In the matter of New Gadget Shop Ltd & the Gadget Shot Ltd and in the matter of the Companies Act 1985

JUDGMENT : Mr Justice Mann : Chancery Division **:** 22nd July 2005.

Introduction

1. This is the hearing of a pre-trial review in this petition, which is brought under s.459 of the Companies Act 1986. The main allegations in the petition are that certain of the defendants wrongfully diverted business opportunities and deprived the trading subsidiary of the subject company of the benefit of those transactions. The main dispute before me was on the question of the striking out of witness statements. Before turning to those issues, I will deal with some of the minor issues arising in relation to which there was in the end no dispute or little dispute.

Minor Issues

2. I rule on the minor issues as follows:
   i) Disclosure applications were made by various of the defendants. Disclosure was sought of certain specified documents as against the petitioner and as against a Mr Wood, for whom the petitioner holds various of his shares as trustee. In the end Mr Michael Crystal QC, who appeared for the petitioner, accepted that there should be an order for disclosure by list of the relevant category of documents within 14 days. For these purposes he was able to accept this on behalf of Mr Wood as well. I therefore order that disclosure within 14 days.

   ii) There was originally a dispute as to whether or not the court should make an order as to the order in which the defendants call their witnesses. In the end that was not pursued before me, and Mr Crystal indicated that there should instead be a date by which the claimant would be told of the order in which the defendants' witnesses would be called. Mr Onions QC, who appeared for the 1st, 3rd, 4th and 6th respondents ("the WCC respondents") resisted this notion. Alternatively, he said, if there were to be a date it should be 14th October, which is approximately two weeks before the trial is likely to start. This is a factually complex s.459 petition, with some interlocking of evidence. It will be helpful to each party to know the order in which the other propose to call witnesses, but I do not think that it will be either helpful or necessary to make that too binding. The course of trials is often so fluid as to require flexibility in the order of calling witnesses, and sometimes questions such as the convenience of witnesses has to be addressed. I would therefore not wish to lay down anything which could be construed as a rigid timetable from which the parties could only depart with difficulty. I shall order that each party shall inform the other by 14th October 2005 of the order in which they then intend to call their respective witnesses and that thereafter, up until the opening of the trial, 48 hours' notice be given of any intention to change that order. During the trial that order may be departed from by agreement between the parties or with the permission of the trial judge.

   iii) There has been an order for a joint expert to be instructed in this case. There was a dispute as to whether he should be ordered to produce his report by the end of August or by the end of September. He was not represented before me, but a letter from him was placed before me which to some extent gave his views as to the proposed timings. In the light of that letter I shall order that he use his reasonable endeavours to produce his report by 4 p.m. on Wednesday 14th September; and that in any event he produce it by 4 p.m. on Friday 23rd September 2005. There must be a long stop date, and the purpose of this two-limb order is to indicate to him that in fact it would be desirable, if possible, that the report be produced before the long stop date.

   iv) Questions for the expert. There was a dispute as to certain questions which the respondents propose to put to the expert, since they were said by the petitioner not to go to the specific question which the expert was asked to address at this point, namely the basis (but not quantification) of the valuation of shares if (as the petitioner claimed) the respondents were to be ordered to buy out the petitioner's shares. This dispute fizzled out when I proposed that the expert be required to address those points so far as (but only so far as) they went to the question of the basis of the valuation. I shall therefore so order.

   v) Timetabling for the trial was floated before me but no-one (rightly in my view) asked me to make an order; I shall therefore not do so. At least one of the parties also flagged a potential dispute about

how the costs of a livenote transcript would initially be borne. Very wisely, the parties decided to agree this matter without putting it before me for a ruling.

The witness statement issues

3. This brings me to the main issue on this pre-trial review, which took up most of the time in argument. This issue relates to the extent to which parts of the petitioner's witness statements ought to be struck out at this stage. The evidential passages fall into two categories. The first is a group of paragraphs which Mr Onions says cannot go to any of the issues in the petition in the way in which they are formulated, and if they remained in (and potentially lengthen the proceedings) would require disproportionate if not profitless further investigation in evidence. In essence he is asking me to strike out those passages on the grounds of irrelevance or conceivably proportionality. The second group of paragraphs are paragraphs that he invites me to strike out on the basis that they contravene the bar on adducing without prejudice correspondence. Mr Spitz, for the remaining respondents, supports Mr Onions. I will deal with the groups of the paragraphs in that order.

