have been filed. Since the contractual relationship has now been put in issue, "AL2" is now more potentially relevant than

ever to determine this issue of whether there was in fact such an agreement between the parties. As such I find "AL2" to be admissible under this exception.

The "unambiguous impropriety" exception and the "without prejudice" rule.

3.21 As for the unambiguous impropriety exception relied upon by the first named defendant, I am not persuaded that there is any evidence of unambiguous abuse and I find that this exception is not reasonably open to the first named defendant. Indeed in my view, from the material which was available to the Court, there is no demonstration of any "blackmailing threat of perjury" or anything along those lines. As such admissibility on this limb fails.

Misleading the Court and the "without prejudice" rule.

3.22 From the material that is available to the Court, I do however form the view that the principle which is directly applicable here is the one which states that the "without prejudice" veil will be lifted if the "without prejudice" rule is abused with the result that the Court is misled. The case which illustrates this principle directly is **Pitts v. Adney [1961] N.S.W.R. 535 (S.C.)** where it was held that the withholding from the court of evidence of a "without prejudice" offer of settlement deceived the court about the true facts of that case. The plaintiff was a landlord who was seeking an order for possession of land governed by the Landlord and Tenant (Amendment) Act, 1948. The Act stipulated that an order could only be granted if the court was satisfied that the premises had been offered for sale to the tenant on terms and conditions which the court considered fair and reasonable. Evidence was therefore placed before the magistrate of an offer by the landlord to accept $5,300.00 and a counter-offer by the defendant to pay $4,250.00. The magistrate found the plaintiff's offer to be fair and reasonable but, being troubled

by the hardship which was likely to be occasioned by an order for possession, invited counsel to confer before an order was made. At that conference the tenant increased her offer to $5,300.00 to meet the plaintiff's original offer. The plaintiff refused to accept the offer and the magistrate was never told of this because the defendant's counsel considered that the offer had been made "without prejudice" and was privileged. Proceeding on the basis that the parties' offer and counter-offer were as led in evidence, an order for possession was made. Walsh J. held that the magistrate had been misled into believing, before the orders were made, that no offer of $5,300.00 had been made by the defendant and concluded at page 539 that:

> "It is of importance that the rule protecting from disclosure, discussions taking place in an endeavour to put an end to pending litigation should, in general, be applied. But it is, after all, a rule based upon public policy. It cannot be permitted to put a party into the position of being able to cause a court to be deceived as to the facts, by shutting out evidence which would rebut inferences upon which that party seeks to rely. In *McFadden v. Snow (1951), 69 W.N. (N.S.W) 8*, evidence was given on behalf of one party that no reply had been received to a letter. Thus it was sought to establish an admission by silence as to a relevant fact. Kinsella, J., admitted a letter headed 'without prejudice' tendered in disproof of that evidence. He said: 'The privilege that may arise from the cloak of "without prejudice" must not be abused for the purpose of misleading the court'. With respect, I state my emphatic agreement with that observation". (emphasis mine).

I am of the view that the withholding of the information contained in "AL2" regarding the settlement arrived at would mislead the Court as to the true facts of the case to be determined and I accordingly rule that "AL2" is alternatively admissible for this reason as well.

4.0 CONCLUSION

4.1 It is beyond dispute that the CPR encourages litigants to settle disputes. Indeed the **Civil Proceedings Rules 1998** proceed on the basis that only about ten percent of cases filed would go to trial. Certainly the "without prejudice" rule is an invaluable tool in facilitating compromise but at the same time, there is no denying that the "without prejudice" rule is not an absolute rule and I find it is elastic enough to embrace the aforementioned exceptions. In arriving at this conclusion I was guided by the approach commended in **Foskett, David Q.C.** ***The Law and Practice of Compromise.*** **5th ed. London: Sweet & Maxwell, 2002 at paragraph 27-44** to the effect that**:**

> "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".

Proceeding from this position, I make the following orders.

5.0 ORDER OF THE COURT

1. The two letters marked "AL1" and "AL2" are not subject to the "without prejudice" rule.
2. "AL2" in particular if subject to the "without prejudice" rule fall within the exception relied upon by counsel for the first named defendant as proof of an agreement.
3. "AL2" is not admissible as proof of unambiguous impropriety.
4. "AL2 is admissible on the basis that to refuse to admit same would cause the Court to be misled as to the true facts of this matter.
5. "AL1" and "AL2" are admissible as evidence in this case.

6. The applications by the claimant and the second named defendant accordingly fail.

Finally, I thank counsel for their assistance.

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge