JUDGMENT : MR. JUSTICE LEWISON: Chancery Division. 1st November 2005

1 In action HC03C02663, which I shall call the main action, Mr. Hall and Momentous Contracts Ltd. sue two defendants, to whom I will refer as VIP, although that was not their name at the time. In the action the claimants claim the return of documents of which they claim ownership (the proprietary claim), injunctions restraining the use of or dissemination of information contained within the documents (the confidentiality claim) and, in Mr. Hall's case, remuneration for work carried out or a quantum meruit claim (the employment claim).

2 The action has had a chequered history. It began in July 2003 when Mr. Justice Jacob made a consent order dealing with the documents on which property was claimed. They have since been held by the claimants' solicitors. The action has been stayed from time to time for the purpose of settlement discussions and mediation.

3 On the 16th April 2004 VIP paid £20,000 into court in respect of the employment claim. That payment was made under Part 36 of the Civil Procedure Rules.

4 Mediation ultimately took place over two days, on the 19th March 2004 and the 25th May 2004. On the second day of the mediation VIP withdrew a second Part 36 offer that it had previously made. It is not now alleged that the withdrawal of that offer was ineffective. Mr. Justice Hart has already ruled that in withdrawing the offer VIP acted lawfully. The mediation did not result in a settlement.

5 On the 11th February 2005, some eight months after mediation, VIP began action HC05C00311 against Mr. Hall (the satellite action). The particulars of claim alleged that in breach of express or implied terms of the mediation agreement Mr. Hall stated to third parties certain threats had been made against him at or shortly after the mediation. In the particulars of claim VIP specifically denied that such threats had been made. Mr. Hall's defence asserts that the mediation had already concluded by the time the threats were made and that they were in fact made, but he denies having communicated those threats to the persons named in the particulars of claim. It is common ground, as I understand it, that the disputed conversation concerned was a one-to-one conversation between Mr. Hall and another rather than any plenary session in the mediation itself.

6 On the 22nd November 2004 the defendant's solicitor, Mr. Goodrham, made a witness statement in which he accepted that the claimants, or one of them, had a good proprietary claim for the return of the documents.

7 On the 1st December 2004 Mr. Hall decided to ask for permission to accept the Part 36 payment in satisfaction of the employment claim, and permission was given by Master Teverson on the 18th February 2005. Meanwhile, in the light of the admission of the proprietary claim, the claimants applied on the 25th January 2005 for judgment on admissions on the proprietary claim and for permission to discontinue the confidentiality claim. Mr. Hall has also applied for permission to withdraw his defence in the satellite action.

8 One question that will or may arise is what costs order the court will or would make on those applications. There is, however, a preliminary dispute between the parties as to whether, in considering that question, the court should have regard to (a) the threats alleged to have been made in the course of or shortly after the mediation, and (b) the circumstances in which the Part 36 offer came to be withdrawn. Mr. Corbett Q.C., who appears on behalf of VIP, says that no regard should be paid to either of these matters. He says (a) they are covered by without prejudice protection, (b) they are irrelevant to the substantive relief sought in the main action, and (c) reference to these matters is an abuse of process because references to them have already been struck out by Mr. Livesey Q.C., sitting as a Deputy Judge of the Chancery Division, on an application for security for costs, and that His Honour Judge Reid Q.C., likewise sitting as a judge of this Division, has directed that at trial the main action should come on for hearing before the satellite action.

9 I deal first with the question of without prejudice protection. Without prejudice protection is based on two strands: first, the public policy which encourages parties to speak frankly in attempting to settle their disputes. This strand of public policy is concerned primarily with the making of admissions that are germane to the subject-matter of the underlying dispute. The second strand is implied agreement

between the parties. This strand can be altered by agreement between the parties, of which the most common example is the making of an offer without prejudice save as to costs.

10 The starting point for the consideration of the modern law is the decision of the House of Lords in **Rush & Tompkins Ltd. v. Greater London Council & Anor.** [1989] 1 A.C.1280. The leading speech was delivered by Lord Griffiths, with whom the other law lords agreed. At p.1299 he said: *"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 to a finish."*

Having quoted from a judgment of Lord Justice Oliver, Lord Griffiths continues:*"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."*

Having then considered authority, Lord Griffiths reached his conclusion in the following terms: *"I would therefore hold that as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party."*

