Neutral Citation Number: [2025] EWHC 218 (KB)
Claim No: H00SR150

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

SUNDERLAND DISTRICT REGISTRY

Sunderland Courts and Tribunals Centre
Gilbridge Avenue
Sunderland
SR1 3AP

BEFORE:

DISTRICT JUDGE DODSWORTH

BETWEEN:

KEITH MORRIS	**CLAIMANT**
- and -	
WILLIAM SIMON WILLIAMS	**DEFENDANT**

Legal Representation
Mr David Morris (Solicitor), on behalf of the Claimant
Mr Paul Higgins (Counsel) on behalf of the Defendant

JUDGMENT

This judgment is handed down by release to the National Archives and circulation to the parties by email at 10.00 am on 5 February 2025

District Judge Dodsworth:

1. The Claimant in this matter, Mr Keith Morris, was represented before me today by his solicitor, Mr David Morris. The Defendant, Mr William Simon Williams, was represented by counsel, Mr Paul Higgins, instructed by Horwich Farrelly Limited.

2. The Claimant has brought proceedings seeking to recover damages for personal injuries he says he sustained when he was involved in a road traffic accident which took place as long ago as 20 July 2018. The Claimant was riding a motorcycle which was hit by a vehicle being driven by the Defendant.

3. It is not in dispute that the accident occurred as a result of the Defendant's negligence and that the Claimant suffered some injuries. But, by way of an amended defence dated 6 April 2023, the Defendant made clear that he was running a case of fundamental dishonesty. The Defendant says that the Claimant has seriously exaggerated the effect and extent of the injuries that he did sustain in the accident and relies, inter alia, on surveillance footage he has obtained of the Claimant going about a number of daily activities.

4. The matter came before me on 22 January 2025 for the hearing of an application made by the Defendant on 5 December 2024. That application sought orders compelling the Claimant to respond to a Part 18 request and that a letter dated 12 May 2023 written by the Claimant's then solicitors, Minster Law, to the Defendant's solicitors ("the Letter") may be adduced as evidence despite being marked "Without Prejudice – save as to costs". The application was supported by a witness statement from Mr Philip Melia, of the Defendant's solicitors, dated 5 December 2024.

5. The Claimant chose not to file a witness statement in response to the application. At a very late stage his solicitor filed a document headed "Response to Defendant's application". This was a somewhat curious document being neither a witness statement nor a skeleton argument. It was neither signed nor dated. In so far as it (or Mr Morris' oral submissions) sought to give evidence about the context of the negotiations that led to the Letter being sent, I have excluded that from my mind.

6. This judgment deals with the application so far as it relates to the Letter. The Letter is annexed to this judgment.

7. The starting point is, of course, that without prejudice correspondence is inadmissible. The rule was explained by Lord Griffiths in *Rush & Tompkins Limited v Greater London Council [1989] AC 1280 at 1289:*

> "The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:
>
> "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott

Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."

8. The "without prejudice" rule is not absolute. There are exceptions and one of those relates to situations where to exclude material marked as without prejudice would act as a cloak for perjury, blackmail or other "unambiguous impropriety". This was explained by Robert Walker LJ in *Unilever PLC v The Proctor & Gamble Company* [2000] 1 WLR 2436 in the following terms:

"24. Nevertheless there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed, para 9-32) are two first-instances decisions, *Finch v Wilson* (8 May 1987) and *Hawick Jersey International v Caplan* (The Times 11 March 1988). But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

9. Mr Higgins referred to examples of cases where privilege had been lost based on the unambiguous impropriety exception: Hawick Jersey International v Caplan (supra) and Merrill Lynch v Raffa [2001] ILPr 31 (a decision of HHJ Raymond Jack QC sitting as a deputy High Court judge). In the *Raffa* case evidence as to without prejudice discussions was admitted where to exclude it would have allowed the defendant to run a defence that he was not involved in a fraud when he had made admissions to his involvement in the fraud in the without prejudice discussions.

10. The Defendant's case is that the Letter should be admitted as evidence in this case as it falls squarely within the unambiguous impropriety exception as it demonstrates that the Claimant accepts he has been fundamentally dishonest in relation to at least some aspects of his case and he should not be allowed to pursue a case where he disputes that he has been fundamentally dishonest.

11. The Claimant opposes the admission of the Letter in this case. His case is that (i) the Letter, properly analysed, does not contain any admission of fundamental dishonesty and (ii) that even if it does contain such an admission then it is not so clear as to come within the unambiguous impropriety exception.

12. Mr Morris directed me to a number of cases where the need to construe the exception narrowly was emphasised, particularly when the matter arises at an interim stage of the proceedings.

13. Males LJ said this at paragraph 64 of *Motorola Solutions Inc & Others v Hytera Communications Corporation Limited & Another* [2021] EWCA Civ 11:

> "64. As for the judge's second concern, I do not regard the fact that the test of good arguable case is used in other interim contexts as a sufficient reason to apply it to the issue of unambiguous impropriety when that issue arises at an interim stage of litigation. Rather, the position should be that the test remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it. In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply. Plainly it would not be appropriate on an interim application to direct a trial of an issue to resolve such a dispute."

