REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S168 of 2014

Claim No. CV 2010-01244

BETWEEN

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

APPELLANT

AND

A & A MECHANICAL CONTRACTORS AND COMPANY LIMITED

RESPONDENT

Panel: A. Mendonça J.A.

G. Smith J.A.

J. Jones J.A.

Date of Delivery: December 12, 2019

Appearances:

Mr. P. Deonarine and Mr. V. Deonarine instructed by Ms. K. Kawal for the Appellant

Mr. A. Fitzpatrick SC instructed by Mr. A. Byrne for the Respondent

JUDGMENT

Delivered by Mendonça J.A.

1. I have had the advantage of reading in draft the judgments prepared by Smith J.A. and Jones J.A. The issue on which there is clear disagreement between them relates to the whether a letter passing between the parties is a without prejudice communication and not admissible in evidence. On that issue I am in agreement with the judgment of Smith J.A. and the orders he proposes to make. I propose however to say a few words of my own.

2. By invitation to bid tender dated October 3, 2003 the Appellant, Petroleum Company of Trinidad and Tobago Limited (Petrotrin) invited various contractors including A & A Mechanical Contractors and Company Limited (the Respondent) to bid to perform certain works namely, the strengthening of platform and block station #4 in the Soldado Main Field. The Respondent emerged as the successful bidder and by contract in writing dated September 23, 2004 made between the Respondent and Petrotrin the Respondent agreed to carry out the works for the total sum of $26,800,000.00 (VAT exclusive) or such sum that shall become payable thereunder.

3. The works were completed and a certificate of compliance/completion was issued on April 4, 2006. The Respondent was paid the contract price. However, during the course of the works, Petrotrin required the Respondent to execute additional and/or modified works (variations).

4. In relation to variations the contract provided, inter alia, that the Respondent must be directed in writing to carry out any variations and that the Respondent must notify Petrotrin in writing and submit for its approval the costs, a statement as to the variations and the impact of such variations on the Project schedule and/or obligations. The contact also contained the following provision:

Clause 7 Alterations and Variations (Section Five General Terms and Conditions of Contract)

> PetrotrinTrinmar Operations may at any time during the progress of the Work make alterations in or additions to or omissions from the Work or any alterations in the kind or quality of the materials to be used therein and if Petrotrin Trinmar Operations shall give notice thereof in writing to the Bidder and the Bidder shall alter, add to or omit as the case may require and the value of such extras, alterations, additions or omissions shall in all cases be agreed between Petrotrin Trinmar Operations and the Bidder the amount thereof shall be added to or deducted from the Contract price as appropriate. No variation shall be made to the Work stipulated without prior written approval of Petrotrin Trinmar Operations' authorized representative. Failure to observe this condition may at the sole discretion of Petrotrin Trinmar Operations result in non-payment for the unauthorized Work.

5. There is no dispute between the parties that certain variations were done. In these proceedings the Respondent's claim is for the payments of the value of variations it claimed were done. The Respondent also claimed costs associated with the increase in the price of steel, increased wages and delay/lost time and damages for breach of contract. The Respondent further claimed interest pursuant to Section 25 of the Supreme Court of Judicature Act for such period and at such rate as the Court deems fit.

6. Petrotrin in its defence alleged in summary that (i) the Respondent failed to adhere to the contractual provisions that required the Respondent to notify Petrotrin in writing and submit for its approval the costs of the variations, a statement as to the variations and the impact of such variations on the project schedule and/or obligations. As a consequence the Respondent is estopped from denying that the variations claimed were variations which would impact the price of the contract; (ii) certain of the claims were statute-barred; (iii) there was no liability on its part for delay or lost time. Petrotrin in its defence also dealt specifically with each of the variations claimed. In general terms, its

defences were (a) some of the variations claimed were not variations within the meaning of the contract but were within the original scope of works; (b) in relation to some of the variations, the values claimed were excessive or erroneously calculated; (c) in relation to some variations, the Respondent failed to use a less expensive method to perform the works or did not perform the works as claimed; (d) in so far as the Respondent claimed as a variation the change out of structural steel, the Respondent used an incorrect definition of structural steel, used an erroneous approach when calculating the amount of structural steel, and claimed under this variation works that fell within the original scope of works.

7. The matter proceeded to trial and at the trial Mr. Ali, the managing director of the Respondent, gave evidence on behalf of the Respondent. The evidence on behalf of Petrotrin was given by Mr. Newton and Mr. Fortune who were respectively the project manager and construction supervisor under the contract. I will refer to their evidence later in this judgment in so far as I think it necessary for the purposes of this appeal.

8. The Trial Judge's conclusions were as follows: (i) Petrotrin waived any issue regarding the Respondent's failure to follow the procedure in the contract for written notification in respect of the variations; (ii) the Respondent's claims were not statute-barred; (iii) the Respondent failed to prove its claim for increased wages; and (iv) in relation to the claim for variations, awarded to the Respondent the sum of $9,972,262.74. He made no order as to interest on the sums awarded to the Respondent.

9. The sum of $9,972,262.74 awarded by the Trial Judge is made up of two sums namely $2,680,300.93 and $7,291,961.81. The former sum is in respect of variations which bore the numbers 27A, 27B1, 27B2, 28 and 29, which I will refer as the specific variations. I will refer to the other variations claimed by the Respondent as all the other variations. The latter sum of $7,291,961.81

was awarded in respect of all the other variations claimed by the Respondent. The sums awarded included sums in respect of the increased price of steel and delay/lost time.

10. In relation to the sum of $7,291,961.81 awarded by the Trial Judge in respect of all the other variations, the Trial Judge relied on a letter of June 23, 2008 (the June letter) from Petrotrin to the Respondent. He stated that the letter set out agreed values and admitted values in respect of all the other variations in the total sum of $7,291,961.81 and that Petrotrin's liability could not be less than that sum and proceeded to award that amount.

11. It was contended by Petrotrin before the Trial Judge that the June letter was a without prejudice communication and accordingly it was privileged and inadmissible and the Trial judge should pay no regard to it. The Trial Judge however did not agree and held that a without prejudice designation could not be attached to the letter. He noted that there were two meetings in 2008 which led to the letter and stated:

> "..the meetings which led to the defendant's letter of 23 June 2008 and the letter are important for setting out what was agreed between the parties as additions or variations. It was a necessary process to finalise the payments due. The purpose of the meetings was exactly for the purpose of agreeing what was to be paid. No without prejudice designation could therefore be attached to the 23 June 2008 letter. These were not negotiations being undertaken for the settlement of a disputed claim but rather an integral step in the process of finalising payment. Without these meetings and process final payments could not be met."

12. In relation to the specific variations, the Trial Judge accepted the evidence of Mr. Ali in relation to them noting that there was no "countervailing evidence" by Petrotrin on this issue.

13. Petrotrin has appealed and the Respondent has filed a counter-notice of appeal. Petrotrin seeks an order setting aside the Trial Judge's orders on grounds which I shall shortly address. In its counter-notice of appeal the Respondent challenges the Trial Judge's refusal to award any sum for increased wages and his failure to award interest. During the course of the hearing however, the appeal in relation to the refusal of the Trial Judge to make an award for increased wages was abandoned leaving only the issue of interest. I will first refer to Petrotrin's appeal.

14. Petrotrin raises three main grounds in support of its appeal namely, (i) the June letter is a without prejudice communication and the Trial Judge was therefore wrong to pay any regard to it. Accordingly the Trial Judge's award in respect of all the other variations which depended entirely on the Trial Judge's reliance on the June letter must be set aside; (ii) the Trial Judge erred in law when he concluded that the Respondent's claim was not statute-barred; and (iii) in relation to the award in respect of the specific variations, the Trial Judge's finding that there was no countervailing evidence is contrary to the evidence.

15. As regards the first ground, Mr. Deonarine, counsel for Petrotrin, submitted that the Trial Judge was wrong to rely on the June letter to arrive at the award he made in respect of all the other variations. It was a letter produced in the course of negotiations between the parties to settle a disputed claim and is therefore to be treated as a without prejudice communication and not admissible in evidence. What the Trial Judge should have done, he argued, is assess the evidence and determine whether the Respondent is entitled to any sums for the variations claimed in the light of Petrotrin's defences, and if so, what that sum should be. As the Trial judge however failed to do that but simply and erroneously relied on the June letter the Trial judge's award in relation to all the other variations must be set aside.

16. Mr. Fitzpatrick SC appearing for the Respondent submitted that it was open to the Judge to rely on the June letter and award the agreed and admitted values as set out in that letter. He contended that the words "without prejudice" were not written or endorsed on the letter and it was not a privileged document. It was written to confirm agreed or admitted values in respect of the variations in the course of negotiations pursuant to clause 7 of the contract, or in other words, pursuant to a process contemplated by the contract and designed to establish a debt between the parties. He stated that Petrotrin's witness, Mr. Newton, had accepted that the negotiations between the parties were pursuant to clause 7 of the contract. Mr. Fitzpatrick further submitted that once there was an agreement on the value of any of the variations, that value became a debt to be added to the contract debt. In the circumstances, the Trial Judge could not be faulted for awarding the admitted and agreed values as set out in the June letter.

17. The submissions of the parties bring into focus the "without prejudice" rule. The rule renders the contents of negotiations between the parties to a dispute genuinely aimed at settling the dispute inadmissible in the course of a trial of the dispute should the attempt to settle the dispute prove futile. The rule applies to exclude all negotiations genuinely aimed at a settlement of the dispute, whether oral or in writing, from being given in evidence.