11 The next case I should refer to is the case of **Unilever plc v. The Procter & Gamble Co**. [2000] 1 W.L.R.2436, a decision of the Court of Appeal. That was an action for a declaration that threats to sue for patent infringement were unjustifiable. The threats relied upon were in fact made in the course of a meeting to settle existing disputes. The question therefore was whether threats made in the course of a without prejudice meeting could found an action. The Court of Appeal held no. Lord Justice Robert Walker gave the leading judgment and, having considered the decision of the House of Lords in the Rush & Tompkins case at some length, he then went on to consider the general scope of without prejudice. At p.2444 he said this: *"At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Lord Justice Simon Brown put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Lord Justice Leggatt put it in **Muller v. Linsley & Mortimer** [1996] P.N.L.R.74, 81, a concept as implausible as a curate's egg (which was good in parts)."*

Lord Justice Robert Walker then went on to list a number of exceptions to the without prejudice protection. Those exceptions included the following: *"(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel."*

Then under sub-para.(4), and I will omit citation of authority: *"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'** ..."*

Lord Justice Robert Walker went on to say that the Court of Appeal had warned that that exception should be applied only in the clearest case of abuse of a privileged occasion. Under sub-para.(5) Lord Justice Robert Walker said: *"Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence."*

Under sub-para.(6), he pointed out that if the statement relied upon was unconnected with the truth or falsity of anything stated in the negotiations it might fall outside the principle of public policy protecting without prejudice communications. However, he also pointed out that in the case to which

he referred the other members of the court would have based their decision on waiver, that is to say, implied agreement between the parties. Lord Justice Robert Walker then referred to the practice of making offers without prejudice except as to costs, and said: *"There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach."*

In reaching his general conclusions at p.2448, Lord Justice Robert Walker said that the court should give effect to the principles stated in the modern cases, and that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. He continued: *"They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the* ***Rush & Tompkins*** *case … '****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."*

He then turned to the specific facts of the case. The case, as I have said, was a claim based on threats of patent infringement which had been made at the without prejudice meeting, and at p.2449 Lord Justice Robert Walker said that the judge was right to conclude that it would be an abuse of process for Unilever to be allowed to plead anything that was said at the meeting either as a threat or as a claim of right.

12 The next case to which I should refer briefly is the recent case, again in the Court of Appeal, of **Reed Executive plc & Anor. v. Reed Business Information Ltd. & Ors.** [2004] 1 W.L.R.3026. Two points, in my judgment, emerge clearly from that case. The first is that the assumption made by the Court of Appeal in the earlier case of **Halsey v. Milton Keynes General NHS Trust** [2004] 1 W.L.R.3002, that what happens in a mediation is protected by the without prejudice rule is correct, and, second, that parties may mutually agree to waive that protection.

13 Finally I should refer to another decision of the Court of Appeal in **Savings & Investment Bank Ltd. (in liquidation) v. Fincken** [2004] 1 W.L.R.667. This concerned the scope of the so-called unambiguous impropriety exception to the without prejudice rule. The decision is, I think, adequately summarised in the headnote to the following effect: *"… that although cases of unambiguous impropriety were an exception to the general rule that without prejudice communications were inadmissible in evidence, that exception is not to be applied too readily in view of the public interest in encouraging parties to speak frankly to one another in aid of reaching a settlement; that absence of challenge might make it easier to establish that an admission was unequivocal, nevertheless, the absence of challenge was not the same thing as an unequivocal or unambiguous impropriety; that it was not the mere inconsistency between an admission and a pleaded or stated position, with the mere possibility that such a case or position, if persisted in, might lead to perjury that led to the admitting party losing the protection of the privilege, rather it was the fact that the privilege was itself abused …"*

14 Most of the cases concern attempts to rely on admissions made in without prejudice negotiations in the course of the underlying dispute itself. It is clear that any such attempt will be permitted only in exceptional circumstances. But that does not, in my judgment, mean of itself that the conduct of the mediation is a no go area. One example I gave in argument was that of an assault which takes place in the course of a mediation. But in most cases the kind of event that takes place in a mediation into which the courts will inquire would be quite irrelevant to the underlying dispute. It seems to me that the more relevant to the underlying dispute the events are the more likely they are to be covered by the without prejudice protection.

15 It is also I think possible to conceive of a case in which threats made in the course of mediation so frightened one party to litigation that he wanted to bring the process to a halt irrespective of the merits of his claim. In such a case it is possible, although I do not say that this is necessarily the case, that the court would inquire, but that is not this case. Despite a rather tendentious statement by Mr.

Cohen, the claimants' solicitor, that the names of potential customers of Mr. Hall could not be revealed because of an alleged propensity to violence, the application to discontinue the confidentiality claim is not based on an allegation of this kind; not least, the claimants wish to proceed with an inquiry into damages in which the names will have to be revealed if their claim is to succeed. The application to discontinue is based on an assertion that Mr. Hall has achieved all that he needs to achieve.

