CA on appeal from QBD, (HHJ Richard Seymour QC) before Auld LJ; Longmore LJ; Toulson LJ. 24th May 2007

JUDGMENT : Lord Justice Auld :

Introduction

1. This is an appeal from a decision of HHJ Seymour QC, sitting as a Judge of the High Court, on Friday 19th January 2007, in which he declined to require the respondent/claimant, Mr Ian Barnetson, to re-serve his first witness statement, omitting from it certain passages that the appellants/defendants, ("Framlington") contended referred to matters that were "without prejudice".

2. The issue for the Court is whether and in what circumstances there may be a dispute prior to litigation or the threat of it, to which the "without prejudice" rule may apply to settlement negotiations between the parties.

The claim and the relevant facts

3. In the action, which Mr Barnetson began on 24th April 2006, he claims damages against Framlington for wrongful dismissal from its employment on 31st December 2005 as its Chief Operating Officer and for other alleged breaches of his contract of employment. Under the contract, which was in writing, the employment was for a term to 1st April 2007. The contract permitted Framlington to terminate it earlier on making certain payments in lieu of notice, which Framlington, by letter of 20th December 2005, purported to do with effect from 31st December 2005. However, its Chief Executive Officer, Mr Robert Kyprianou, had told him, on 28th October 2005, of what it intended.

The facts and the matters in Mr Barnetson's witness statement that Framlington seeks to exclude

4. To indicate the significance of the matters giving rise to the dispute that were to harden into threatened litigation and then litigation, I start with Framlington's engagement of Mr Barnetson in early March 2005 as its Chief Operating Officer and a number of exchanges at that time and over the ensuing months between him and Lord Douro, Framlington's Chairman, and others acting for it. These were detailed in Mr Barnetson's first witness statement in evidence before the Judge and accepted by him for the purpose of determining the issue before him. In summary, and so far as is relevant, his account was as follows.

5. On 7th March 2005, Lord Douro orally offered Mr Barnetson the post of Chief Operating Officer at an annual salary of £172,500 with standard provision at his executive level for a car allowance, pension, holiday, health-care etc. Mr Barnetson also understood from the discussion that he would be entitled to two further significant benefits, namely allotment to him of restricted shares in Framlington ("the Restricted Shares") and participation in its bonus scheme comprising guaranteed and discretionary sums. He accepted the offer and promptly took up the post, the orally agreed terms being left for later written confirmation.

6. However, in the course of protracted efforts by Mr Barnetson to secure such confirmation, the matter of the Restricted Shares and the content of the bonus benefits rapidly become bones of contention between him and Framlington, Lord Douro in particular. According to Mr Barnetson, at least two approaches to Lord Douro in March 2005 failed to secure the sought written confirmation.

7. Eventually, on or about 11th April 2005, he was presented with two draft contracts, which he regarded as incomplete or inaccurate in a number of respects, in particular, as to allotment of the Restricted Shares and bonus. He raised his concerns about the drafts in a meeting with Lord Douro two days later, who indicated that he would have a further draft contract prepared. There were further meetings, at one of which, on 20th April 2005, Mr Barnetson reminded Lord Douro that he had still not received the sought confirmation of his terms of employment, again mentioning the Restricted Shares; Lord Douro again indicated that he would attend to the matter.

8. On 25th April 2005, Lord Douro handed Mr Barnetson a further document purporting to confirm the terms of his contract, and asked him to sign it. Mr Barnetson refused to do so, querying a number of matters in it, in particular, the absence of any mention of what he understood to be his entitlement to the Restricted Shares. Lord Douro's response was one of impatience; he threatened to withdraw Framlington's offer of appointment; he remarked that they would have a very difficult working relationship; and he said that the corporate shareholders would be unhappy with Mr Barnetson, since they needed formal confirmation of his role. As a result of that pressure, Mr Barnetson signed the document. He did so in the belief that Lord Douro would honour the terms he understood they had orally agreed on 7th March 2005, making plain that he regarded the document as incomplete.