18. The rule is based partly on public policy and partly on the express or implied agreement of the parties. In **Ofulue v. Bossert [2009] UKHL 16** Lord Neuberger explained the juridical basis of the rule in this way (para 85):

> "**[85] …** The normal rule is, of course, that statements made in negotiations entered into between parties to litigation with a view to settling that litigation are inadmissible and therefore cannot be given in evidence. In *Rush & Tomkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739, [1989] AC 1280 at 1299, Lord Griffiths explained that the rule was 'founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish'. As stated by Robert Walker

LJ in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 at 789–790, [2000] 1 WLR 2436 at 2442, the rule also rests on 'the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence'."

19. The June letter is not endorsed or marked with the words "without prejudice". But the application of the rule is not dependent on a letter being so marked or endorsed. If it is clear from the surrounding circumstances that the parties were seeking to compromise their dispute the communication would be treated as without prejudice and would not be admissible. As Lord Griffiths in **Rush & Tompkins Ltd. v. Greater London Council and Another [1989] A.C. 1280, 1299:**

> "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 even 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."

Similarly in **Bradford & Bingley Plc v. Rashid [2006] UKHL 37** Lord Brown of Eaton-under-Heywood said this (at para 64):

> "In the present case, of course, as already observed, the exchanges in question were not marked without prejudice, so

> there can be no question of any implied agreement here. Rather the critical question here is whether (in Lord Griffiths' words in ***Rush & Tompkins v GLC***) "it is clear from the surrounding circumstances that the parties were seeking to compromise the action"-whether, as Megarry V-C put it in ***Chocoladefabriken Lindt & Sprungli AG v The Nestlé Co Ltd*** [1978] RPC 287, 288, "there is an attempt to compromise actual or impending litigation"."

Whether a communication is without prejudice is to be determined objectively having regard to the surrounding circumstances.

20. Any letter in response to a without prejudice letter will itself form part of the negotiations and is caught by the without prejudice rule. Unless the author of the response waives the privilege, his response is privileged and not admissible.

21. The rule however is not absolute and there are exceptions that permit without prejudice communications to be admitted in evidence. Material to this appeal for reasons that will become apparent, is where the issue is whether without prejudice communications have resulted in a concluded compromise agreement. In such a case the communications are admissible to determine that issue (See **Unilever v. Procter & Gamble [2001] 1 All ER 783**).

22. The June letter, as the Trial Judge correctly found, followed two meetings between the parties in 2008. The first meeting was held on March 10, 2008 and the second on May 23, 2008. The June letter in essence recorded the position of parties after the two meetings. As noted earlier, the Trial Judge concluded that the meetings were not negotiations being undertaken for the settlement of a disputed claim but were integral steps in the process of finalising payments to the Respondent as contemplated by clause 7 of the contract.

23. The purpose of the meetings is of course of critical importance to a determination whether the June letter is a without prejudice communication.

In so far as the June letter appears to record the position of the parties after the meetings and the without prejudice rule is meant to exclude negotiations aimed at the settlement of a genuine dispute, it follows that if the meetings were not for the purpose of attempting to settle a dispute between the parties then the June letter would not be a without prejudice communication and would be admissible.

24. The finding of the Trial Judge as to the purpose of the meeting, it seems to me, is a question of fact. Before the Court of Appeal may interfere with a finding of fact by the Trial Judge it must be satisfied that he went plainly wrong. What that means has been explained in **Beacon Insurance Company Limited v. Maharaj Bookstore Limited [2014] UKPC 21 (see para 12)**. In short, the Court of Appeal is required to identify a mistake in the Trial Judge's evaluation of the evidence which is sufficiently material to undermine his conclusion. Occasions where the Court of Appeal may interfere with the Trial Judge's finding of fact include where the Trial Judge has failed to analyse properly the entirety of the evidence or has failed to take into account relevant evidence.

25. I cannot accept the Trial Judge's finding as to the purpose of the meeting as to do so is to ignore material evidence which the Trial Judge failed to take into account.

26. According to Mr. Newton, who was the project manager of the contract, when the structural works were completed in or around October 2005 he instructed Mr. Fortune, the construction supervisor appointed by Petrotrin, to measure all the works that were considered by the Respondent to be a variation of the contract. Mr. Fortune gave evidence that he and Mr. James, who was the project engineer on the site for the Respondent, walked through the entire job site and measured all the works which were done by the Respondent and which it was claiming to be variations. The measurements were done and Mr. Fortune and Mr. James calculated the cost of the variations. The Trial Judge

accepted Mr. Fortune's evidence that "walk throughs" with Mr. Fortune and Mr. James took place and made no adverse comment on Mr. Newton's evidence.

27. According to Mr. Newton and Mr. Fortune, Mr. Ali however did not agree with the measurements and the calculations, although they were done by representatives of both parties. They were then redone and on that occasion Mr. Ali was present. Based on these measurements and calculations, the value of the variations was determined to be $2,327,380.63. Again, Mr. Ali was not in agreement with the calculations. Some months later, in January 2007, Mr. Ali submitted a claim for variations in the amount of $14, 911,233.04. Mr. Newton explained that after the receipt of that claim, he sought the assistance of Petrotrin's internal audit department but after waiting for almost a year he was told that that was not the department's responsibility. He indicated that he then met with the representatives of the Respondent, including Mr. Ali, on "10 March 2008 and 23 May 2008 to try to resolve the matter notwithstanding our previous agreement". By "previous agreement", Mr. Newton was referring to the measurements and calculations which were done by representatives of the parties as mentioned above.

28. Mr. Ali in his witness statement also referred to meetings prior to the meetings in 2008 which generally were unsuccessful to agree the value of the variations undertaken by the Respondent.

29. The Trial Judge did not pay any regard to that evidence which established that there was a dispute between the parties with respect to the variations. Mr. Ali had not accepted the value of the variations in the amount of $2,327,380.63 arrived at after measurements and calculations were carried out by representatives of Petrotrin and the Respondent. He rejected that and submitted a claim for almost fifteen million dollars. According to Mr. Ali, there were meetings previous to the 2008 meetings to try and agree the value of the

variations but they were unsuccessful. As Mr. Newton put it, the 2008 meetings were an attempt to "resolve the matter".

30. Following the first of the 2008 meetings which was held in March 2008, Petrotrin wrote a letter dated May 14, 2008. That letter is in somewhat similar vein to the June letter in that it contains values of variations on which the parties agreed and Petrotrin's proposals as to other variations. The letter demonstrates that the parties were attempting to agree the value of the variations in resolution of their dispute. In the letter Petrotrin further stated "as we pointed out at our meeting of 2008 March 10, Trinmar Operations has several counterclaims and Table III indicates how we propose to treat with said claims." Table III, contained particulars of Petrotrin's counterclaims then amounting to $1,996,146.00. The letter ended by Petrotrin inviting the Respondent to a meeting on May 21, 2008 at 9:00am "to discuss and bring this issue to closure". Of course it is apparent from the letter that "this issue" included Petrotrin's counterclaims.

31. The second meeting was held on May 23, 2008 and the June letter was written by Petrotrin to the Respondent after that meeting. The June letter, as the letter of May 14, 2008, set out the values of variations which the parties had agreed and Petrotrin's proposals in respect of others. The letter also set out Petrotrin's counterclaims which were then stated to be $2,123,847.00. There were attachments to the letter, one of which was said to contain calculations "associated" with the counterclaims. The letter ended by Petrotrin inviting the Respondent to a meeting on June 27, 2008 "to discuss the attached and bring this issue to closure".

32. It seems clear therefore that differences had arisen between the parties in relation to the variations claimed by the Respondent and counterclaims of Petrotrin. There were meetings between the parties genuinely aimed at a settlement or compromise of their differences. The meetings led to the June

letter which outlined where the parties had reached in their effort to resolve their dispute. In those circumstances the June letter, in my judgment, is a without prejudice communication and accordingly is privileged and inadmissible. The Trial Judge therefore should not have relied on it to arrive at his award in respect of all the other variations.

33. In coming to his conclusion that the negotiations were not undertaken for the settlement of a dispute but were integral steps in the process of finalising payment as contemplated by the contract, the Trial Judge may have had in mind Mr. Newton's evidence in cross-examination where he accepted on two occasions that the 2008 meetings were pursuant to clause 7 of the contract. But if that is what operated in the Trial Judge's mind, it is not a fair and proper assessment of the evidence to rely simply on that. The clear purport of Mr. Newton's evidence is that measurements and costings of the variations were conducted with representatives of both parties as I have referred to above but those were not accepted by Mr. Ali. As Mr. Newton said in relation to the letter of May 14, 2008 which was written after the first of the 2008 meetings and was similar in vein to the June letter:

> "Well this was in an effort to try to resolve this long outstanding matter because the job had been completed in 2006. Mr. Ali submitted his claim in 2007. A whole year had elapsed while we were waiting on some internal issues to be resolved. So in 2008 we were trying to see if we could resolve this matter bearing in mind that he had some cash flow situations and so on. So some of these agreements were to try to bring the matter to closure."

34. Further, the 2008 meetings were not simply as contemplated by clause 7 to agree the values of the variations. There were other matters that went beyond the pale of simply agreeing values. Mr. Newton alluded to this when he said that the Respondent's claims for variations and subsequent discussions raised several other issues "including a larger lost time claim, claims for the increase

in the price of steel, the increase in wages, and a creative interpretation of what constituted structural steel."

35. In any event, even if the meetings were pursuant to clause 7, I do not accept that the negotiations at the meetings to determine the values of the variations would fall outside the without prejudice rule unless the parties had arrived at an agreement.

