The "R" Trusts
Royal Court
2nd October 2017

JUDGMENT
43/2017

Admissibility of "without prejudice" materials on an application by Trustees to bless a momentous decision under the doctrine of *Public Trustee v Cooper*

IN THE ROYAL COURT OF GUERNSEY

Civil No 1791

ORDINARY DIVISION

IN THE MATTER OF THE "R" TRUSTS

BETWEEN:

(1) ROTHSCHILD SWITZERLAND (CI) TRUSTEES LIMITED
(2) GUERNSEY GLOBAL TRUST LIMITED
(3) ROTHSCHILD TRUST GUERNSEY LIMITED
(4) ROTHSCHILD TRUST FINANCIAL SERVICES LIMTIED
(5) ROTHSCHILD TRUST NEW ZEALAND LIMITED

Applicants

-and-

(1) W **First Respondent**
(2) S1 **Second Respondent**
(3) D **Third Respondent**
(4) S2 **Fourth Respondent**

and others

Respondents

Hearing date and judgment given: 2nd June 2017

Written judgment handed down: 2nd October 2017

Before: Her Hon Hazel Marshall QC Lieutenant Bailiff

Counsel for the Applicants: **Advocate Alison Ozanne**
Counsel for the First, Second and Fourth Respondents: **Advocate Ian Swan**
Counsel for the Third Respondent: **Advocate Jeremy Wessels**
Counsel for the Eighth Respondent: **Advocate Christian Hay**
Counsel for the Twelfth Respondent: **Advocate Andrew Laws**

JUDGMENT (approved)

Cases texts and legislation referred to:

Rush & Tompkins Limited v Greater London Council and others [1989] AC 1280
Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436
Public Trustee v Cooper [2001] WTLR 901
Re Trustees of X Charity [2003] 1WLR 2751
Pearson v Prentice Hall [2005] EWHC 636
Linsen v Humpuss [2010] EWHC 303
Savings & Investment Bank v Finken [2004] 1WLR 667

Lieutenant-Bailiff Hazel Marshall QC:

1. This is an anonymised version of a judgment recently given with regard to a dispute as to the status of "without prejudice" materials in the context of an application to the court to "bless" a momentous decision of Trustees under the doctrine of *Public Trustee v Cooper* [2001] WTLR 901. Whilst the hearing was held in private, I consider it appropriate to make this judgment public because it raises certain points which may be of assistance to the profession.

Introduction

2. The R Trusts are discretionary trusts administered in Guernsey. The settlor is deceased. The trust assets are now held by the Trustees, the Applicants in this matter, for the benefit of the settlor's widow W (the First Respondent) and his two sons and daughter, S1, D and S2, (who are the Second, Third and Fourth Respondents), and their respective issue. Such issue who are now living are mostly minors and they, together with two Protectors of the Trusts, make up the remaining Respondents to the main application in this matter, although they are not concerned with this particular aspect.

3. There is considerable family hostility and suspicion between S1, S2 and W on the one hand and D on the other; disputes and disagreements over the trusts and their assets have now been in train for a very long time.

4. The principal application now before the court is an application dated 5th December 2016 made by the Trustees for the court to "bless", under the second limb of the rule in *Public Trustee v Cooper* [2001] WTLR 901, the "momentous" decision which they have arrived at with regard to dividing the trust assets in order to effect a separation of the interests of D and her issue from those of the other beneficiaries. The mechanisms for this are accepted to be within the powers of the Trustees, and there is agreement among the main beneficiaries that such a division would be a good idea and help end or reduce family frictions. However, making such a division is not a simple matter, owing to the nature of the trust assets, and the mistrust between family members.

5. The assets include some assets which are liquid and readily realisable but also certain illiquid assets, principally a valuable property in the United Kingdom which is apparently not readily saleable - at least at present - and also some business ventures abroad which are neither readily saleable nor easily valued so as to provide a working figure for apportionment purposes. In both cases it appears that the value of the assets, apart from being difficult to ascertain at all, is also subject to significant fluctuation from time to time, such that an

apportionment *in specie* might give rise to unpredictable unfairness between the beneficiary groups. In addition the status of certain loans between other branches of the wider family and the R Trusts is not clear. D has already received a significant distribution from the Trusts, but the circumstances of this may not have been entirely satisfactory, and, conversely, she has not been involved in working in the businesses of the family trust assets whilst S1 and S2 (and possibly W) have been. There is disagreement as to how all these points, and other matters, should be taken into account in any division of the trust assets.