9. Further attempts by Mr Barnetson at the end of April 2005 to sort out the matter, this time with Lord Douro and Mr Alain Dromer, a board member of Framlington, were rebuffed. Over the ensuing months he was deterred from raising it again with Lord Douro because of the latter's generally overbearing attitude and because he believed that he would honour his word. However, in early August 2005, he mentioned it to the Chief Operating Officer of AXA Investment Managers, the second appellant, which was negotiating the purchase of Framlington.

10. Eventually, on 26th October 2005, Mr Barnetson wrote to Lord Douro and Mr Dromer seeking resolution of the matter. This gave rise to a telephone conversation on 27th October 2005, in which Mr Barnetson expressed to Lord Douro in blunt terms his dissatisfaction. Lord Douro's response was to terminate the conversation.

11. On the following day Mr Kyprianou told Mr Barnetson that he would be dismissed at the end of the year, and sought to discuss terms for his departure. Mr Barnetson responded on 1st November by presenting Mr Kyprianou with a sheet headed "Ian Barnetson-COO Framlington Settlement", outlining his acceptable settlement terms for early termination of his contract, including what he sought by way of the Restricted Shares and bonus for 2005 and 2006.

12. There followed in due course the first of the following exchanges that Framlington seek to exclude as *"without prejudice",* relating in the main to his pleaded claims for the Restricted Shares and bonus. These are set out by Mr Barnetson in paragraphs 51, 53, 54, 58, 59, 60 and 63 of his first witness statement, and include:

    i) Framlington's counter proposals at a meeting on 18th November 2005 with Ms Louise McMahon, a human resources executive employed by AXA Framlington Group Ltd, as Framlington had now become. According to Mr Barnetson, Miss McMahon put a figure to him for bonus, which he rejected as "rubbish", and challenged his claim to the Restricted Shares. She presented him with a document in the form of a draft Compromise agreement, which he refused to read and returned to her, saying that he would deal only with Mr Kyprianou.

    ii) Discussions between Mr Barnetson and Mr Kyprianou on 22nd and 24th November 2005 including, in particular, an offer by Mr Kyprianou of £175,000 by way of bonus, and Mr Barnetson's insistence on £200,000.

    iii) A discussion on 1st December 2005 in which Mr Kyprianou asked Mr Barnetson if he would accept £200,000 as a settlement figure for the bonus, if he, Mr Kyprianou, could agree it with his colleagues; to which Mr Barnetson assented conditionally on Framlington's acceptance of his claims to the Restricted shares and further bonus.

    iv) Subsequent exchanges up to and including 20th December 2005 proposing changes to the draft Compromise agreement first put to Mr Barnetson on 18th November 2005, including a subsequent offer of £200,000 for bonus.

13. I should mention two further matters.

14. The first is Miss McMahon's claim in evidence that the "draft Compromise agreement" she presented to Mr Barnetson on 18th November 2005 was marked with the words "without prejudice", and that she drew his attention to that. Mr Barnetson, in evidence, denied any mention of "without prejudice" at the meeting, adding that, in any event, he would not have appreciated its significance. The Judge concluded that there was no evidence on which he could rely to find that there was any reference to the term "without prejudice" at the meeting. Even if there had been, as he recognised, given the wider issue between the parties as to the nature of the negotiations, it could not have been determinative either way, either as to the discussions that day or over the whole period of the negotiations from 28th October 2005 to the end of the year.

15. The second matter is that Mr Barnetson, in a letter to Framlington of 13th December 2005, threatened proceedings if the dispute between them was not speedily resolved. Framlington's response was to discontinue the negotiations and, on 20th December, hand him a letter dismissing him as from 31st December, purportedly in accordance with the provision in the contract for early termination on making payments in lieu of notice. That, in turn, prompted Mr Barnetson to issue these proceedings in April 2006 in which the parties have joined issue on, among other matters, the Restricted Shares and his entitlement to bonus.

The application and the Judge's decision

16. Before the Judge, Framlington relied, in support of its application for deletion of passages from Mr Barnetson's witness statement, on evidence in the form of witness statements from Mr Kyprianou and Ms McMahon. Ms McMahon also gave oral evidence. Mr Barnetson also put in a second witness statement and gave oral evidence.