4. In support of his application that I should strike out paragraphs in the witness statements now on the grounds of obvious irrelevance and/or disproportionality, Mr Onions drew my attention to various cases which demonstrate the power of the court to control adducing evidence. ***Re Unisoft Group Limited* (No 3)**[1994] 1BCLC 609 was a case in which Harman J observed (in the context of a s.459 petition) that the courts had to be careful not to allow the parties to trawl through irrelevant grievances. In ***Vernon v Bosley*** [1999] PIQR 337 Hoffman LJ approved a passage from the judgment of Sedley J below, in which Sedley J had said: *"A point comes at which literal admissibility has to yield to the constraints of proportionality… such proportionality may in any one case depend on issues of remoteness, fairness, usefulness, the ratio of cost benefit in terms of time or money and other things besides."*

Hoffman LJ approved that, with one slight modification*: "I think I would prefer 'relevance' to 'literal admissibility' but the general tenor of this passage expresses the principle which I have tried to explain in my own words, namely that in some cases a ruling on admissibility may involve weighing a degree of relevance against 'other things'."*

5. Those cases, and indeed others in a similar vein, illustrate the very important powers of the court to control proceedings before it to make sure they remain manageable, proportionate and fair to the parties. If one were constructing a list of cases to which that power might be thought to be particularly appropriate, unfair prejudice petitions would be fairly high on the list. However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial. It is noteworthy that the two cases which I have referred to above were both cases in which the issues as to evidence arose during the course of trials. By the time that the issue arises in that context, the judge is likely to have a much fuller overall picture of the issues in the case and of the evidence which is going to be adduced in support of them. In a large number of cases, he or she is likely to be in a better position to make judgments which turn on the real value of the line of evidence in question and its proportionality, and in very many cases its admissibility. A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time- and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden.

6. As far as the relevant passages which I am currently considering are concerned, I do not consider that the defendant has discharged that burden. I will not set out all the paragraphs which are under attack. There are about 20 of them in about five different groups. On a purely numerical basis, they form a very small part of the evidence that the claimant will seek to adduce, though that by itself is not a reason for

leaving them in. In relation to none of them am I satisfied that they can never be relevant, or can never be sufficiently helpful to the petition or to the trial judge so as to make it right to strike them out now. Indeed, my present view in relation to some of them is that they were plainly relevant as part of the background narrative at least. Mr Onions relied on the fact that in relation to at least some of them, the respondents would have to adduce some further evidence of their own in order to deal with them. At least two of the groups describe events in which one of the respondents is said to have let down either a third party or one of the principal protagonists in other business ventures, and Mr Onions submitted that it would not be helpful or desirable for those other transactions to be debated in these proceedings which do not currently directly involve them. There may be a lot in what he says about that. The investigation of the background to most s.459 proceedings is intricate enough by itself, and I can quite see why the trial judge would be most reluctant to carry out an investigation of other business dealings which are not directly in issue. However, I am unable to say at this stage that the court would inevitably wish to hear nothing at all about those points. I am sure that the extent to which the court would want to go into it is likely to be limited, but it would be inappropriate for me to say at this stage how limited that would be. Similar remarks would apply to the other paragraphs which Mr Onions seeks to strike out. In the circumstances, I decline to strike out the parts of the petitioner's witness statements currently under consideration. The WCC respondents can make submissions on this to the trial judge who will be much better placed to make a fairer judgment as to the relevance, helpfulness and proportionality of this evidence. I should make it clear that nothing in this judgment is intended to debar the respondents from taking those points at the trial and seeking a ruling if they wish to do so.

7. Mr Onions' fallback position was that if the evidence was to be allowed to stand for the time being, then he should be allowed to put in some evidence to answer it. This was not opposed by Mr Crystal, and I will make a direction that his clients be at liberty to do so by a date which I think the parties have already agreed between themselves for this purpose.

8. The second batch of paragraphs require separate consideration. Mr Onions' attack on these goes beyond an attack on their relevance or proportionality. He submits that they contravene legal principles concerning the admissibility of without prejudice correspondence. It seems to me that a point such as this is rather more amendable to a pre-trial ruling since it turns on legal principles going beyond relevance, helpfulness and proportionality. In order to consider this matter, I have to deal with the paragraphs, and indeed the pleadings, in a little more detail.