6. The Trustees have eventually, however, made a decision as to the best way to progress the division of the trust assets. The details of this are not important in themselves. The Trustees seek the blessing of the court to proceeding on the basis which they have now formulated. Their application is supported by an affidavit of Mr Paul Buckle of the Trustees' Advocates, made on their behalf.

7. The application is opposed by D. She objects to the Trustees' proposals. She has made an application, on 10th March 2017, for extensive disclosure of evidence in the main application and for other directions for its conduct, including permission to cross-examine the Trustees as to their deliberations and meetings and how they reached their decisions, and permission to call expert valuation evidence with regard to the value of trust assets. This procedural application is due to be heard in about three weeks' time by the Deputy Bailiff, who is also seised of the main application.

The subject application

8. However, W, S1 and S2 (whom I will now refer to compositely as "WSS" for brevity) are resisting the stance which D has taken. They have made their own application, dated 17th May 2017, to admit certain written materials into evidence on the hearing of D's procedural application, and presumptively the main application, and they state an intention to make further comments on these materials and other non-documentary "without prejudice" materials in affidavit evidence from their solicitor.

9. D objects that the materials which are the subject of their application are inadmissible because they are properly "without prejudice" and therefore privileged from production in court, and the matters alluded to in WSS's solicitor's commentary are similarly inadmissible, as well as being disputed in point of fact. The Trustees take a position of neutrality on this application, although, insofar as it may be material, they express "sympathy" for the arguments of WSS.

10. The dispute as to admissibility has therefore been referred to me to be heard independently of matters in the main application, procedural or substantive, because I would be able to examine the disputed materials and the proposed further commentary of WSS's solicitor directly and independently, and give an immediate judgment on whether or not they were admissible. I have done so, giving an ex tempore judgment and ruling that these materials are inadmissible.

11. At the time, I provided to the parties a neutral note of my reasons for refusing the application of W, S1 and S2, composed without reference to the content of the without prejudice materials themselves, so that this could be referred to before the Deputy Bailiff if necessary, without prejudicing the privilege which I had ruled attached to the materials. I indicated that I would later put my decision into a written judgement, anonymised appropriately but which would elaborate my findings and reasons, because the points raised appeared to me to have potential general importance and interest. This I have now done, albeit deferring the production of this judgment to make sure that it could cause no problem with the main application.

Legal framework

12. The foundation of the without prejudice privilege from admissibility (which I will now call the "WP privilege") is partly public policy and partly contractual: see per Lewison LJ in *Avonwick Holdings Ltd v Webinvest Ltd and anor* [2014] EWCA Civ 1436 at [17].

13. The public policy aspect is that of encouraging and facilitating parties to settle their disputes without recourse to legal proceedings. It leads to the jealous preservation by the courts of parties' ability to speak freely in the course of negotiations, without fear that anything said might be used against their interests in subsequent court proceedings. It only applies, though, to situations in which there is a dispute in existence, although the term "dispute" is given a wide meaning, such that the initial communication made by one party may still be regarded as attracting the privilege even though as yet the other party has not actively rejected it so as to create a clear dispute. In considering whether the WP privilege applies, the question whether or not there is, as yet, a sufficiently proximate dispute, or whether a communication is merely a statement of a party's position which is not so privileged, is a matter to be determined objectively, on the facts of the particular case.

14. The contractual aspect of the doctrine recognises that parties who are aware of the effects of the WP privilege may quite legitimately agree, expressly or by necessary implication, to apply those principles to their intercommunications even outside the ambit within which it would operate as a matter of the public policy principle. In this way parties can, by contract, extend the ambit of without prejudice status wider than the limits applicable under the public policy principle, but otherwise contract adds nothing to the effect, or the scope, of those principles.