36. This brings me to the submission made by Mr. Fitzpatrick that the June letter is admissible because there was agreement on certain of the variations claimed by the Respondent. He argued that once there was agreement on any amount to be paid by Petrotrin to the Respondent on any variation that became a debt due to the Respondent and Petrotrin could in essence tick off that variation and move to the next. He argued that in so far as the June letter contained a list of variations which Petrotrin had agreed or admitted, the Trial Judge was correct to award the values of those variations.

37. As I mentioned, without prejudice negotiations are admissible to determine whether the negotiations had resulted in a concluded compromise agreement. However, where there is no concluded agreement, it is not permissible to dissect out identifiable admissions or admitted facts from the without prejudice negotiations. The point was made this way in **Unilever v. Procter & Gamble**(supra) (at 2448 to 2449):

> "[The modern cases] 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 (in the words of Lord Griffiths in ***Rush & Tompkins*** at p. 1300)
> "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts."

Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

38. In determining whether there is a concluded agreement, it is necessary to look at the without prejudice communications as a whole. It is not correct to pick out parts and ignore the others or to look at one side of the account and ignore the other.

39. In my view there was not a concluded agreement between the parties as contended by Mr. Fitzpatrick. To accept his submission would amount to dissecting out parts of the negotiations and would undermine the policy of allowing parties to speak freely to attempt to negotiate a settlement of their dispute and would violate the without prejudice rule. I have come to this conclusion in view of the following.

40. The first of the 2008 meetings of the parties, as I mentioned, occurred on March 10, 2008 and this led to the letter of May 14, 2008. I have already referred to the contents of this letter but for present purposes it is necessary to refer to it in a bit more detail.

41. The letter of May 14, 2008 contains three tables numbered I, II and III. Table I contains a list of variations on which there was agreement between the parties and Table II contains Petrotrin's proposals in relation to other variations claimed by the Respondent. Table III, however, sets out counterclaims of Petrotrin and indicates how Petrotrin proposes that they be dealt with. The letter concluded by inviting the Respondent to a further meeting, as I have indicated above, to "bring this issue to closure". Two things are relevant to note. The negotiations were not yet concluded and the claims of the Respondent and the counterclaims of Petrotrin were regarded as a single issue, hence the invitation to attend a further meeting to bring "this issue" to closure.

42. The subsequent meeting was held on May 23, 2008 and led to the June letter. The letter is somewhat similar to the letter of May 14, 2008. It sets out (this time as an attachment to the letter) certain items of the Respondent's claim on which there was agreement. It also sets out Petortrin's proposals on other items. Further, the letter outlined Petrotrin's counterclaims which were set out at Table II in the letter. The June letter, as the letter of May 14, 2008, invited the Respondent to a further meeting to discuss the "attached" and bring "this issue" to closure. So that as at the date of the June letter the negotiations were not yet concluded to bring "this issue" to a close which referred to the agreed values, Petrotrin's proposals and Petrotrin's counterclaims.

43. In those circumstances, it would be wrong to seek to dissect out those matters which were listed as agreed items. As I mentioned, it would undermine the policy of allowing parties to speak freely to attempt to negotiate a settlement of their dispute and violate the without prejudice rule.

44. After the June letter there is no evidence of further meetings between the parties with a view to compromising their dispute. There were however letters that passed between the parties that they were unable to resolve their dispute. In fact they appear to get no closer. In two letters dated November 29, 2008 the Respondent re-submitted its claim and sought to revisit matters that were said to have been agreed in the June letter. Petrotrin's response was to "retract all previous offers and concessions made in the course of negotiations". Petrotrin further itemised its assessment of the Respondent's claim and their counterclaim the net effect of which according to Petrotrin was that the Respondent was liable to it in a sum of almost three million dollars.

45. The Respondent referred to **Bradford & Bingley plc v Rashid**, supra, as providing support for the proposition that the agreed values referred to in the June letter could be excised and admitted in evidence. That case decided that

communications designed to discuss the payment of an admitted liability rather than to negotiate and compromise a disputed liability are not caught by the without prejudice rule. However, the dispute in this matter, which the negotiations were aimed at compromising, cannot be described as negotiations to settle an admitted liability. There were issues surrounding whether what was claimed were variation, and if so their proper values as well as Petrotrin's counterclaims. That authority in my view does not assist the Respondent.

46. In my judgment there is no justification to extract from the June letter those items which are indicated as agreed far more those or in respect of which Petrotrin made proposals.

47. For these reasons and those contained in the judgment of Smith JA I agree that the June letter is a without prejudice communication and is inadmissible. In the circumstances I agree with the order proposed by Smith JA that the awards made by the Trial Judge in respect of all the other variations must be set aside and the matter remitted for retrial.

48. In relation to the second ground of appeal (i.e that the Trial Judge erred in law when he concluded that the Respondent's claims were not statute barred), in the written submissions of Petrotrin before this Court it was there submitted that the Respondent's claim in respect of four items was statute-barred. These items were (a) the removal of the barge; (b) increase in the price of steel; (c) lost time; and (d) increased wages. In the course of his oral submissions, however, Mr. Deonarine at one point indicated that he was taking the limitation point only in respect of the increase in the price of steel and the increase in wages. At another point, he indicated that the limitation argument was being pursued only in respect of the increase in wages which, as I have indicated, the Respondent has abandoned. In the circumstances, it does not appear that there is anything left of the limitation point.

49. In any event, Petrotrin's challenge to the Trial Judge's conclusions on the issue of limitation is misconceived in so far as it is argued that the Trial Judge relied on the June letter to determine when time began to run for the purposes of limitation. Petrotrin's argument was that the Trial Judge was wrong to do so as the letter was inadmissible. The Trial Judge, however, did no such thing. What the Trial Judge did say was that final payments under the contract by Petrotrin were conditioned upon the issuance of a certificate of completion. Consequently, it was only when the completion certificate was issued that the parties can engage the process of finalising what if any payments were due. As the completion certificate was only issued on April 4, 2006, the Trial judge held that the Respondent's causes of action could not have arisen before then and as these proceedings were filed on April 1, 2010 they were filed within the four year limitation period and accordingly were not time-barred. No proper basis has been argued to persuade me to take a different position from that of the Trial Judge on this point. Indeed, Mr. Deonarine conceded, that save for the claim for increased wages, time would run for the purposes of limitation from the issue of the completion certificate. However, as I mentioned, the claim for increased wages, which the Trial Judge denied, is no longer an issue in this appeal. In all the circumstances, Petrotrin's appeal from the Trial Judge's conclusion on the limitation point fails.

50. The third ground of appeal challenges the trial Judge's award in relation to the specific variations. The Trial judge in awarding this sum accepted the evidence of Mr. Ali and said there was no countervailing evidence by Petrotirn. I agree with Smith JA and Jones JA that in doing so he failed to take into account evidence of Mr. Newton which was of relevance to the specific variations. Accordingly there is no indication in his judgment that the Trial Judge appreciated that a relevant issue in relation to the specific variations was whether there were variations at all. There is no attempt to grapple with that

issue and demonstrate that the specific variations were variations within the meaning of the contract.

51. Another relevant aspect of Mr. Newton's evidence relates to the rates used by the Respondent for calculating the value of variations which Mr. Newton claimed are erroneous. This is not addressed by the Trial Judge.

52. Of relevance too is Petrotrin's submission that the claim for the specific variations arose late in the day and well after the "walk throughs" by Mr James and Mr. Fortune when they measured the variations claimed by the Respondent and calculated their value. The Judge accepted that was done. But Mr. James and Mr. Fortune did not identify the specific variations as variations. A relevant question would seem to be how does that evidence affect the weight or cogency of Mr. Ali's evidence. But the Judge does not address that.

53. For these reasons and those contained in the judgments of Smith JA and Jones JA I agree that the Judge's award with respect to the specific variations cannot stand.

54. In view of the above it is not necessary to discuss the Respondent's appeal which deals with the failure of the Trial Judge to award interest on the sums awarded to it since the result of the orders proposed by Smith JA, with which I agree, is to set aside the awards.

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A. Mendonça

Justice of Appeal

Delivered by Smith J.A.

55. The Appellant, Petroleum Company of Trinidad and Tobago, appeals an award of $9,972,262.74 made in favour of the Respondent, A&A Mechanical Contractors Company Limited, for monies allegedly due for the performance by the Respondent of certain additional works and variations done for the Appellant on an offshore platform and block station in the Soldado Main Field.

56. The trial judge determined that the Respondent was entitled to the sum of $7,291,961.81 "**as the agreed values and admitted values**" by the Appellant in a letter dated June 23 2008 and the sum of $2,680,300.93 for variations 27A, 27B1, 27B2, 28 and 29. The trial judge however dismissed the Respondent's claim for payment for increased wages and lost time over and above the sums identified as agreed in the letter 23 June 2008. By way of a cross appeal, the Respondent has appealed the dismissal of its claim for increased wages and the failure of the trial judge to award interest on the sums awarded.

57. The central issue in this case is whether the trial judge can be faulted for considering alleged admissions in a letter from the Appellant dated 23 June 2008 in coming to his decision on liability and quantum in this matter.

58. At paragraphs 8-11 of his reasons, the trial judge relied on the evidence of the alleged admissions contained in the Appellant's letter of 23 June 2008 as the keystone for his decision.