9. The petitioner is a Mr Peter Wilkinson. He holds some of his shares beneficially, and some of them in trust for a Mr Wood, who was closely involved in the business of the subject company from time to time. I have already set out the main complaints made in the petition and in the reamended points of claim. Paragraph 7 of the amended points of claim is headed "*The '**in principle**' settlement*". It then goes on to read as follows:

"*7.1 On 19th September 2003 the parties reached an agreement in principle to resolve this dispute. Negotiations in respect of the details broke down finally in February 2004.*

7.2 The Investors simply abandoned the agreement reached in principle after some five months of costly negotiations with the assistance of lawyers and accountants.

7.3 The Petitioner will contend that the Investors were not negotiating in good faith but were, rather, temporising.

7.4 This further contributes to the distrust in which the Petitioner holds the Investors.

7.5 The Investors have since made open offers to the Petitioner including that he be bought out on the valuation of an independent valuer. However, the only bases on which the investors have been prepared to allow such an independent valuer to provide such a valuation falls far short of the valuation to which the Petitioner contends that he is entitled…."

The expression "Investors" is intended to connote various of the active respondents; it does not matter for these purposes which, but they include Sir Thomas Hunter.

10. There is no application to strike out these paragraphs in the Points of Claim (slightly oddly to my eyes, bearing in mind the attack on the evidence, but there it is). The offer referred to in that paragraph is dealt with in witness statements from Mr Wood and Mr Wilkinson. Mr Wood deals with it in three paragraphs. In paragraph 216 he lists three meetings with various of the protagonists in this case, the last

of which took place on 19th September 2003. Paragraph 217 describes how at that meeting he and Mr Wilkinson on the one hand and Sir Thomas Hunter (the 4th respondent) and Mr James McMahon (the 3rd respondent) on the other reached an agreement to resolve the dispute. They shook hands and assurances were given that the deal would not be changed. It is not alleged that that was a binding deal. Paragraph 218 refers to the fact that the deal had to be documented. Attempts were made to do so. However, at the end of January 2004 it is said that Mr Hunter had announced that he was not prepared to honour the 19th September agreement. At the end of paragraph 218 Mr Wood says: *"It had become increasingly obvious over the course of my dealings with Mr Hunter that he was not a man of his word and that he was not somebody who could be trusted."*

He was not surprised that Mr Hunter had *"reneged on his word again"*.

11. Mr Wilkinson deals with the same events in paragraphs 118 to 125 of his witness statement. He starts by referring to attempts made by others to settle the dispute between the parties. He then refers to the meeting on 19th September 2003. He gives no details of the meeting, but in paragraph 120 he says that as far as he was concerned an agreement was reached and hands were shaken. Mr McMahon was told he could ring the bank and tell the bank that the dispute was settled, and the parties parted. In paragraph 124 he describes that the matter was left to others to settle the legal formalities, and that at the end of January 2004 he heard that Mr Hunter was "*reneging on the deal*". Paragraph 125 refers to his being cross about that because "once again Mr Hunter had reneged on what we had agreed".

12. Although it does not appear from the evidence or from the pleading, it is common ground that the negotiations referred to were without prejudice. In those circumstances the WCC respondents say that evidence of those negotiations is not admissible. The petitioner does not seek to say that a binding agreement was reached; it seems to be part of its case that a binding agreement was **not** reached.

13. Mr Crystal's response to this is twofold. The first is to invite me to look at the true basis on which without prejudice negotiations are excluded from evidence, which he says is to prevent the adducing of evidence of admissions against interest, and to find that the reliance by the petitioner on this material is for a different purpose, namely to provide evidence of a justifiable lack of trust of Sir Thomas Hunter on the part of the petitioner and Mr Wood. This, said Mr Crystal, justified the petitioner and Mr Wood in declining offers to purchase their shares made subsequently. This is not the same as relying on details of without prejudice negotiations to demonstrate an admission against interest. The second way in which Mr Crystal approaches this is to say that the without prejudice protection only applies where there are bona fide negotiations, and these negotiations were not conducted by Sir Thomas Hunter in good faith. In those circumstances the without prejudice rubric simply does not apply. In making his submissions, Mr Crystal made it clear that he was not in fact relying on any of the details of the negotiations, including details of what the agreement actually was. All he is relying on is the fact of negotiations, a deal in principle and Sir Thomas Hunter's "reneging" on the deal. At present it is not clear whether any documentary evidence would be relied on in relation to this area of evidence and sought to be introduced into the trial bundle.