15. The two aspects - public policy and contractual - are thus separate, but they are mutually reinforcing. Heading a letter "without prejudice" effectively represents to the recipient that the writer is intending to treat his communication as such, and implicitly authorises the recipient to accept and respond on the same basis. (If the recipient did not agree that the communication was properly headed "without prejudice" he would and should, of course, take that point at the time.) This contractual analysis is also, in my judgment, the more satisfactory explanation of the fact that WP privilege is joint and cannot be unilaterally waived by one party. On the other hand, the public policy aspect is the only satisfactory basis for the rule that "without prejudice" material is inadmissible in subsequent proceedings relating to the same subject matter but with a third party: *Rush & Tompkins Limited v Greater London Council and others* [1989] AC 1280.

The facts and the materials

16. I do not need to rehearse the facts of the case in any more detail than I have already mentioned above. The materials which are the subject of this application fall into three different categories:

i. A position paper headed "Without Prejudice and Subject to Mediation Privilege" prepared on behalf of D for a mediation which took place between the Trustees, W, S1, S2 and D in May 2016, indicating D's attitude to various options then proposed by the Trustees.

ii. A brief email exchange of early June 2016 between all three parties' London solicitors and a lengthy following letter of 29th June 2016 from the Trustees' London solicitors, Clifford Chance, to the respective solicitors for W, S1 and S2 and for D, all headed "WP" or "WITHOUT PREJUDICE", expressing comments and views on the valuations of the property and businesses prepared by the respective valuers instructed on behalf of the Trustees and D, respectively.

iii. A similarly headed email exchange in March 2017 (and thus after the launch of both the main application and D's procedural application) between Clifford Chance for the Trustees and WSS's London solicitors which refers to the content of without prejudice

discussions which the Trustees' solicitors had had with D's advisers, and a subsequent letter of 30th March 2017 from D's London solicitors addressed to the Trustees' solicitors, again headed "WITHOUT PREJUDICE" and making responsive comments and suggestions.

(A further document which was apparently a draft of a letter intended to be sent as a letter of instruction to a potential mediator in 2016 appears on the reverse of this letter in the bundle, but since this was not referred to at the hearing, I have concluded that this was simply the unintended consequence of previous double-sided copying. As it is also headed "without prejudice", though, it would be in no different position from any of the other materials in any event, and needs no separate mention.)

The arguments

17. Consideration of the position starts from the proposition that materials which are headed "without prejudice", or are otherwise deemed to be treated as "without prejudice", are privileged from production and are inadmissible in subsequent court proceedings unless a case to the contrary is proved to the court's satisfaction. The burden therefore rests on the applicant, here WSS, to satisfy the court accordingly.

18. Advocate Swan contends, for WSS, that the above materials should be and are admissible on at least one of four separate grounds:

    i. That an application invoking the court's power to "bless" a momentous decision of trustees under the second limb of the doctrine of *Public Trustee v Cooper* is not a matter which attracts the operation of Without Prejudice privilege at all.

    ii. That even if a "blessing" application attracts WP privilege, on their true construction the materials exhibited are not, in fact, "without prejudice" materials at all.

    iii. That even if the materials prima facie attract WP privilege, they are admissible under an exception to the WP privilege doctrine, which applies in a situation where the court would be misled if it were not apprised of WP materials.

    iv. That D is estopped from asserting WP privilege over the communications.

19. I will consider each of these propositions in turn.

Discussion

(i) Is an application invoking the court's power to "bless" a momentous decision of trustees under the second limb of the doctrine of *Public Trustee v Cooper* a matter which attracts the operation of without prejudice privilege at all?

20. The basis of the argument that it is not is the submission that such an application is not contentious because the court is not determining a dispute at all; the Trustees are simply appealing to the Court's supervisory jurisdiction over trusts for the approval of their momentous decision.

21. However, this submission must therefore be founded on an assertion, either that there is no "dispute" for the materials to be without prejudice to, despite their express headings, or alternatively that the nature of a *Public Trustee v Cooper* application is such as to override or negate any WP privilege which might otherwise be invoked. I reject either submission, for five reasons.

22. First, the public policy aspect of the WP privilege is the strong encouragement and facilitation of parties to resolve differences consensually and without resort to the courts. Whilst the nature of a "blessing" application may be, or become, inquisitorial, a contested such application is still contentious between the material parties, as regards whether the court ought to bless the Trustees' decision. Whether that contest is actually between the Trustees and the beneficiaries or some faction of them, or whether it is analysed as being between factions of the beneficiaries *inter se*, does not, in my judgment, affect the point that this is just as much a dispute as any other, and this is so even if the Trustees take a neutral position. The policy aspects of the WP privilege therefore apply just as much to a contest on such an application as they do to any other dispute.