16 Mr. Corbett submits that the exception to the without prejudice protection and the case of unambiguous impropriety does not apply here. The allegations of impropriety are hotly contested so they are not unambiguous. The exception should be sparingly applied. Moreover, the impropriety does not go to the merits of the underlying claim. In principle, I accept this submission. In the ordinary way I would hold that allegations of threats made in the course of mediation are covered by without prejudice protection. The peculiarity of this case is the existence of a satellite action. In that action VIP do not simply plead that the revelation of anything said or alleged to have been said in the course of the mediation is covered by without prejudice protection, they positively aver that no threats were made. That averment was made in a pleading which is prima facie a public document. The allegation was responded to in the defence, which is also prima facie a public document. Thus, the pleadings in the satellite action squarely raise the factual issue of what happened in the mediation as regards that particular event. Those allegations seem to me to be a mutual waiver by both parties of the without prejudice protection so far as concerns that discrete matter which took place in the course of a discrete meeting, and which Mr. Hall attended.

17 Mr. Corbett points out that the allegations are hotly contested and that if Mr. Hall withdraws his defence they never will be tested. He is right. On the other hand, if the defence is withdrawn VIP would be entitled to judgment on its claim in the satellite action. I do not regard this factor as an argument of substance. Inherent in any case in which serious allegations are made is the possibility that the allegations will never be tested if the defence is abandoned, or indeed if a claim is abandoned.

18 Mr. Corbett next says that the allegations of threats are irrelevant to the substance of the main action. In my judgment, he is right. Mr. Speck does not, I think, argue the contrary. Mr. Speck says that he wishes to have the opportunity to argue that I should take a global view on costs having regard to all the litigation. The question at this stage, as it seems to me, is whether I should shut that argument without hearing it. I do not think that I should. In so saying I do not express a view one way or the other on the merits of the argument, although Mr. Corbett in the course of his reply did I think begin to address those merits.

19 I can I think deal with the abuse of process arguments relatively shortly. Mr. Livesey Q.C. struck out references to the threats as being scandalous. Scandalous in this sense means irrelevant and prejudicial. The nub of an allegation that a pleading or evidence is scandalous is that the person making the allegation is abusing the privilege afforded by the legal process merely to vilify another. If an allegation is relevant to the matters in dispute it will not in the ordinary way be scandalous, no matter how serious it is. The allegations that Mr. Livesey struck out were made in the context of an application of security for costs in the main action, to which they were obviously irrelevant. But of more importance is the fact that at the time when Mr. Livesey made his order striking out the passages the satellite action had not been started. In my judgment, that makes all the difference. By positively averring that the threats were not made VIP have put their existence or non-existence into the public arena.

20 So far as the order made by His Honour Judge Reid is concerned, I accept Mr. Speck's submission that a direction about the order of trial is a different question to whether I should take a global view of costs if no trial is to take place. I emphasise that Mr. Speck does not invite me to look at any material other than what is pleaded. I rule therefore that I can take into account the fact that the allegations and counter-allegations in the satellite action have been pleaded.

21 The circumstances in which the Part 36 offer came to be withdrawn are, in my judgment, different. Mr. Corbett accepts that in considering costs I can take into account (a) the fact that the Part 36 offer was made, the date on which it was made and the terms of the offer, and (b) the fact that it was

withdrawn and the date on which it was withdrawn. But he says that, if and insofar as it is alleged that the circumstances in which it was withdrawn spring from anything said or done at the mediation, what was said is covered by the without prejudice cloak and has not been waived. In my judgment, he is right. Mr. Speck points to an oblique reference which he says is a reference to what happened in the mediation in a witness statement made by Mr. Goodrham on the 19th January 2005. The particular part of the witness statement upon which Mr. Speck relies is a reference by Mr. Goodrham to *"the fact that a dispute arose between the parties as to the scope of the offer"*. I do not regard that as amounting to any sort of waiver of without prejudice discussions at the mediation and, as I have said, it seems to me that, insofar as there was a waiver relating to the threats, that was a waiver in relation to a discrete matter.

22 I do not consider that Mr. Speck is entitled to open up what was said or done at the mediation insofar as it goes wider than what has been pleaded in the satellite action. In my judgment, what happened at the mediation is covered by the without prejudice protection.

23 I rule therefore that the circumstances in which the Part 36 offer came to be withdrawn, insofar as those circumstances arise out of the mediation, are not things that I can take into account in deciding the question of costs.

MR. J. CORBETT QC appeared on behalf of the Claimants.
Mr. A. SPECK appeared on behalf of the Defendants.