    Specifically, at paragraph 11, the trial judge stated: "**It** (the letter) **must be the starting point for fixing what is due pursuant to the mechanism set out in the contract. The sum here is $7,291,961.81."**

59. The relevant law is best encapsulated in the seminal decision of Lord Griffiths in **Rush and Tompkins Limited v Greater London Council [1989] AC 1280 at page 1301 C**. The general rule is set out as follows:

> **"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."**

The without prejudice rule is a rule governing the admissibility of evidence. Again, as Lord Griffiths set out in the **Rush and Tompkins** case at page 1299 D-F:

> "**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."**"

Therefore, if the letter of 23 June 2008 was part of, or even the entirety of negotiations genuinely aimed at settlement, it ought not to have been received in evidence as was done by the trial judge.

60. A point to note about the without prejudice rule is that even if parties do not use the term "without prejudice" as here, the rule would still apply to give the veil of privilege to all communications in the process of negotiations genuinely aimed at a settlement.

Again, I quote from Lord Griffiths in **Rush and Tompkins** at pages 1299 G to 1300 A:

> **"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."** (emphasis mine)

61. One notable exception to this evidential rule is that a court may look at without prejudice material to see whether the without prejudice negotiations resulted in a settlement. As was stated by Lord Griffiths in **Rush and Tompkins** at page 1300 C, "…**the "without prejudice" material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement**." This position was also set out by Walker LJ in the case of **Unilever plc v The Proctor and Gamble Company 2001 1 All ER 783, 791 J-792 A**, "…**when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible**." Therefore, the letters and other communications in the negotiations between the parties could have been examined to determine the issue of whether there was a concluded compromise agreement or agreed settlement.

In this regard, the trial judge erred in finding that he could not have looked at subsequent letters between the parties because they were without prejudice communications. At paragraph 10 of his judgment he stated: "**Regarding the further two letters for which prejudice is claimed, the 30 April 2009 and 5 March 2010 can more properly be seen as without prejudice communications. It is also not necessary to go to these letters**."

He could and should have examined these and other relevant letters to see if they shed light on the issue as to whether the letter of 23 June 2008 was indeed a concluded compromise agreement or agreed settlement.

62. An examination of the relevant correspondence indeed reveals that the letter of 23 June 2008 and other letters were written while the parties were negotiating with a view to compromise or settlement and would attract the without prejudice privilege from use in evidence. Further, that the letter of the 23 June 2008 was not a concluded compromise agreement or an agreed settlement and it did not lose the privilege from use in evidence.

Letters from the Respondent

63. First, there is the letter of the Respondent dated 29 January 2010 (written after the disputed letter of 23 June 2008) where the Respondent through its Attorney-at-Law put forward his claim for $14,580,169.06 and stated specifically:

> "I am further instructed that between the period 19 April 2007 to 10 December 2009 my client through its representative Mr. Azard Ali held various meetings with your representatives in an attempt to resolve the issues that surround its claim." (emphasis mine)

This is an admission from the Respondent that as at 23rd June 2008 (the date of the letter in question), the parties were still in the process of negotiations to resolve their disputes in the claim. They had not reached a concluded compromise agreement or agreed settlement.

64. Second, there is the letter from the Respondent dated 6 November 2008 (written after the letter of 23 June 2008) where the Respondent stated that the parties:

> "met… to try to bring closure to the variations…A&A Mechanical Contractors would like to request an extension of three (3) weeks from the date of this letter to complete our final variation which is the 'Repairs to the 24" I Beams under the Compressor and the Electrical Switch Gear Room.' After this document is submitted and reviewed by your company, we can meet at a date at your convenience to close off this contract." (emphasis mine)

Even after the 23 June 2008, the Respondent had not completed its claim for variations. There was no concluded compromise agreement or agreed settlement at that date.

65. Third, there are the two letters from the Respondent dated 19 November 2008 (written after the letter of 23 June 2008) where the Respondent stated that:

(a) "Changes were made to variations agreed upon in earlier meetings because while reviewing the variation package, we noticed that some items were mistakenly duplicated and there were some mathematical errors.

Attached are A&A Mechanical Contractors' final variation claims for the above captioned tender…" (and the Appellant attached final variation claims); and

(b) "A&A Mechanical Contractors and Co. Ltd. has revised Variation 17 to now include the variations named in the attached document…"

As late as 19 November 2008, the Respondent still had not submitted its full claim for the variations which were the subject of this claim. Again, as at 23 June 2008 there was no concluded compromise agreement or agreed settlement at that date.

Letters from the Appellant

66. Fourth, the Appellant's letter of 23 June 2008 contained several attachments. In these attachments there were some agreed items, items submitted for clarification, a counterclaim and the rejection of some claims. It would be contrary to the plain reading of the letter of the 23 June 2008 to say that it was a concluded compromise agreement or agreed settlement. Several items remained to be dealt with.

67. Fifth, the Appellant's letter of 05 March 2010 put forward a response to the Respondent's claim, a deduction or set off against the Respondent's claim, a request for further information on the claims and a denial of part of the claims. The Appellant also invited the Respondent to a meeting to discuss the claim as it was "confident that the issues can be amicably resolved without reference to litigation...".

68. The correspondence shows that the parties were genuinely negotiating with a view to reaching a settlement. There was no concluded compromise nor was there an agreed settlement. The letter of 23 June 2008 was a part of these negotiations and thus the without prejudice privilege would make the contents of that letter such as admissions and partial admissions, inadmissible in subsequent litigation between the parties (see **Rush and Tompkins** at pages 1299 and 1301 cited above).

69. The trial judge erred in referring to the letter as evidence and by placing heavy reliance on it in reaching his decision on liability and quantum. He ought to have done an assessment of the case independent of this letter and the others forming part of without prejudice communications.

70. The Respondent has argued that as part of the context between the parties, they had reached agreement on some items which must now be included in the contract price pursuant to clause 7 of the contract which states that "…the value of such extras, alterations, additions or omissions in all cases be agreed…the amount thereof shall be added to or deducted from the Contract price as appropriate." (my emphasis)

    Thus the Respondent argued that the letter of 23 June 2008, which was an open communication, was proof of that contractual agreement and is receivable in evidence.

    In fact, the trial judge so found at paragraphs 8 and 12 of his judgment.

71. I disagree with this argument for three reasons.

    First, even if parties are contractually bound to agree, it does not put the process of agreement outside of the without prejudice rule of evidence. In fact, the without prejudice rule of evidence and its deep-rooted validation in public policy protects the process of negotiation even if the words without prejudice are not used. (See **Rush and Tompkins** at pages 1299 G to 1300 A).[1]

    Therefore, even if these letters were not headed 'without prejudice', they were part of the negotiations between the parties, and it is this entire process of negotiations which would have attained the privilege of being excluded from evidence in later litigation between the parties.

[1] Cited at paragraph 6 above.

72. Second, at best, the Appellant is trying to use the letter as a partial admission. An attempt to excise an independent partial admission from the letter runs contrary to the reading of the letter as a whole. The letter proffered partial admissions, denials, counter-proposals and set-offs/deductions as part of a total package to invite the Respondent to "a meeting on 27June 2008to discuss the attached (letter) and bring this issue to closure."

Further, the use of documents as partial admissions has been disapproved of and runs contrary to the underlying policy of the without prejudice privilege. As stated by Lord Griffiths in **Rush and Tompkins** at page 1299 H to 1300 A, **"…evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission**." (emphasis mine)

This point was also articulated by Lord Mance in **Bradford & Bingley plc v Rashia [2006] 1 WLR 2066** at paragraph 91:

> **"In *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2448–2449, Robert Walker LJ said that the authorities showed that the protection of admissions was "the most important practical effect" of the without prejudice rule, and that**
>
> **"to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case[1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise,**

admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

Thus, to dissect the letter of 23 June 2008 in the way suggested by the Respondent would be contrary to the deep-rooted policy considerations of the without prejudice rule.

It would also be contrary to the Practice Directions on Pre-Action Protocols of the Civil Proceedings Rules, 1998, which encourage parties to negotiate toward a settlement.

73. Third, the evidence in the case disclosed that at the time of the letter of 23 June 2008 and the meetings between the Appellant and the Respondent, the parties were not truly engaged in meetings pursuant to clause 7 alone. They were engaged in negotiations with a view to compromising claims that went outside the ambit of clause 7 and the letters written during the course of these negotiations (including the letter of 23 June 2008) would, in any event, be protected by the without prejudice privilege.

Because it is central to the issue I will set out clause 7 here with the necessary emphasis:

> "[the Appellant] may at any time during the progress of the Work make alterations in or additions to or omissions from the Work or any alterations in the kind of quality of the materials to be used therein and if [the Appellant] shall give notice thereof in writing to the Bidder and the Bidder shall alter, add to or omit as the case may require and <u>the value of such extras, alterations, additions or omissions shall in all cases be agreed</u> between [the Appellant] and the Bidder the

> amount thereof shall be added to or deducted from the Contract price as appropriate. No variation shall be made to the Work stipulated without prior written approval of [the Appellant] authorized representative. Failure to observe this condition may at the sole discretion of [the Appellant] result in non-payment for the unauthorized Work." (my emphasis)

Clause 7 merely provided for agreement to be reached between the parties only on the value of extras, alterations, additions or omissions. At the time of the letter of 23 June 2008 and the meetings between the parties there were substantial disputes as to whether some of the matters in the Respondent's claims were even variations, extras or additions for which they could be paid and/or were matters that were already catered for in the contract price. These were not issues concerning the value of the extras, alterations, additions or omissions which the parties should agree under clause 7 but were issues that were outside the ambit of the mechanism for agreeing values as provided for in clause 7.

74. As mentioned, these disputed issues were substantial and also touched on claims in the allegedly agreed items at the time of the letter of 23 June 2008.

So for instance, the claims for increases in the price of steel (item 18 of the allegedly agreed items in Attachment I of the letter of 23 June 2008) was over $1,800,000.00.