23. It is no answer to this point that a court application would be necessary in any event, such that the policy objective of avoiding court proceedings does not apply, which is one of the arguments used by Advocate Swan to support this argument. I reject this because an uncontested *Public Trustee v Cooper* application, which is effectively no more than a courtesy appearance to signify consent, is of quite a different quality from a contested one. The "mischief" at which the public policy of "without prejudice" privilege is aimed is that of avoiding costly, time- and resource-consuming contested proceedings. Even in an ordinary case, there might need to be a court application for a consent order to finalise a compromise which has been negotiated. It seems to me that the more commonplace uncontested "blessing" application is really akin to this latter. It is a very different situation from the present.

24. Second, and similarly, a "blessing" application is, in practice, determinative of parties' rights, and underlying this is the recognition that the situation is an occasion for potential dispute. The justification for, and the effect of, the "blessing" application is to insulate the trustees from future challenge by a disaffected beneficiary to the decision which they will by then have implemented. The application is made to forestall the possibility of a later dispute or difference which would then require resolution. Unlike an application merely for directions (see, eg, *Re Trustees of X Charity* [2003] 1WLR 2751), a "blessing" application will fix the parties' subsequent substantive rights; attempts to agree the outcome of such an application are therefore quite fairly regarded as an attempt to resolve a potential dispute. Where, as here, disputes between the beneficiaries have already materialised and the Trustees are attempting, by their decision, to prevent or reduce these, the blessing application can even be seen as an attempt to resolve an actual dispute. On either basis, such attempts fall within the scope of the policy behind the WP privilege, that of encouraging settlement.

25. Third, the authorities show that the WP privilege is jealously upheld and protected by the courts as a matter of policy, and is therefore given a wide application. It is consistent with this policy approach to interpret the situations in which WP privilege is conferred as extending to include a contentious "blessing" application; I can see no reason why such an application should be excluded.

26. Fourth, the ordinary intelligent layman acquainted with the operation of the WP privilege would naturally and reasonably expect express "WP" or "without prejudice" communications, made with a view to agreeing the substance of a "blessing" application, to attract the operation of the privilege.

27. Fifth and in any event, the WP privilege is also contractual, and parties can therefore, expressly or by their conduct, confer without prejudice status on communications or material which might not strictly fall within the standard recognised situations. Even, therefore, if a "blessing" application did not attract WP privilege, it would be open to the parties to proceed as if it did. By plain implication on the facts of this case, by which I refer to the mutual use of "WP" headings, the parties seem to me always to have done so, both before and after the commencement of the Trustees' application in December 2016.

(ii) Are the exhibited materials properly regarded as "without prejudice" materials at all?

28. The submission that they were not properly so regarded was actually narrowed at the hearing, and argued to apply only to the second group of materials and in effect the 29th June 2016 letter from Clifford Chance LLP. This concession was, in my judgment, entirely correct. I regard it as unarguable that a mediation position paper did not attract mediation WP privilege. I also regard it as unarguable that the materials subsequent to the issue of the principal application were not in the nature of WP communications.

29. WSS's submission was concentrated on the 29th June 2016 letter. Advocate Swan argued that it did not contain "without prejudice" statements at all but was simply a statement of position and was therefore not properly headed "without prejudice".

30. I reject this submission. Whether one looks at the letter in the very wide general context of the relations between the Trustees and the principal beneficiaries, or the narrower context of the immediately surrounding communications, or even only the contents of the letter itself, I find that the 29th June letter was in the nature of a true "without prejudice" communication. This view is reinforced by the consideration that a firm of the eminence of Clifford Chance LLP regarded it as appropriate to head the letter prominently "WITHOUT PREJUDICE". That label was obviously intended to have some effect, and that effect is the obvious one that it is sent with a view to furthering an agreement under the aegis of the "without prejudice" privilege. The recipients would reasonably have read this heading and relied on the intention that this letter was "without prejudice" – as I am quite satisfied it was meant to be.