17. Mr Kyprianou, in his witness statement, stated that the "meetings were aimed at resolving any claims which Mr Barnetson may have had against … [Framlington] upon the termination of his employment, thereby (hopefully) avoiding the prospect of Mr Barnetson bringing formal claims before the courts". Ms McMahon, in her witness statement, described the conversations as "aimed at settling the dispute between … [Framlington] and Mr Barnetson without recourse to the Court".

18. Mr Barnetson's evidence, in his second witness statement, was that "the discussions did not start with an attempt to settle a dispute", but that he had agreed to work on the timescale of leaving at the end of the year "and the conversations were concerned with the terms of my departure, in particular a fair bonus for 2005 and my entitlement to Restricted Shares". He also asserted that he had only discovered the meaning of the term "without prejudice" in January 2006 after the negotiations had come to nought and his employment had been terminated. The Judge was to reject that assertion, but also as I have said, to find that when Ms McMahon presented Mr Barnetson with the draft Compromise agreement, on 18th November 2005, she did not expressly draw to his attention that it was "without prejudice".

19. The Judge dismissed Framlington's application, holding that the passages to which it objected did not offend the "without prejudice" rule, because the exchanges to which they referred took place before the commencement of litigation or any basis for potential litigation, and, therefore, at a time when there was no dispute. He was of the view that the exchanges were directed simply at an attempt to agree a variation of Mr Barnetson's contract of employment. This is how he put it, at paragraphs 34 and 38 to 41 of his judgment:

    "34. What is material to the application before me is that the privilege did not apply because the negotiations were to prevent a dispute occurring, not to compromise an extant dispute. …

    38…the discussions were, from each side, not about compromising litigation, as none had been commenced, nor about compromising potential litigation as nobody had threatened to make claims against the other. The discussions were about the agreement, if possible, to a variation of Mr Barnetson's employment contract on terms which would bring it to an end without Mr Barnetson having a grievance he could pursue. On any ordinary

analysis, there was a negotiation between the parties and they were seeking to agree a variation of the contract of employment. If that was it, there is no question of without prejudice privilege applying …

39. So because it was possible that the Defendants might terminate Mr Barnetson's contract, in circumstances he would contend were wrongful, is that enough to make the discussions to which without prejudice would not otherwise apply, apply? In my judgment, the answer is no.

40. The Defendants were not committed to pursuing the course of dismissing Mr Barnetson until notice was given on 20 December 2005. At any point until then it was open to the Defendants to reconsider the position and stand by the terms of the contract. Until notice of termination was given, Mr Barnetson had not even a potential claim against the Defendants for wrongful dismissal. The Defendants had done nothing which would justify making a claim.

41… At no point during the discussions prior to his dismissal did Mr Barnetson threaten to commence proceedings in relation to the Restricted Shares or the bonus. Therefore, until dismissal, Mr Barnetson had no possible grounds for making a wrongful dismissal claim and he had not indicated any intention to pursue a claim for the Restricted Shares or the bonus. In fact, there were no negotiations relating to the Restricted Shares as the Defendants simply rejected Mr Barnetson's offer."

Framlington's case

20. Framlington's case, as put on its behalf by Mr Paul Nicholls, was as follows:

i) There plainly was a dispute. Mr Barnetson set out what he wanted on termination. Had Framlington accepted those proposals, there would have been no dispute. But Framlington responded with a proposed Compromise agreement, which Mr Barnetson did not accept, and pressed for more. It is plain therefore (a) that the parties were in dispute and (b) that they were negotiating; that was enough to render what was said "without prejudice".

ii) The Judge wrongly confined the meaning of a dispute to one that had become the subject of litigation or of threat of litigation. The case-law shows that it is enough that there was a dispute capable of being resolved by compromise and from which, if not so resolved, the parties could reasonably have contemplated that litigation would ensue.

iii) The Judge did not deal with the evidence of Mr Kyprianou and Ms McMahon that the various meetings and exchanges with Mr Barnetson were aimed at resolving any claims he may have had.

iv) On such evidence, the exchanges, read as a whole, could not be properly construed as an attempt by Mr Barnetson to re-negotiate his contract of employment. They reflected a dispute between him and Framlington as to what he was entitled to under the contract and were discussions with a view to a compromise of his claims.