Other claims in the allegedly agreed items included "beams, channels, angle irons and welding rods"[2] would also be caught by this item because they contained steel of increased value.

[2] See the witness statement of Mr. Newton at paragraph 42 and see items 3, 6 to 10, 14 to 16 and 22 to 26 of Attachment I of the letter dated 23 June 2008.

So too, the claims for change out of structural steel as extras, alterations or additions were also hotly disputed. This was a substantial claim for $1,925,616.10.

75. Evidence of these disputed claims came from the testimony of the Appellant's witnesses, Mr. Fortune and Mr. Newton. The trial judge accepted and preferred the evidence of Mr. Fortune over the Respondent's sole witness, Mr. Ali, a director of the Respondent on the issue of the disputed claims. The trial judge also expressed no negative view as to Mr. Newton's evidence. According to this evidence, Mr. Fortune and the Respondent's representatives had been meeting to decide on what extra amounts of structural steel would qualify as variations to the contract amounts. While these two had agreed the same, the Respondent's Managing Director flatly and unreasonably refused to admit or agree to the same, even up to November 2008 (as evidenced in the Respondent's letters of 19 November 2008 referred to above). At the time of the letter of 23 June 2008, the claim for extra steel was a hotly disputed item. It was not an accepted variation, extra or addition to the claim. This issue had to be sorted out even before a value could be agreed between the parties pursuant to clause 7. This disagreement on the substantial claim for structural steel in the meetings and letters went beyond the ambit of merely meeting to agree on the value of this claim. Further, many of the allegedly agreed items in Attachment I of the letter of 23 June 2008 upon which the judge relied contained claims involving the use of extra steel.[3] When the parties met and the letter was written, this was an attempt not only to resolve the value of this claim but to ascertain whether and how much of it could be accepted. This went beyond the ambit of merely agreeing the value of the claim pursuant to clause 7.

[3] See note 2 above.

76. Mr. Newton fortifies this position when he stated in his witness statement that "I also agreed to treat some of the claims as variations even though there was no basis for doing so as the parties were negotiating in good faith."[4] (my emphasis)

This again was clear testimony that this was not merely a negotiation for agreed values pursuant to clause 7 but an all-embracing attempt to settle disputes that went beyond clause 7.

77. Further, according to Mr. Newton, the Respondent was supposed to cater for increases in the price of steel in his tender. Therefore, any claims which included increases in the price of steel were not maintainable.

As I indicated above, a substantial portion of the Respondent's claim included increases in the price of steel ($1,800,000.00 plus any items in Attachment I where extra steel was used). These claims had to be first accepted, agreed or compromised before there could be any meeting to agree the value of such claims pursuant to clause 7.

That being the case, when the parties were negotiating about settling or agreeing these claims, on 23 June 2008, these negotiations went beyond merely agreeing values for extras, alterations, additions or omissions under clause 7. It went outside the ambit of meeting to agree a value for extra steel, to negotiating or compromising claims (outside the ambit of clause 7), which would not otherwise have been maintainable.

This evidence was not even considered or discussed by the trial judge.

78. Therefore, and in any event, insofar as the trial judge at paragraphs 7 and 8 of his judgment felt that the meetings which led to the letter of 23 June 2008 were pursuant to the contractual process (as defined in clause 7), he erred. Also, the Respondent's reliance on the letter as part of the clause 7

[4] See paragraph 27 of the witness statement of Mr. Newton

negotiations was misplaced. These meetings and negotiations went beyond the ambit of clause 7 and were truly meetings and negotiations to compromise valid and even doubtful claims as opposed to meetings or agreements on the valuation of the claims for extras, alterations, additions or omissions.

79. Further, even if it could be argued that the agreements in the letters were partly concerned with the value of the extras, alterations and additions claims as well as partly concerned with compromising or agreeing to items that went beyond the mere valuation of such claims, to dissect the agreements in the letter of 23 June 2008 into what would fall within or without the scope of clause 7 would be inappropriate and contrary to policy considering the court's reluctance to dissect admissions as stated at paragraph 18 above.

The award for variations 27A, 27B1, 27B2, 28 and 29

80. Even if the letter of the 23 June 2008 could have been considered by the trial judge (and I have found that it should not), I agree with Jones J.A. that there is a part of the claim that would still need to be re-assessed.

81. The trial judge made two awards of damages: (a) the sum of $7,291,961.81 as "admitted values per the June 2008 letter"; and (b) "the sum of $2,680,300.93 for variations 27A, 27B, 27B2, 28 and 29. In coming to the determination on the sum of $2,680,300.93, the trial judge accepted the evidence of Mr. Ali, a Director of the Respondent company. According to the trial judge, there was no evidence concerning these matters by the Appellant. In arriving at this conclusion the trial judge was wrong.

82. The trial judge failed to consider the evidence of Mr. Newton the main witness for the Appellant and failed to appreciate that Mr. Newton's evidence was directly relevant to the question of the variations and specifically dealt with the variations the subject of this part of the award.

83. The evidence of Mr. Newton was firstly that what the Respondent termed variations were not in fact variations to the contract. According to Mr. Newton this was work contemplated by the contract and for which the contract contained specific provisions for the method of assessing what was due. The procedure being first the measurement of the work and then the application of the rates contained in the contract for the specific type of work. This, he says, was done but Mr. Ali subsequently refused to accept the outcome.

84. According to Mr. Newton it was only in order to bring the contract to a close and in a spirit of compromise that they entered into the agreements contained in Attachment I of the 23 June 2008 letter. His evidence was that it was the Respondent who subsequently reneged on these agreements by demanding a substantially higher payment. As a result of this he says the Appellant was now relying on the strict interpretation of the contractual provisions. According to Mr. Newton should the Court reject this position then the Appellant's fall-back position is that contained in a table prepared by him and forming a part of his witness statement. The table specifically treats with those variations the subject of the award.

85. The trial judge not only ignored the evidence of Mr. Newton on these variations but later in the judgment discounted his evidence by saying that its key points concerned the meetings with Mr. Ali. In accepting the evidence of Mr. Ali as being the only evidence on this issue and discounting the evidence of Mr. Newton in this manner the trial judge was plainly wrong. In the circumstances we are entitled to review this finding of fact and revisit the award. The difficulty posed to us as a Court of Appeal is that as a court of review we are unable to assess and weigh the evidence as would a first

instance court. In the circumstances prudence would have demanded that this issue be referred back to the High Court for such an exercise.

86. Therefore, even if the trial judge could have relied on the letter of 23 June 2008 as evidence, the trial judge failed to consider the very relevant evidence of Mr. Newton in respect of the claim for $2,680,300.93 and the validity and, if necessary, the assessment of this entire claim would have had to be re-examined by a trial judge.

Waiver

87. During the oral hearing, this court raised issue with Counsel for the Appellant whether he had waived the without prejudice privilege by: (i) the Appellant's Defence; (ii) having cross-examination on the letter of 23 June 2008; and (iii) disclosure of the letters in its List of Documents.

    I find that Counsel did not waive the without prejudice privilege for the following reasons.

88. In relation to (i) above (the Defence), at paragraphs 6 and 7 of the Appellant's Defence, it stated that it would be relying on correspondence between January 2007 and April 2009 for "its full terms true meaning and effect."

    However, such reliance does not amount to a waiver for two reasons:

    i. A waiver must be express; it is not inadvertent; and involves the consent of both parties[5].
    ii. The statement was ambiguous since the Appellant was relying on the correspondence to show that there were incomplete negotiations between parties in an attempt to reach settlement.

[5] See **Phipson on Evidence** 18th Edition at paragraphs 24 and 25

89. In relation to (ii) above (cross-examination), Counsel for the Appellant objected to cross-examination on the correspondence at pages 306, 321 and 341 of the Supplemental Record of Appeal and the judge allowed it in *de bene esse* and stated that he would rule on it.

    The cross-examination was for the purpose of determining whether the letters could attract the without prejudice status and/or were admissible as evidence of a concluded agreement. Cross-examination was not a waiver of the without prejudice status of the letters.

90. In relation to (iii) above (disclosure in a List of Documents), disclosure in a List of Documents does not amount to a waiver[6]of the without prejudice privilege.

Limitation

91. At the hearing before us Counsel for the Appellant correctly conceded that the issue of limitation could not be pursued.

    For completeness, I summarise our 2 reasons for this:

    a) As Counsel admitted, this was a claim for breach of contract and the earliest date from which a breach of contract could have occurred on the facts was from the date of the issue of a certificate of compliance/completion. On the pleaded case,[7] the Appellant accepted that the certificate of compliance and completion was in fact issued on the 4 April 2006. This current action was started on 1 April 2010. This was three days within the four-year limitation period.
    b) Alternatively, this was a claim for variations to the works in a contract. The Respondent alleged that under the relevant clause in

[6] See **Phipson on Evidence** 18th Edition at paragraphs 24 and 25
[7] See paragraph 26 of the Amended Defence dated 9 May, 2011

the contract[8] the parties were to agree the variations and add the cost of the same to the contract price. On the facts, the earliest date of any agreement on the claim for alterations would have been the 23 June 2008 (the date when the Appellant "allegedly" accepted some of these claims). This too was well within the four-year limitation period for starting this action.

CONCLUSION

92. The trial judge incorrectly placed heavy reliance on the letter of 23 June 2008 in coming to his decision on liability and quantum.