14. In approaching this matter, I bear in mind the following principles.
    i) The "*without prejudice*" rule must be applied carefully and only in cases to which the public interest which underlies the rule requires it to be applied. This is apparent from the judgment of Sir Andrew Morritt V-C in *Prudential* ***Assurance Company Limited v The Prudential Insurance Company of America*** [2002] EWHC 2809 at para 27. He said there: *"Article 10 [ECHR, s.12(1) of the Human Rights Act 1998] confers on everyone the right of freedom to expression, including the right 'to receive and impart information and ideas without interference by public authority and regardless of frontiers'. But that right is subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the rights of others. Prima facie, therefore, the right is engaged by the 'without prejudice' rule but justified by the public interests which underlie it. But what this part of the case does is emphasise the need to apply the 'without prejudice' rule with restraint and only in cases to which the public interests underlying the rule are plainly applicable."*

I therefore approach the argument with a clear eye to the purpose of the principles and rules involved.

ii) The fact that the rule is based on the need to protect against admissions against interest appears from the judgment of Robert Walker LJ in ***Unilever plc v Procter and Gamble*** [2000] 1 WLR 2437. At page 2448 he said: *"In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially **Cutts v Head, Rush & Tompkins and Muller**. Whatever difficulties there are in a complete reconciliation of these cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in **Rush & Tompkins** at page 1300:*

> *'To speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purposes of establishing a basis of compromise, admitting certain facts.'*

The 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."

iii) Mr Crystal may well be correct in saying that negotiating in bad faith would disentitle a party to rely on the "*without prejudice*" rubric. In ***Unilever plc v Procter and Gamble*** at page 2444, Robert Walker LJ said: *"(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffman LJ in **Forster v Friedland**…)…but this court has, in Forster v Friedland and **Fazil Alizadeh v Nikbin**…warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."*

Negotiating in bad faith, intending to temporise for some purpose or otherwise mislead the counterparty into thinking that the temporiser was intending to reach a settlement, would probably fall within this wording. However, it seems to me that strong evidence must be available to support a case where that has happened. It is an allegation that is likely to occur to many litigants in highly charged litigation, and the courts must be careful not to allow distracting attempts to open up without prejudice negotiations on the basis of simple assertions or expressions of feeling.

15. With those principles in mind, I turn to the first way in which Mr Crystal seeks to justify his reliance on aspects of without prejudice negotiations. What he has sought to do is to separate out those aspects which might amount to admissions against interest by carefully not giving any details of the negotiations themselves. That leaves us, he would say, with the fact that they happened, the fact that they gave rise to an agreement in principle (without identifying its terms) and the fact that one party decided not to pursue them. That does not reveal any admissions and therefore does not contravene the objectives of the without prejudice principles.

16. I do not think that Mr Crystal is right about this. What he seeks to do is that which Robert Walker LJ said should not be done in the first of the two extracts from *Unilever v Procter and Gamble* set out above, namely to dissect out identifiable admissions, or anything which might be such a thing, and leave in what amounts to the rest. The law does not allow such a literal application of the policy for the reasons given by Robert Walker LJ and Lord Griffiths in the same passage. Protecting against admissions against interest in a narrow sense is not the only thing to be achieved. A more general freedom to negotiate is also part of the same package. Since part of the purpose is to enable parties to conduct themselves freely in negotiations, it is important that things going beyond technical admissions should be caught by the bars imposed by the without prejudice principles. In my view, that will extend to who it was who broke off negotiations and who decided not to go through with an apparently agreed deal (albeit subject to contract). That seems to me to be all part of the freedom of negotiation under the umbrella. It may even be that one could analyse the breaking off of negotiation as being one of the admissions against interest which the breaker is entitled to have protected, and if necessary I would so hold. This is particularly so in a case such as a s.459 petition in which the unreasonableness of parties usually figures so heavily. The policy of promoting negotiations allows an unreasonable party to negotiate under the without prejudice umbrella, free from the risk of having the further unreasonableness of his negotiation brought into the fray.