31. It may be that the Trustees could have written the same, or a very similar, letter openly at the time, or that they could even now still do so. In my judgment this does not affect the effects of their having chosen to head this letter "WITHOUT PREJUDICE" at the time. By doing so they were implicitly reserving their own right to change the views expressed in that letter without it then being used or referred to in later proceedings if those proved contentious. Bearing in mind the difficult position of trustees faced with disputes between factions of beneficiaries, it seems to me that if a trustee feels the need to protect its own position by choosing to head such a letter "Without prejudice", that wish deserves respect. This is consistent with the public policy of encouraging trustees to accept office by enabling them to feel comfortable about fulfilling their functions fearlessly, as well as encouraging the resolution of differences, or potential differences, out of court. However, as mentioned, the privilege operates in favour of all parties to without prejudice communications, and therefore can be invoked by either side of any potential dispute. I do not see that it would have been open to Clifford Chance to withdraw its purported imposition of "without prejudice" terms from this letter. All parties were and are concerned in the resolution of the same subject matter and therefore, in my judgment, the status of the 29th June 2016 letter as a "without prejudice" communication is clear and proper, and is to be upheld.

(iii) Are the materials admissible in any event under the exception to the WP privilege doctrine, which arises in a situation where the court would be misled if it were not apprised of "without prejudice" materials?

32. Advocate Swan for WSS argues that the above is a further exception to the WP doctrine, beyond the eight listed originally by Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444D-2445G, and the ninth added by Crane J in *Pearson v Prentice Hall* [2005] EWHC 636. This last referred to the duty of a party seeking a *Mareva* injunction to give full and frank disclosure to the court. Advocate Swan argues by analogy to this last that the Trustees have a duty of "full and frank" disclosure to the court here, which requires them to disclose all matters which are material or potentially material to their decision, and this duty must thus override any countervailing considerations of the without prejudice doctrine.

33. Advocate Swan argues that this duty on the Trustees arises because the court is obliged to consider the Trustees' thought processes in concluding whether their application should be blessed, and the court must therefore be apprised of absolutely all the material which operated on the mind of the Trustees, including their knowledge of the attitude(s) taken by other parties in without prejudice communications. Otherwise, he argues, the court is in danger of being misled. He relies on an analogy with the duty of full and frank disclosure when making an *ex parte* application, referred to in *Pearson v Prentice Hall* above and again in *Linsen v Humpuss* [2010] EWHC 303, where the courts have held that "*some disclosure of without prejudice communication will be necessary if it is clear that without it the court may be misled*". He argues that this principle applies in this case.

34. Advocate Wessels for D argues that no such exception for "misleadingness" exists, or if it does, it does not extend to this case, and there is no authority to support that it should do so.

35. Advocate Wessels submits that on proper analysis, what WSS is seeking to argue - although D does not accept that the premise is in fact true - is that a party (D) has taken a different attitude in "without prejudice" communications or negotiations from that which she is now putting before the court, and that insofar as the Trustees have taken into account her previous attitude, it is material for the court to know this in deciding whether or not to bless the Trustees' decision, and if the Court is denied knowledge of this material it will have been misled. However, (Advocate Wessels counters) the only exception to the without prejudice rule which deals with an argument of "misleadingness" is that of "unambiguous impropriety" (see the fifth of the eight exceptions listed in *Unilever v Procter & Gamble* (above), [2000] 1WLR 2436 at 2443-2444). That exception, though, does not apply, he submits, to the bare proposition that a party's attitude in without prejudice negotiations has been inconsistent with its current position, and that not knowing this will mislead the court, for the rather obvious reason that it is precisely the right of a party to adopt a different attitude in without prejudice communications for the purpose of possible settlement, from that which it puts before the court in any later proceedings, which is what is protected by the WP privilege. WSS's argument would therefore logically apply in all cases where WP privilege is invoked, but it obviously does not do so; the "unambiguous impropriety" exception to the doctrine applies only where it is the WP occasion *itself* which is being abused and it is a very narrow exception: see *Savings & Investment Bank v Finken* [2004] 1WLR 667.