I therefore make the following orders:

i. The appeal is allowed.

ii. The orders of the trial judge are set aside save and except for the order for the Respondent to pay the Appellant's costs of the application dated 23 August 2011 in the sum of forty thousand dollars ($40,000.00) before the High Court and two thirds (2/3) for the costs of the appeal.

iii. The matter is remitted to the High Court for rehearing. This hearing is to proceed without reference to the "without prejudice" letters (including the letter of 23 June 2008 from the Appellant) and meetings which represented the negotiations between the parties toward a settlement of the Respondent's claim.

……
G. Smith
Justice of Appeal

[8] See clause 7, section 5.1 of the contract

Delivered by Jones J.A.

93. I have read the judgments of my brothers Mendonca JA and Smith JA in draft and, for the reasons contained herein, regretfully I disagree with the conclusion on the admissibility of the letter of June 23 2008 arrived at by them.

94. The Appellant, Petroleum Company of Trinidad and Tobago, appeals an award of $9,972,262.73 made in favor of the Respondent, A&A Mechanical Contractors Company Limited, for monies due for the performance by the Respondent of certain additional works and variations (the works) done for the Appellant on an offshore platform and block station in the Soldado Main Field.

95. The Trial Judge determined that the Respondent was entitled to the sum of $7,291,961.81 "as agreed values and admitted by the Appellant in a letter dated June 23 2008" (the June letter) and the sum of $2,680,300.93 for variations 27A, 27B1, 27B2 28 and 29. The Judge however dismissed the Respondent's claim for payment for increased wages and lost time over and above the sums identified as agreed in the June letter. By way of a cross appeal the Respondent has appealed the dismissal of its claim for increased wages and the failure of the Judge to award interest on the sums awarded.

96. Save as to differences on the methods of measuring and valuing the works and of ascertaining the sums due to the Respondent the basic facts are not in dispute. The Appellant and the Respondent had entered into a written contract for the performance by the Respondent of certain maintenance works for the Appellant. There is no dispute between the parties on the sums due for the work specified in the contract. Neither is it in dispute that the

Appellants requested and the Respondent completed the works. The sole dispute between the parties surrounds the payment for the works.

97. With respect to payment for alterations and variations to the work specified in it the contract, by clause 7, stipulated that:

> "[the Appellant] may at any time during the progress of the Work make alterations in or additions to or omissions from the Work or any alterations in the kind of quality of the materials to be used therein and if [the Appellant] shall give notice thereof in writing to the Bidder and the Bidder shall alter, add to or omit as the case may require and the value of such extras, alterations, additions or omissions shall in all cases be agreed between [the Appellant] and the Bidder the amount thereof shall be added to or deducted from the Contract price as appropriate. No variation shall be made to the Work stipulated without prior written approval of [the Appellant] authorized representative. Failure to observe this condition may at the sole discretion of [the Appellant] result in non-payment for the unauthorized Work."

98. In some instances the works were commenced without any notice in writing being given to the Respondent. In this regard the Judge found that the Appellant had waived any issue regarding the procedure set out in the contract. The Appellant has not appealed this finding.

99. The evidence is that the June letter was written after the conclusion of two meetings, the last being held on May 23 2008, between the parties held pursuant to clause 7 of the contract. The contents of the June letter apart evidence of agreements arrived at the meeting of May 23 was given by Azard Ali (Ali), the only witness for the Respondent, in his witness statement. The

Appellant has not objected to the admissibility of this evidence. Evidence for the Appellants was given by Ainsley Newton (Newton) and Paul Fortune.

100. The main issue on the appeal surrounds the admission of the June letter and whether the Judge was correct when he admitted and relied on its contents to arrive at the awards made by him. The Appellant submits that this was a communication made without prejudice and as a result not admissible into evidence. In this regard the Appellant also challenges the Judge's determination that certain of the Respondent's claims were not statute barred. This determination, the Appellant contends, is based on the wrongful admission into evidence of the June letter. In addition the Appellant challenges the award of the sum of $2,680,300.93 for work done on variations 27A, 27B1, 27B2, 28 and 29 on the ground that the Judge was wrong when he determined that the Appellant had led no evidence in this regard and, in those circumstances, accepted the evidence of Ali.

101. The June letter formed the basis for the Judge's determination that the sum of $7,291,961.81 was due to the Respondent. If it was a privileged communication, as concluded by my brothers, then the Judge erred in admitting it into evidence and was wrong to rely on it to arrive at the sums found to be due to the Respondent. If this is the case then it is clear that, in the absence of any specific finding by the Judge as to the value of these claims and the money, if any, due to the Respondent on them, the matter will have to be remitted to the High Court for such determination.

102. If however the June letter was not a privileged communication but simply generated as part of the process under the contract for arriving at a value for the works, as the Respondent submits and I find, then the Judge was correct in admitting it. In this case we would have to go on to determine whether the Judge was correct to relying on the agreements contained in the letter as to

the value of the work as the basis for an award to the Respondent. In other words what would have to be determined then would be the effect of the June letter.

103. With regard to the cross-appeal at the hearing the Respondent withdrew its challenge to the Judge's finding that it was not entitled to an award for an increase in wages but maintained its position that the Judge was wrong not to award interest on the sums awarded to it.

104. The issues for determination on the appeal therefore are: (i) Was the June letter admissible into evidence and, (ii) if so, what was the effect of it; (iii) was the judge wrong to accept the evidence of the Respondent with regard to the award of the sum of $2, 680,300.93 in preference to the evidence of the Appellant's witnesses; and, on the cross-appeal, (iv) ought the Judge to have made an award for interest on the sums found to be payable to the Respondent and, if so, what is an appropriate award.

The Appeal

(i) Was the June letter admissible into evidence

105. Like the Judge I am entitled to examine the letter for the purpose of determining its admissibility: see **Rush & Tompkins v Greater London Council and Another [1989] AC 1280; Unilever plc v The Procter & Gamble Co. [2001] 1 All ER 783**.

106. The June letter does not contain the words "without prejudice". It states that it is further "to our meeting of 2008 May 23 re the finalization of your claims associated with Tender No. 03/10141402 – the Strengthening of

Platform & Block Station 4 in the Soldado Main Field". It identifies, among other things, those items the value of which have been agreed between the parties (Attachment I); those items on which the Respondent wanted clarification (Table 1); an assessment of the replacement of corroded structural members (Attachment II); calculations associated with claim 21(Attachment III); the counterclaims made by the Appellant (table II) and the calculations associated with the Appellant's counterclaims. The letter ends by inviting the Respondent to another meeting on June 27 2008 to discuss "the attached" and bring the issue to closure.

107. The Appellant contends that the June letter, does not amount to an admission of liability but was merely an offer to settle the claim in an attempt to avoid litigation. According to the Appellant they entered into the agreements contained in the letter to bring the matter to a speedy conclusion. It submits that the June letter ought not to have been admitted into evidence by the Judge because it was an admission made in the course of negotiations for a settlement between the parties. In support of this submission the Appellant relies the case of **Rush and Tompkins Ltd v Greater London Council**.

108. The Judge was of the view that the contents of the letter were not subject to the 'without prejudice' rule and were admissible as evidence of what had been agreed upon between the parties. He was of the opinion that:

> "the meetings which led to the [Appellant's] letter of 23 June 2008 and the letter are important for setting out what was agreed between the parties as additions or variations. It was a necessary process to finalise the payments due. The purpose of the meetings was exactly for the purpose of agreeing what was to be paid. No

without prejudice designation could therefore be attached to the 23 June 2008 letter. These were not negotiations being undertaken for the settlement of a disputed claim but rather an integral step in the process of finalising the payments. Without these meetings and process final payments could not be met."

109. In this regard he accepted the submissions of the Respondent on this point. These submissions have been repeated before us on appeal.

110. Insofar as the Judge stated that the purpose of the meetings was to determine what was to be paid to the Respondent he was not entirely correct. The evidence of the Appellant, not disputed by the Respondent, was that the meetings were held pursuant to clause 7 of the Contract. Clause 7 of the Contract required the parties to agree the value of the works and then determine whether the amount ascertained as the value was to be added or deducted from the contract price. In accordance with the clause therefore the parties had first to determine the value of the works, that is finalize the Respondent's claims, and then determine whether the value as agreed was to be added to or deducted from the contract price. This was the purpose of the meetings. While ultimately the meetings would determine what was to be paid to the Respondent the Judge seems to discount the fact that this was a two-step process. As we shall see later in this judgment it is the failure to recognize this that, in my view, led the judge into error.

111. The Appellant does not dispute that it entered into the agreements contained in the June letter. By way of an aside to meet the submission made by the Appellant that that it entered into the agreements so as to bring the matter to a speedy conclusion. The fact that it entered into the agreements to bring the matter to a speedy conclusion is not relevant to a determination as

to the admissibility of the June letter. As we will see when we examine the cases the relevant question for the admissibility of the June letter is the purpose of the discussions that led to the letter and not the reason a party may have for arriving at agreements contained therein.

The 'without prejudice' privilege principle

112. "Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted into evidence." **Phipson on Evidence, Eighteenth Edition, paragraph 24-09.**

113. The principle and the policy behind the rule was stated by Lord Griffiths in **Rush & Tompkins** to be as follows:

> "The "without prejudice rule'' is a rule governing admissibility of evidence and is founded on 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 LJ in Cutts v Head [1984] I All ER 597 at 605-606, [1984] Ch 290 at 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."

114. In the case of **Unilever plc v The Procter & Gamble Co. [2001] 1 All E.R 783** after an extensive review of the cases on the point, including Cutt v Head and Rush & Tompkin, following on from the statement by Oliver LJ in Rush that the privilege rested at least in part on public policy, the court concluded that the rule was founded partly on public policy and partly on the agreement of the parties. According to Robert Walker LJ:

> "In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head, the Rush & Tompkins case* and *Muller's* case. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. 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, in the words of Lord Griffiths in *Rush & Tompkins Ltd v Greater* London Council [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

Lord Griffiths in the *Rush & Tompkins* case noted, and 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."