Mr Barnetson's case

21. Mr Barnetson's case, as put on his behalf by Mr Peter Oldham, was as follows:-

i) For a dispute to be capable of engaging the "without prejudice" rule, the case-law indicates that, in general, it must relate to communications made at a time when litigation has begun or has been expressly or impliedly threatened or is at least "proximate". On the facts here the rule did not apply because the parties did not come into dispute until Mr Barnetson began litigation in April 2006, some four or five months after the exchanges in respect of which privilege is claimed, or at the earliest on 20th December 2005 when he was dismissed.

ii) Courts should be cautious of going outside those limits, having regard to the approach of the Court of Appeal in *Prudential Assurance* Co. *v Prudential Insurance* Co [2002] EWHC 2809, from which the editors of *Phipson,* 16th ed., at para 24-14, have drawn the proposition that the rule should be applied "with restraint and only to cases to which the public interest rule underlying it were plainly applicable". In that case the Court held that the rule did not apply because the negotiations in question were to prevent disputes developing world-wide, not to compromise an existing dispute.

iii) A particular area for caution is in the context of employment law, where vulnerable employees should not be subjected to a regime under which an employee's protest against dismissal and all subsequent communications about it become immediately cloaked by the "without prejudice" rule. Mr Oldham cited, as an example, the Employment Appeal Tribunal's ruling in *Paribas v Mezzotero* [2004] IRLR 508, that the mere raising of a grievance as to discrimination by an employee did not put the parties "in dispute", and section 203 of the Employment Rights Act 1996 subjecting compromise agreements relating to employees' statutory rights to stringent conditions.

iv) In the alternative, where parties begin negotiations on "an open basis", a party seeking to rely on the "without prejudice" rule in respect of the continuance of those negotiations, must have signalled to the other party if and when a change occurred so as to engage it. Mr Oldham maintained that, if that is what happened here when the parties first began discussions on 28th October 2005, Framlington did not subsequently so indicate. At no stage in the course of the relevant exchanges was there mention that they were "without prejudice".

v) In the further alternative, the Judge correctly found that the discussions were about avoiding a dispute by variation of the employment contract rather than settling a dispute, a finding of fact that this Court should not disturb.

The "without prejudice" rule

22. Written or oral communications made as part of negotiations genuinely aimed at, but not resulting in, settlement of a dispute are not generally admissible in evidence in litigation between parties over that dispute. It is trite law that the use or non-use of the words "without prejudice" in such negotiations may indicate whether the communication(s) in question may attract the privilege, but is not necessarily determinative on the point; see *Phipson,* para 24-16 to 24-18.

23. The "without prejudice" rule, it is often said, may have two main legal bases.

24. The first and more commonly advanced basis is one of public policy, namely, to encourage those in dispute to settle their differences without recourse to or continuation of litigation. It is on this basis for the rule that Framlington mainly rely. The second, albeit of limited application and of doubtful legal respectability,[1] is contractual, that is, where the parties agree expressly or impliedly that it should apply. Framlington also rely on this basis, maintaining that the inclusion in the exchanges of draft "compromise" and "settlement" proposals and counter-proposals suggest an implied agreement that what passed between them and Mr Barnetson was "without prejudice", notwithstanding the Judge's rejection on the evidence before him of an express agreement to that effect.

25. However, the main battleground between the parties on the appeal concerned the possible ambit of a "dispute" for this purpose, more particularly, how proximate it must be to litigation to engage the rule.

26. The familiar and authoritative starting point for such enquiry is the rationale identified by Lord Griffiths, speaking for the House, in ***Rush v Tompkins Ltd v Greater London Council*** [1989] AC, 1280, at 1299E-F, who described it as: *"…founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish."*

    Although ***Rush v Tompkins*** was a case in which the material in question had arisen in the course of litigation, it is plain from Lord Griffiths's ensuing reference to the words of Oliver LJ in ***Cutts v Head*** [1984] CH 290, at 306, that the prime function of the policy was to discourage parties from *resorting* to litigation at all, as well to encourage those already embroiled in it to discontinue it:

    "It [the rule] is nowhere more clearly expressed than in the judgment of Oliver LJ in ***Cutts v Head*** *… [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 …may be used to their prejudice in the course of the proceedings. … 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."* [my italics]

27. It follows that, for the "*without prejudice*" rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun. If there were any doubt about that bare proposition, it is dispelled by the following authorities and applications of it.