14. Ms Pat Treacy, sitting as a judge of the Chancery Division, said this at paragraph 122 of *Ocean on Land Technology (UK) Limited & Another v Richard Land & Others* [2024] EWHC 396 (IPEC):

> "122. To recap, to fall within the exception, it is necessary to show that the without prejudice rule is being used to cloak wholly improper conduct and the possibility of perjury will not suffice. Conduct or statements which do not go beyond the bounds of what is to be expected in negotiation will not fall within the scope of the exception."

15. Mr Morris also cited paragraphs 2 and 7 of the judgment of Lord Hope of Craighead in *Ofulue v Bossert* [2009] UKHL 16 but, in my judgment, they merely restate the law as set out above.

16. Mr Morris also submitted that it is not appropriate to dissect without prejudice discussions. He drew support for this proposition from the judgment of Peter Gibson LJ where he said, at paragraph 34 of *Berry Trade Limited & Another v Moussavi & Others* [2003] EWCA Civ 715:

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

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

17. Having set out the law, I must apply it to the Letter. The Letter is plainly headed "without prejudice – save as to costs" and was sent in an attempt to reach a settlement between the parties. It would normally attract the privilege that attaches to without prejudice correspondence.

18. Does the Letter contain an admission? The Claimant submits the answer to this question is no. Mr Morris says that paragraph 2 of proposed terms of settlement is a promise to admit something (that some representations in respect of his claim were fundamentally dishonest) in the future if it is contained within a non- disclosure agreement. The Defendant says the answer to the question is yes – the Letter is a clear acceptance by the Claimant that he has been, at least in part, fundamentally dishonest when presenting his claim.

19. Although I bear in mind the comments about dissection of without prejudice correspondence, and the need to proceed cautiously as this application is made at an interim stage, the answer to the question appears to me to be clear from the terms of the Letter. I also bear in mind that the Letter was written by experienced solicitors instructed by the Claimant to pursue his case. It was a letter that was, no doubt, carefully written. It seems to me that the Letter contains a clear admission that the Claimant has been fundamentally dishonest in the way he has put forward his case. It is written in the future tense but it is, in reality, no different from the promises in paragraph 1 of the proposed terms of settlement to pay back sums received by way of an interim payment and make a contribution to the Defendant's costs.

20. Having concluded that the Letter contains an admission that the Claimant has acted in a way that has been fundamentally dishonest, I must now consider whether it falls within the unambiguous impropriety exception such that I should allow it to be admitted as evidence.

21. In my judgment the letter does fall within the unambiguous impropriety exception and should be admitted. I have found the Letter to be a clear admission of fundamental dishonesty on the part of the Claimant. That goes well beyond, say, an acceptance that the Claimant has over-egged his injuries, or their effects on his day to day activities, or a concession that some aspects of his case may be difficult to prove. All of those might be things said in usual exchanges in the context of without prejudice negotiations and which would fall to be protected by the without prejudice rule as they do not demonstrate unambiguous impropriety. Here the line has been crossed. If the Letter is excluded there is more than a risk of the Claimant perjuring himself, which would not of itself be sufficient to bring the exception into play, but the certainty that the Claimant's pleaded case was being put forward on a (at least partly) false basis, which is sufficient to bring the exception into play. This is an example where the public

policy arguments in favour of litigating disputes with full disclosure trump the policy argument in allowing parties to speak candidly and with protection of the contents of the discussions, to encourage settlements. This case is, I think, analogous to the *Raffa* (supra) case: to refuse to admit the Letter would permit the Claimant to benefit from an unambiguous impropriety.

22. Accordingly, and for the reasons I have given, I will allow the Letter to be adduced as evidence.

ANNEX

Without Prejudice – Save as to costs

12th May 2023

Dear Sirs

Our Client: Mr Keith Morris

Accident date: 20th July 2018

Your Client: Mr William Simon Williams

We have instructions to put forward a Calderbank Offer in full and final settlement of our client's claim.

This offer is a genuine attempt by our client to settle their claim at this stage and to avoid further costs being incurred. If it is not accepted, we reserve the right to refer this letter to the Court when the question of costs is determined.

The Claimant hereby offers to settle and discontinue his claim on the following basis:

1. That the Claimant do pay the total sum of £20,000 to the Defendant, to cover both the interim payment of £1,500 and a contribution towards your legal costs and disbursements.

2. That the Claimant will admit that he was fundamentally dishonest in respect of some of the representations made in respect of his claim. However, it should be noted that he is **only** prepared to make such an admission on the basis that it be contained in a non-disclosure agreement to the effect that the case cannot be discussed or reported in any way, with any third parties at all (including without direct reference to the Claimant or Minster Law by name).

This offer is open for acceptance until 4.00 pm on 16th May 2023. After such time, the offer is to be considered withdrawn and cannot be accepted. We reserve the right to withdraw this offer at any time prior to the deadline for acceptance.

We look forward to hearing from you.

Yours faithfully

Rebecca Waller

Rebecca Waller
Minster Law Ltd