115. The rule therefore is not absolute. Indeed in **Cutts v Head[1984] I All ER 597**, applying the matrimonial case of Calderbank v Calderbank[9], it was accepted that the right to refer to such communication on a determination of costs was a valid exception to the rule once the opposing party had been warned beforehand. In **Unilever** Robert Walker LJ[10] identified 8 recognized exceptions to the rule. In **Re Daintrey [1893] 2 QB 116** a notice expressed to be without prejudice was admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition.

[9] 1996 Fam 193
[10] Pages 791-793

Is the 'without prejudice' rule applicable in this case

116. As noted in **Unilever** the use of the words 'without prejudice' is not a mandatory requirement to a court determining whether or not the principle applied. This position was also taken in the case of **Bradford & Bingley v Rashid [2006] 1 WLR 2066** there Lord Mance stated:

> "……..the express use of the phrase not only puts the matter beyond doubt in a situation where there is an offer to compromise an existing dispute but is also capable of throwing some light on the answer to the objective question whether such a situation existed. But its use is by no means conclusive. Neither a dispute nor a concession can be conjured out of mere words.": **paragraph 84**

So that while there is benefit to the use of the phrase 'without prejudice' its usage is not determinative of the status of the communication.

117. In the case of **Best Buy Co. Inc. v Worldwide Sales Corp Espana [2011] EWCA Civ. 618,** for example, one of the issues for the court's determination was whether a letter, which was not marked without prejudice, could in fact be understood to be so. Here the court of appeal ultimately found that the letter was not protected by the privilege. According to **Lord Neuberger at paragraph 18**:

> "In my view, in so far as such question turns on the meaning of any particular passage in the September letter, it is to be answered by reference to what a reasonable person, in the position of the recipient of the letter, with its knowledge of all the relevant

circumstances as at the date the letter was written, would have understood the writer of the passage to have intended, when read in the context of the letter as a whole. That approach is consistent with principle in the light of the recent authoritative decisions on the interpretation of contracts and unilateral documents - *Mannai Investment Co Ltd v Eagle Star Assurance* [1997] UKHL 19, [1997] AC 749, 775-780; *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896, 912-913; *Kirin-Amgen Ltd v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667, paras 27-34; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1100, para 14."

118. Lord Neuberger was of the opinion that in determining the status of the document it was not appropriate to take into account subsequent correspondence unless perhaps that subsequent document was in reply to the first. Under normal circumstances therefore the letter must be looked at independently of later correspondence.

119. According to **Phipson**[11] "……there are many circumstances in which correspondence is initiated with a view to settlement but the parties do not intend that the correspondence should be without prejudice. It may be that the parties positively want any subsequent court to see the correspondence and always had in mind that it should be open correspondence." Phipson cites the case of **Prudential Assurance Co. Ltd v Prudential Insurance Co of America [2003] All ER (D) 546** as an example of such a situation.

[11] paragraph 24-12

120. In **Prudential** the issue for the court's determination was whether the defendant could prevent the claimant from adducing into evidence, in the UK and abroad, correspondence passing between the parties over the past 20 odd years on the basis that they were protected by privilege under the 'without prejudice' rule. None of the correspondence was marked 'without prejudice'. It was accepted by the parties that the correspondence was admissible, as an exception to the rule, on the question of whether or not there was a binding agreement between the parties. The question was whether the letters were admissible in proceedings where that was not an issue and, in particular, whether in this regard the court could prevent their use in foreign proceedings.

121. Vice-Chancellor, Sir Andrew Morritt, at first instance, held that the without prejudice rule would not apply in the circumstances. He concluded that neither public policy nor implied contract would prevent the use of the letters. On the question of public policy he stated:

> "It does not appear to me that the considerations of public policy described by Oliver LJ in Cutts v Head and referred to with approval by Lord Griffiths in Rush & Tompkins [1989] 1 AC 1280, 1299 have any application to these communications. Nothing had been said or done by either party which was likely to give rise to any litigation the outcome of which might be affected by any admission made in the course of these negotiations. And if the protection of the 'without prejudice' rule is extended to communications of this nature the effect will be to withhold from the court evidence which may be material in many diverse contexts without good reason."

Prudential Assurance Co Ltd v Prudential Insurance Co of America [2002] EWHC 2809 (Ch) at para. 20.

On appeal the decision was upheld by the court.

122. After examining the authorities **Phipson**[12] suggests the correct position to be:

> "(a) The starting point is to determine whether the "without prejudice" principle is engaged at all: is the communication in the course of bona fide negotiations with a view to settlement of a dispute.
>
> (b) If so, the court will expect to treat communications marked "without prejudice" as being within the without prejudice rule in subsequent court proceedings between the parties.
>
> (c) If there is doubt as to whether the without prejudice principle is engaged, the use of the words may assist the court in determining whether there is an attempt to settle an existing dispute.
>
> (d) However, even if the words "without prejudice" were not used, the without prejudice principle will still apply if the circumstances judged objectively were such that it can be assumed to have been intended that the communications in question, being made with a view to settlement, be not admitted in evidence."

123. I agree with Phipson's analysis of the authorities. The question for us on the admissibility of the June letter is simply whether the letter was written for

[12] Paragraph 24-13

the purpose of a genuine attempt to compromise a dispute between the parties. This requires an objective consideration of the letter by reference to what a reasonable person, in the position of the recipient of the letter, with the knowledge of all the relevant circumstances as at the date the letter was written, would have understood it to mean. The relevant circumstances here include the contractual provisions and the nature of the meetings from which the June letter emanated.

124. Looking at the letter in this way I think that the Judge was correct when he determined that the letter and the meetings that led to it was a "necessary process to finalise the payments due". In accordance with clause 7 of the contract the meetings were a necessary step in the process to determine what, if any, additional sums were due to the Respondent for the works.

125. The letter itself advised that it is further "to our meeting of 2008 May 23 re the finalization of your claims associated with Tender No. 03/1014 1402". It identified the items on which agreement as to value had been achieved; it attempted to clarify certain of the Respondent's concerns and, by reference to the Appellant's counterclaims, it sought to treat with the question of what sums were to be added to or deducted from the contract price. From the letter it was clear that the Appellant was of the opinion that despite the agreements arrived on the finalization of some of the Respondent's claims there was need to meet further to finalise the rest of the claims and determine what, if anything, was to be paid to the Respondent.

126. The terms of the letter do not suggest that the purpose of the meetings, and the issue of the letter, was to settle any dispute but rather simply to finalise the Respondent's claims. This was what was required by the contract.

The fact that the words “without prejudice” are not contained in the letter to my mind confirms that the discussions were not discussions entered into by the parties in an attempt to compromise a dispute. Rather, and this is also borne out by the terms of the letter, these were discussions entered into in accordance with the process set out by the contract for determining how the Respondent was to be paid for the works. What the letter sought to do was to identify items on which there was no dispute and items on which there was a dispute and set out the Appellant’s position on those latter items.

127. In these circumstances the Judge was correct when he determined that the June letter was not a written communication made for the purpose of a attempt to compromise a dispute but rather a record of an integral step in the process set out in the contract for arriving at the sums due to a contractor for alterations and variations to the work identified to be performed under the original contract. Indeed, given the terms of clause 7, this was a necessary step in the Respondent being paid for the works and a process that the Respondent would be required to adduce in evidence in order to be entitled to payment. This evidence was therefore an essential prerequisite for a claim for payment for the works. Like in the Prudential case if the protection of the ‘without prejudice’ rule is extended to communications of this nature, in my view, the effect will be to withhold from the court material evidence.

128. In my opinion this is a situation where, in accordance with their contractual arrangements, the parties must have contemplated that correspondence confirming agreements arrived at in meetings held in furtherance of the finalization of the value of additional works should be open correspondence. To now assert otherwise and to rely on the ‘without prejudice’ rule would be to abuse the protection afforded by the rule.

129. In the circumstances I am of the opinion that the June letter was admissible and the Judge was entitled to consider the contents of the June letter in coming to his determination as to the sums of money due to the Respondent.

130. Even if I am wrong in my determination that the letter was not written for the purpose of a genuine attempt to compromise a dispute but rather as a part of the contractual arrangements between the parties it seems to me there is no proper basis for the application of the principle in this case. Insofar as the application of the 'without prejudice' principle is founded on an implied agreement between the parties it would not apply in this case. In this case the meetings were part of the contractual process contemplated by the parties and the letter was in furtherance of those meetings.

131. Insofar as the principle is based on public policy, in my view, this is not a case where public policy should prevent the June letter from being admitted into evidence. While there undoubtedly exists a public policy on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court as admissions of liability equally important is the public policy of ensuring that parties abide by their contractual agreements.

132. In giving the judgment of the court of appeal in **Prudential** Lord Justice Chadwick dealing with the public policy aspect of the rule stated:

> " In my view the position is different in those cases in which the only justification for restraining the use of 'without prejudice' material is public policy; that is to say, in cases of which Rush & Tompkins and Muller v Linsley and Mortimer are examples. In those cases there is no contractual basis upon which to order an extra-territorial restraint.