36. I reject Advocate Swan's submissions; I prefer those of Advocate Wessels, for D, for the following reasons.

37. Generally, I can see no reason why a "blessing" application should, because of its nature, be regarded as having any special or exceptional status in the context of WP privilege, so as to form yet another separate exception to the general policy of WP privilege. This would have to be justified by some incremental argument from existing situations, having regard to the purpose of the policy behind WP privilege in the first place. I am not convinced of any.

38. First, I can see no analogy between the duty of full and frank disclosure to the court when obtaining an *ex parte* order and the duty of full and frank disclosure to the court when invoking the court's power to bless, and thus to insulate from subsequent challenge, a trustee's decision. The duty in the former case arises because the court is being asked to make an order impinging on the rights of a party who is not before the court, and to do so in a situation where it may later turn out that the order was not justified. The *quid pro quo* for obtaining such assistance from the court is that the party seeking it should disclose all material matters to the court, even those adverse to its interests. The duty of trustees on making a blessing application does not have that added quality. It is more akin to a final determination of parties' rights, although made in anticipation, and it is therefore made in a balanced, rather than an unbalanced, procedural context. The two situations are very different in their context and the Trustees' duty is no more than an emphasis of the ordinary duty of a litigant not to mislead the court. It does not import any policy need to go behind normal principles, such as might apply in the exceptional case of an *ex parte* application.

39. Second, even the authorities cited by WSS in the context of the *ex parte* exception have not, in practice, gone further than requiring revelation of the *existence* of without prejudice communications, as contrasted with their *contents*. Although the courts may have nominally acknowledged that the possibility of requiring disclosure of the *contents* of without prejudice communications was not to be ruled out, these references are at best, therefore, mere *obiter dicta*.

40. I should state here, however, that, in my judgment disclosing the mere *existence* of without prejudice communications is not, in fact, any breach of the WP privilege at all. Although Advocate Swan cites Christopher Clarke J in *Linsen v Humpuss* above as saying (see [51]) that *"The basic rule is that the fact and content of without prejudice communications are not to be disclosed…."* (emphasis added), this appears to have arisen from an agreed concession by the parties, expressed in a generalised form that "*Parties are entitled and bound not to disclose or refer to without prejudice communications"* (see [36] at subparagraph (ii)). That concession seems to me actually to be ambiguous on the specific point whether the fact, as contrasted with the contents, of without prejudice communications cannot be referred to In any event, it was only a concession by counsel, and the precise point was not necessary for the decision. Upholding this proposition would involve that the fact of such communication, as well as their content was somehow, itself, without prejudice". That seems bizarre. It is difficult to see how revelation of that bare fact could ever prejudice the position of any party. Whilst I suppose it might be said that disclosing a readiness to embark on settlement negotiations could suggest a lack of belief in the strength of a party's case which could be "prejudicial" to it, I regard such an argument as tenuous and far-fetched. The court does not decide matters on the basis of such indirect inferences, but on the basis of the merits of the case itself. A party's willingness to settle would be quite irrelevant with regard to determining his substantive rights, if it came to doing so. I would therefore respectfully disagree, to this extent, with the judicial comment cited above.

41. Third, even the exception in the *ex parte* cases is formulated as being a matter of discretion only, on the basis of the court's judgment of the necessity of "trumping" the WP privilege in the particular circumstances. In other words, it involves a clash of public policies. For reasons given below, I take the view, having looked at the materials, that no such "trumping" even approaches being necessary in this case, but neither do I think the situation here is properly analysed as a clash of public policies, because I do not see any such clash.

42. Fourth, and moving on from the claimed *ex parte* application analogy, I accept D's submission that the only other potentially arguable and already recognised exception in this case is the "unambiguous impropriety" exception, but that this simply does not apply in this case, because it is confined to proof that it is the WP privilege *itself* which is being abused. Where the complaint is that a party is making statements in open submissions to the court which are inconsistent with statements he has previously made "without prejudice", the purpose of revealing this is to urge the tribunal to prefer the tenor of the without prejudice statements to the current open statements. What is therefore really being alleged is that the open submissions are perjury. However, it follows from this that the allegation is that the truth was being told in the WP communications - and this actually means that the WP privilege was not being abused at all. The "unambiguous impropriety" exception refers to abuse of the WP privilege itself, and is therefore very narrow: see *Savings & Investment Bank v Fincken* (above). The mere fact that a party is alleged to have put forward a position at a without prejudice meeting which is inconsistent with his open position is not sufficient to bring the case within it, and on analysis, it seems to me, as Advocate Wessels submits, that that is all that is being alleged in this case. The objective may be to try to show that the Trustees' proposals are not in fact as unpalatable to one party (D) as she is alleging, rather than to show an admission of fact or some other matter directly affecting the parties' rights or positoin, but that does not seem to me to make any difference.