28. In ***Bradford & Bingley plc v Rashid*** [2006] 1 WLR 2066, AC, the House of Lords proceeded upon the basis that exchanges some 21 months before the start of litigation could attract the rule in the same way as exchanges after the start of litigation. The issue there was whether admissions by a mortgagor in default as to his liability to pay the amount outstanding, against whom his mortgagee had obtained possession, were admissible in subsequent proceedings by the mortgagee for the arrears. No point arose on the appeal as to the exchanges in question having taken place before commencement of the relevant litigation, the only question being whether an acknowledgement of debt, as distinct from an offer in negotiations with a view to compromise of a disputed liability, was caught by the rule. The House held that it was outside the rule, as not coming within the public policy interest of encouraging settlement of a dispute. It was implicit in all their Lordships' speeches that the rule, if applicable at all, included exchanges in negotiation before the start of the proceedings for the arrears. Lord Walker of Gestingthorpe, for example, described the public policy interest, at paragraph 37: *"in encouraging the settlement of disputes so as to avoid (or at least shorten) litigation"*

    Lord Mance, at paragraph 81, indicated the breadth of the policy, albeit obiter, by reference to Lord Griffiths's observations in ***Rush v Tompkins***: *"The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) … The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)".*

    See also per Lord Hoffmann, at paragraph 18, in his reference to the background for the ruling of Court of Appeal in ***Unilever PLC v The Proctor & Gamble Co*** [2000] WLR 2336.

29. A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege. Were it not so, a party to a dispute could never safely make, by way of negotiation, an initial offer in response to a claim; see ***South***

[1] See David Vaver, *"Without Prejudice" Communications – Their Admissibility And Effect"* [1974] U Br Col LR 85, at 97-101, an article commended in *Phipson,* para 24-14, fn 47

Shropshire District Council v Amos [1986] 1 WLR 1271, CA, a Lands Tribunal case, which concerned *"without prejudice"* negotiations in a dispute that arose long before reference to the Tribunal as to the amount of compensation payable in respect of a discontinuance of business use order made under section 51(1) of the Town and Country Planning Act 1971. Parker LJ, giving the judgment of the Court upheld, at 1276D-1278A, the ruling of Gatehouse J that *"without prejudice"* negotiations could begin with an *"opening shot"*, that is, an initial offer from one party in dispute with another setting out his proposal for settlement of his or the other's claim giving rise to the dispute, and could continue with the ensuing exchanges, all before the commencement of proceedings.

30. The public policy interest in avoidance of litigation has, with the new Civil Procedure Rules, received firm recognition and support in the "Offers To Settle" provision in part 36.10. The courts, when considering matters of costs, must now have regard to offers to settle made before, as well as after, the commencement of proceedings – *"one of the cornerstones of the reforms of procedure made by the CPR"*, as Lord Woolf MR (as he then was) described them in ***Petrograde Inc v Texaco Ltd*** [2002] 1 WLR 947, CA, at Para 55. Although ***Petrograde*** did not concern the application or extent of the "*without prejudice*" rule, the following words of Lord Woolf, in the same passage, are clearly of general effect and have particular relevance to the desirability of encouraging early settlement of disputes: *"Part 36 makes significant changes to the previous practice and procedure relating to payments into and out of court under what was RSC Ord 22. The first of these changes is that offers to settle can be made before as well as after the commencement of proceedings. In the case of both, the court is required to take into account an offer when making any order as to costs. In particular, … they may now be made by a claimant."*

Thus, as Longmore LJ pointed out in the course of submissions, the CPR provisions in this respect are predicated on the desirability of "without prejudice" negotiations for settlement taking place before commencement of proceedings.