> The question in those cases is whether the English court, by ordering a person not to make use of 'without prejudice' material in foreign proceedings, should seek to impose on the conduct of the foreign proceedings a restraint which is justified only by its own perception of what public policy requires. In my view it is plain that that question must receive the answer "No". In that context it is important to keep in mind that the rule in England - in so far as it is based on public policy - has evolved in response to the need to balance two different public interests, "namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation" - see the observation of Lord Griffiths in Rush & Tompkins [1989] AC 1280, 1300A-B). The latter interest is a reflection of the principle that trials should be conducted on the basis of a full understanding, by both parties and the court, of the facts relevant to the issues in dispute. The 'without prejudice' rule has to be seen as encroaching upon that principle. The justification for such encroachment, in the eyes of the English courts, has been the greater public interest in promoting settlements. But it would be insular not to recognise that courts in other jurisdictions might think - or might be required by legislation to accept - that a different balance should be struck; and arrogant to seek to impose on the conduct of litigation in other jurisdictions a rule which is based on our own perception of where the greater public interest lies.": **para. 23.**

133. In these circumstances, even if this court is of the opinion that the purpose of the discussions from which the June letter emanated were conducted in a genuine attempt to settle a dispute, it is open to us in this jurisdiction to consider afresh where the greater public interest lies. It seems to me that here the tension described by Lord Justice Chadwick in **Prudential** between two

competing public interests should be resolved in favor of ensuring that parties abide by their contractual arrangements. As Lord Griffiths in **Rush v Tompkins** noted "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." This, in my view, is such a case.

134. This would, in my view, apply even in circumstances where the rules of court encourage the settlement of disputes. It cannot be that the public policy of encouraging parties to settle their disputes will permit a party to resile from an agreement validly made pursuant to its contractual obligations.

135. Even if the letter was a communication made in the course of negotiations with a view to settlement of a dispute it seems to me that the contractual provisions in this case, to adopt the words of Robert Walker in **Unilever**, provide a special reason to dissect out identifiable admissions and withhold protection from the rest of the letter. In this case, given the admission by the Appellant that it entered into the agreements and the admittance, without objection, of confirmatory evidence of the agreements by Ali, no practical difficulties arise in doing so.

136. In the circumstances, even if I am wrong in my determination that the 'without prejudice' rule does not apply here, in my view the public interest in this case requires that the veil imposed by the 'without prejudice' rule be pulled aside and the June letter be admitted into evidence.

(ii) the effect of the June letter

137. On the basis of the June letter the Judge concluded that:

> "The [Appellant's] liability cannot be less than the sums of the Agreed and Admitted Values as set out in the 23 June 2008 letter. This was intended to finalise what was owed and the [Appellant] came up with this document setting out what the [Respondent] claimed and what was agreed upon. It cannot be that the [Appellant] in contemplation of litigation could go back on this and seek to put a different interpretation on what this figure represented. It must be the starting point for fixing what is due pursuant to the mechanism set out in the contract. The sum here is $7,291,961,81."

138. In arriving at this conclusion the Judge made two errors. The first is that the agreed value of the works listed in Attachment I was $5,180,175.31 and not $7, 291,961.81. The Judge seems to have arrived at that latter sum by adding the sum identified at table 1 to the agreed total of $5,180,175.81. In doing so he was wrong table 1 did not purport to identify values that had been agreed between the parties but rather simply outlined items for which the Respondent had sought clarification. The Judge seems to be of the opinion that the Appellant could not now go back on this position and therefore it was appropriate to add the sum of $2, 111,786.50 to the values identified as being agreed in Attachment 1. In adding the two figures the Judge ignored the fact that the contract required agreement on the values and there was no evidence that the Respondent had agreed these figures presented for clarification.

Indeed the evidence was that by a letter of November 19 2008 the Respondent had resubmitted its proposal on two of the items referred to in table 1.

139. More importantly however is the fact that, despite acknowledging that the agreement on value was the starting point for fixing what was due, the Judge totally ignored the second step in the process. The next stage was to determine whether in the context of the work agreed to be performed under the written contract the sums agreed between the parties as representing the value of the works were to be added to or deducted from the contract price. In arriving at his award the Judge did not engage in that exercise or consider the evidence in this regard.

140. From the terms of the June letter itself it is clear that the Appellant was saying that despite the agreement as to the value of the works identified in Attachment 1 there were claims by it that had to be considered before any determination as to the monies due to the Respondent could be made. It is clear therefore that at the time of writing the letter the parties had not as yet completed the clause 7 process. The Judge was therefore wrong to order that the Appellant pay to the Respondent the sum of $7,291,961.81 as representing the sums due the Respondent on those works the values of which had been agreed. What had been agreed pursuant to step 1 of the contractual process was the sum of $5, 180,175.31 with respect to the value of those items identified in Attachment 1. Step 2 of the process had still to be completed with respect to these sums.

141. The Appellant also appeals the Judge's finding that the claims dealing with the removal of the barge, the increase in the price of steel, lost time and increase in wages were not statute barred. It submits that the Judge came to

this erroneous conclusion as a result of the wrongful admission into evidence of the June letter. According to the submission "Had he not made such a finding the situation would have been different since [the June letter] would impact on when time begins to run for breach of contract. If the same is therefore inadmissible it cannot be resurrected in relation to the limitation period."

142. In this regard the Appellant is not correct. What the Judge actually held was that:

> "In the present contract (Clause 5, section 5.1) the final payment provisions were conditional upon the completion of the works and the issuance of a Certificate of Compliance and a Completion Certificate. These were issued on 4 April 2006. Under the contract, this had to be done before final payments could be established. It is only when the Completion Certificate was issued that the parties could engage the process for finalising what payments would be due for any additional work or variations done. The process was not engaged until sometime later. Any liability for those payments was therefore conditional upon the work being completed as evidenced by the Completion Certificate. Thus, the causes of action could not arise before 4 April 2006 and liability for what was considered due to the claimants could only arise when the sums payable were in fact established. This took place at meetings which went well into 2008 culminating in the defendant's letter of 23 June 2008. The claims are therefore not statute barred having been filed on 1 April 2010."

143. The Judge in fact held that since the completion certificate had not been issued until April 4 2006 that was the earliest date from which time would start to run and since the action was filed within four years from that date none of the claims would be statute barred.

(iii) Was the judge wrong to accept the evidence of the Respondent with regard to the award of $2,680,300.93 in preference to the evidence of the Appellant's witnesses.

144. It is trite law that the general approach of an appellate court is to exercise the power to review findings of fact very sparingly. A judge's findings of primary fact cannot be disturbed unless it is demonstrated that the judge was plainly wrong. A judge can be said to be plainly wrong where there is no evidence to support the finding which was made or where the judge misunderstood the evidence or failed to analyse the totality of the evidence or where the finding is one which no reasonable judge would have made: see **Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21.**

145. In other words, there must be some error in the process by which the judge made the finding. For example, it may be that the judge made an inference that was not justified or failed to make one that was or that the judge failed to take into account some relevant piece of evidence or failed to appreciate its proper significance or an irrelevant factor was taken into account or undue weight attributed to an irrelevant factor: see **Ettienne v Ettienne Civil Appeal 116 of 1996** per de la Bastide at page 8.

146. The Judge awarded the sum of $2,680,300.00 (the second award) in respect of variations 27A, 27B1, 27B2, 28 and 29. In coming to this determination the Judge determined that there was no evidence given by the Appellant concerning these matters and consequently accepted the evidence of Ali. In doing so the Judge was wrong. He failed to consider the evidence led by the Appellant through its witness Newton. Newton's evidence was directly relevant to the question of the variations and specifically dealt with the variations the subject of the second award.

147. The evidence of Newton was, firstly, that what the Respondent termed variations were not in fact variations to the contract. According to Newton this was work contemplated by the contract and for which the contract contained specific provisions for the method of assessing what was due. The procedure being first the measurement of the work and then the application of the rates contained in the contract for the specific type of work. This, he says, was done but Ali, on behalf of the Respondent, subsequently refused to accept the result.

148. According to Newton it was only in order to bring the contract to a close and in a spirit of compromise that they entered into the agreements contained in Attachment 1 of the June letter. His evidence was that it was the Respondent who subsequently reneged on these agreements by demanding a substantially higher payment. As a result of this, he says, the Appellant was now relying on the strict interpretation of the contractual provisions. According to Newton should the Court reject this position then the Appellant's fallback position is that contained in a table prepared by him and forming a part of his witness statement. The table specifically treats with those variations the subject of the second award.

149. The Judge not only ignored the evidence of Newton on these variations but, later in the judgment, discounted his evidence by saying that its key points only concerned the meetings with Ali. In accepting the evidence of Ali as being the only evidence on this issue and discounting the evidence of Newton in this manner the Judge was plainly wrong. In the circumstances we are entitled to review this finding of fact and revisit the second award. The difficulty posed to us as a Court of Appeal is that as a court of review we are unable to assess and weigh the competing evidence as would a first instance court. In the circumstances prudence demands that this issue be referred back to the High Court for such an exercise.

150. On the question of the failure of the Judge to make an award of interest on the sums found by him to be due to the Respondent, while I accept that interest will usually be awarded on the sums made payable, in the light of my determination of the other questions in this appeal, the question of the failure to award interest on the sums made due to the Appellant would not arise at this stage.

151. In the circumstances I would have set aside the orders of the Judge and remitted the matter to the High Court for:

(i) a determination in accordance with Clause 7 of the contract on what compensation, if any, is the Respondent entitled to receive for those items the value of which had been agreed between the parties and identified in Attachment 1 to the letter of June 23 2008;

(ii) a determination whether, after considering the evidence before the court, what sum, if any, is the Respondent entitled to receive for variations 27A, 27B1, 27 B2, 28 and 29 and

(iii) a determination of the interest payable to the Respondent on any of the sums found due.

……
Judith Jones
Justice of Appeal