43. Fifth, there is the issue of convenience and proportionality balanced against probative value. It is apparent that the use that WSS wish and intend to make of the without prejudice materials will in itself lead to a dispute as to the correct interpretation, both of the disputed materials themselves and of other without prejudice discussions. This is clear from the affidavit evidence of D's solicitor sworn in opposition to the application of WSS. The provoking of "satellite" disputes about what happened in without prejudice negotiations is obviously highly undesirable. It is also immaterial to the merits of the case itself; it is similar to a dispute about materials going merely to the credit or credibility of a witness. The only justification for entertaining such a dispute would be that it was being alleged that an actual compromise agreement had been reached between the disputing parties in the without prejudice negotiations, such that further proceedings would be obviated. Short of that, however, the mere fact that admitting without prejudice materials would provoke yet more disputes of fact which would require determination is a matter which in itself militates against admitting such materials at all.

44. Sixth, I cannot see that there is any good countervailing reason why such materials should be before the court. Whilst I have no doubt that the Trustees would find life easier if they could disclose the content of the without prejudice materials to the court, that it not the test. Since I am satisfied that the without prejudice exception applies only to the communications themselves, and not to either the fact of without prejudice communications having taken place, or to the underlying open materials which may have been considered in them, there will generally be ample open materials available to be put before the court, to explain the Trustees' decision. This will obviously include the fact that the Trustees have been involved in without prejudice negotiations and the obvious inference that they must have had regard to their contents when reaching their decision, even if they are not able to tell the court what those contents were, or what weight they gave them.

45. Therefore, I do not consider that the Trustees' duty of full and frank disclosure is in fact impaired or impeded by the operation of WP privilege upon some of the communications between them and the other parties. Whilst of course, in making their decision, the Trustees "know what they know", and this includes what was said in without prejudice communications, the Trustees only "know" this on the basis that it cannot be revealed in subsequent court proceedings in which they may explain their position. The court will obviously recognise that as a fact. The Trustees cannot be accused of failing to be full and frank just because they respect the WP privilege, and they are entitled to say that that is what they are doing.

46. Seventh, even if the Trustees have issued their application based on certain assumptions as to positions taken in without prejudice communications, they issued it expressly on the assumption and concession, referred to at the end of Mr Buckle's supporting affidavit, that the parties did still have the opportunity to contest their decision if they wished to do so. Having met such a contest on the open basis on which it has been pursued, the Trustees have the opportunity, in response, to review the open materials which they have relied upon in reaching their decision, to introduce into the proceedings any further open materials which they may have thought unnecessary to introduce previously if they were expecting that the parties would respond in accordance with the Trustees' interpretation of what had been said in without prejudice discussions, and, if necessary, to elaborate on their explanations to the Court of their thought processes about the justification of their decision.

47. In connection with that, the fact that the Trustees' position is not materially jeopardised is underlined when the nature of the principal application is borne in mind. Crucially, the Trustees do not have to, and are not seeking to, get the court to agree that their decision is either the best decision or the only "right" decision in the circumstances. A "blessing" application is concerned more with process than substance. The Trustees are only seeking the court's confirmation that, in reaching the decision which they have already made, it appears that they have taken into account all the material matters which they apparently ought to have done, that they have not taken into account anything which is not properly relevant,

and that, against this background, *the decision which they have arrived at is not irrational, or perverse, or a decision which no reasonable trustee could have made.* It follows that the only basis on which admission of without prejudice materials could affect this would be if the Trustees felt that they could only justify their decision as being within the range of rational and reasonable decisions if the contents of without prejudice negotiations were taken into account. Such a proposition is extraordinary, and if it were the case it could well (and quite properly) call into question the Trustees' decision making process. It is certainly not, in my judgment, a point which would justify the withdrawal of the WP privilege from materials reasonably and properly understood by the objecting party to have been "without prejudice" when generated or transmitted.