17. In addition, it seems to me that Mr Crystal's dissection approach is unrealistic. The accusation against Sir Thomas Hunter is that he reneged on the deal. In law he is entitled to do it because the deal was not completed. It is to be anticipated that he would wish to justify what he did. As soon as he seeks to do that, I do not see how it can be done without indicating what the deal was, and that takes one straight into the sort of territory that on any footing the without prejudice bar does not allow one to go. In fact, things would probably go further. It is quite likely that the enquiry would have to extend to how the parties got to that deal, and what they did afterwards by way of trying to bring it to fruition. Those again are matters which (as Mr Crystal's own case acknowledges) are within the substance of the without prejudice bar. Mr Crystal's way of putting the matter seems to me to be to try to present only part of a picture when the whole of the picture is necessary, but inadmissible. It demonstrates again why the dissection is inappropriate.

18. For those reasons, therefore, that line of the petitioner's reasoning does not justify the retention of evidence of without prejudice negotiations. I would also add that there is a problem over the issue to which the point is said to go. Mr Crystal said that the relevance of the evidence was that it demonstrated reasonable grounds for distrusting Sir Thomas Hunter, and that that lack of trust justified the rejection of later open offers by him and other respondents. Unfortunately that does not seem to be pleaded. The current paragraph 7.5 justifies the rejection of open offers on the basis that they were not good enough. There used to be a paragraph 7.6 which, among other things, seemed to justify non-acceptance by reference to the need for the petitioner to be able to trust the Investors (though the English went a little astray in this paragraph) but this paragraph was deleted at the time that other amendments (including the addition of the last sentence of paragraph 7.5 which added the unacceptability of the amount of the offer as a reason for rejection). Lack of trust as a reason for not accepting later offers has not resurfaced anywhere else in the pleadings.

19. In the circumstances that attempt to justify the evidence fails. I turn therefore to the other way in which Mr Crystal puts his case. At this point Mr Crystal's argument is that the without prejudice protection cannot apply because Sir Thomas Hunter was not negotiating in good faith. I have indicated above that if there were proper evidence of this then it might well prevent Sir Thomas from relying on the umbrella and allow evidence of the negotiations to be given (if relevant to a pleaded issue). However, I do not think that this case is open to Mr Crystal on the current state of the evidence. The evidence is general, and nowhere is there any evidence of lack of good faith on the part of Sir Thomas (or anyone else) in this respect. There are indications that Mr Wilkinson and Mr Wood did not think highly of him, but that is different. The point cannot be run on the evidence as it is. Mr Onions took the point that bad faith is not particularised in the Amended Points of Claim. That is true, but in this particular case I am not sure that it needs to be (though it would help if it were). The point under debate concerns the admission of evidence and reasons for penetrating the without prejudice cloak. One would not necessarily expect to see those matters pleaded. But the groundwork has to be laid somewhere, and it is in fact laid nowhere, so on any footing there is no material in any relevant document which would justify the bad faith allegation.

20. In the circumstances both of Mr Crystal's attempted justifications for the admission of evidence of without prejudice negotiations fail and the evidence in the relevant witness statements falls to be struck out. Mr Crystal said that if I was minded to take that course then he would wish to try to preserve the evidence by means of adding additional material to supply what is omitted on the bad faith front, and I should hold my hand on the striking out to give him an opportunity to do that. My present inclination is not to adopt that course, and simply to strike out the evidence. If the petitioner wishes to add material to justify the bad faith point then he is going to have to prepare and serve additional material anyway, and then get permission to serve it. I doubt if it is sensible to have part of this material appearing in the current witness statements and part appearing in the new evidence (or whatever form the material takes) but I will allow the parties (and in particular the petitioner) to make further submissions on that point on the occasion of the handing down of this judgment.

MR. M. CRYSTAL Q.C., MR. D. ALEXANDER and MR. M. HAYWOOD (instructed by Hammonds) for the Petitioner.
MR. J. ONIONS Q.C. and MR. B. STRONG (instructed by McGrigors London) for the 1st, 3rd, 4th and 6th Respondents.
MR. D. SPITZ (instructed by Bevan Brittan LLP) for the 2nd and 5th Respondents.