31. Early settlement of disputes is as important in the employment field as elsewhere, notwithstanding the existence of special provisions governing compromise of statutory employment claims. Such restrictions do not bear on the "without prejudice" nature of communications arising in proceedings to which they apply. See e.g. ***Hinton v University of North East London*** [2005] IRLR 552, a case concerning the ambit of section 203 of the Employment Rights Act 1996, which, subject to certain exceptions, renders void any provision in a contract purporting to preclude an employee from instituting proceedings before an employment tribunal. However, even in that context, Mummery LJ began his judgment with the words: *"Like other people, employers and employees sensibly settle most of their disputes. The law encourages them to mend their differences. It upholds and enforces compromises. The last thing that they want and the employment tribunals need is a dispute about an agreement aiming to resolve a dispute. … ."*

32. The question remains, how proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation, be to the start of that litigation, to attract the "without prejudice" rule. Must there be, as Mr Oldham contended, an express or implied threat of litigation underlying the negotiations, or, failing any such threat, some proximity in time to the litigation eventually begun? In answering that question, the courts are logically driven back, as Mr Nicholls submitted, to the public policy interest behind the rule, of encouraging parties to settle their disputes without "resort" to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation – hardly the encouragement to settle their disputes without *resort* to litigation that Oliver J had in mind in ***Cutts v Head***.

33. On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases to which I have referred do not provide any precise pointers, and there are seemingly no other authorities directly in point.

34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.

35. Most of the judicial observations on the rule and the public policy underlying it have been made in cases where the communications in question were made after litigation had been commenced. However, as I have mentioned, in ***Bradford & Bingley v Rashid***, they ante-dated the start of proceedings by about two years; and in ***South***

Shropshire District Council v Amos, the Court of Appeal was not deterred from upholding Gatehouse J's acceptance of negotiations as privileged long before referral of the matter to the Lands Tribunal.

36. In the light of the guidance derived from the jurisprudence, I have no hesitation in concluding that the Judge was wrong to reject the claim for privilege, as he did in paragraph 38 of the judgment, on the basis that there was no dispute between the end of October and mid-December 2005 because at that stage no litigation had been commenced or threatened. The summary history that I have given of what, on Mr Barnetson's account, had passed between him and Framlington between early March and late October 2005, culminating on 28th October 2005 in Framlington's notification of its intention to dismiss him at the end of the year, demonstrates that they were already well and truly at odds as to his contractual entitlement. All that followed over the next six or so weeks of exchanges, including those the subject of Framlington's claim of privilege, amounted to wrangling over the terms of that entitlement, not discussions as to variation of them as the Judge found.

37. The amount of money in issue between the parties and the manner and content of the negotiations were such that both were clearly conscious of the potential for litigation if they could not resolve the dispute without it. As I have indicated, Mr Kyprianou and Ms McMahon's evidence was, in general,[2] of a piece with Mr Barnetson's account of the exchanges – which the Judge accepted. On his evidence, Mr Kyprianou, on 28th October 2005, suggested that they should discuss terms for him to leave Framlington at the end of the year because "there would be no role for him in the new structure". It was a clear indication of Framlington's intention to dismiss him before the expiry of his full contract term, an intention to which Mr Kyprianou and others involved at Framlington adhered throughout the ensuing negotiations. And throughout, Mr Barnetson's stance was that dismissal on the terms proposed by Framlington would be unlawful and/or unfair because they did not conform with his contractual entitlement. It is noteworthy too that, on 13th December 2005, before the final abandonment of the negotiations, he wrote to Framlington, threatening proceedings if the dispute between them was not speedily resolved.

38. The resultant picture is one of negotiations arising out of a dispute as to Mr Barnetson's contractual entitlement on his early dismissal, all against the backcloth of potential litigation if they could not resolve the dispute by compromise. It is not a picture of negotiations to vary his contractual entitlement against the possibility that he might not be dismissed after all, or to accommodate the proposed early dismissal, with no thought given on either side to potential litigation if variation were not agreed.

39. For those reasons, I am of the view that the exchanges the subject of Framlington's application are covered by the "without prejudice" rule. I would, therefore, allow its appeal and, subject to any matters of detail that may arise on the formulation of the order, direct amendment and re-service by Mr Barnetson of his first witness statement and exhibits to it, as sought by Framlington.

Lord Justice Longmore

40. I agree.

Lord Justice Toulson

41. I also agree.

Mr Paul Nicholls (instructed by Slaughter & May) for the Appellant
Mr Peter Oldham (instructed by Ferguson) for the Respondent

[2] Apart from Ms McMahon's account as to the mention of the words "without prejudice" at the 18th November meeting.