48. Eighth, it is also to be borne in mind that the main application is not concerned with whether D actually agrees to, or even understands, the basis of the Trustees' decision. That is irrelevant, such that D's actual opinion of the merits of the decision is not, strictly, of any concern at all to the court which will decide whether or not to bless the Trustees' decision. The main application is concerned only with whether the court concludes that the Trustees had sufficient information to be able to make a proper and reasonable decision and have apparently done so, and therefore that the court itself has sufficient information to be able to follow and understand that decision, and conclude (if appropriate) that it is a proper and reasonable decision.

49. Ninth, at a practical level, having considered the content of the documentary without prejudice materials I do not, in fact, consider that they will be of any material assistance to the Deputy Bailiff in deciding the blessing application, on its merits, on the basis of open materials which are or ought otherwise to be available to him. Their proposed introduction also appears to me potentially to be the thin end of the wedge as regards a further application to introduce other, non-documentary, without prejudice materials, the factual accuracy of which is disputed. This is yet another reason why I consider that they would be of no material assistance, and probably even a hindrance, to the Deputy Bailiff in this case. I do not need to go into the details of this, and in this public judgment I will not do so, but this reason is in addition to the other reasons which cause me to conclude that these materials are inadmissible.

50. Lastly, and for completeness, I do not find that the considerations above have any different application to the issues arising on D's procedural application which is before the Deputy Bailiff for disclosure etc, as compared to the main application. D's procedural application is concerned with what open materials ought to be before the court in assessing the objective reasonableness of the Trustees' decision. The question of the without prejudice materials the subject of this application is intertwined with these procedural aspects, and therefore, in my judgment, the considerations of materiality and policy are no different.

(iv) Is P estopped from asserting privilege over the material communications?

51. This ground is raised in respect of the documentary without prejudice materials in this application. It was not strongly argued by WSS, and I reject it.

52. Whilst the creation of an estoppel in without prejudice communications is a recognised possible exception to the general WP privilege rule, it is, again, a narrow exception and, like the similar exception in the case of an allegation that an actual compromise agreement was concluded in without prejudice communications, it requires examining the without prejudice communications themselves to establish whether facts which give rise to an estoppel are disclosed.

53. This therefore requires the demonstration of the following elements: (1) The making of a clear statement or representation by one party to the without prejudice negotiations to another party, (2) which is intended to be acted on by another party, and (3) which is so acted on by that party, (4) to its or his detriment, such that (5) it would be unconscionable to permit the

representing party to resile from the representation. The context of without prejudice negotiations is an unpromising context for making out any such case.

54. In fact, the actual without prejudice documentary materials with which this application is concerned do not seem to me even arguably to give rise to any situation of estoppel against D. It is, rather, the additional (and disputed) allegations about the content of other non-documentary without prejudice negotiations which are the alleged foundation for an estoppel.

55. In addition, there is no arguable allegation that the Trustees acted to their detriment in reliance on any such estoppel. The Trustees issued their application affording the opportunity to the parties for objections, in the normal way, and this is what has in fact occurred.

56. In any event, having seen the nature of the without prejudice materials and surrounding context, and bearing in mind that the statements alleged to have been made by D were all made expressly under the "without prejudice" banner, I cannot see that there is anything unconscionable in D's invoking the WP privilege, either in general principle, or having specific regard to the particular events in this case. The claim of estoppel is not, therefore, made out.

Conclusion

57. For all the above reasons, therefore, WSS's application is dismissed. For the avoidance of doubt, whilst I hold that the subject materials are not admissible into any part of the court proceedings in, or related to, this matter, it is no infringement of this ruling for the fact of "without prejudice" communications or discussions including their dates, to be mentioned to the court. Indeed, I would regard it as right that this circumstance should be known to the court entertaining the application, as it would be material background to the decision which the court is being asked to make. Nor would it be an infringement of this ruling for a party who has made a communication under the "without prejudice" banner subsequently, if so advised, to repeat such communication, or the gist of it, on an expressly open basis, so long as this contained no reference, express or implied, direct or indirect, to the content of earlier without prejudice communications which have taken place.

Her Honour Hazel Marshall QC
Lieutenant Bailiff

2nd October 2017