JUDGMENT : The Honourable Mr Justice Garland : QBD. 24th March 1996.

1. This is an appeal from a decision of Master Rose on 5th February 1996. The Plaintiffs applied for summary judgement under Order 14. The Defendants filed an affidavit in opposition sworn by Mr Michael Harold. The Plaintiffs objected to it on the grounds that the greater part of the content consisted of accounts of "*without prejudice*" discussions and correspondence. A preliminary issue was taken as to whether the affidavit was admissible in whole or in part. The Master decided it was not. The Defendants now appeal against the Master's decision. The shape of the dispute has changed to this extent: the Defendants now concede that the communications were "*without prejudice*" but say that parts of them fall within two established exceptions to the privilege of "*without prejudice*" which can conveniently be abbreviated as:
    1. Assertion of rights.
    2. Dishonesty or unambiguous impropriety constituting an abuse of the "*without prejudice*" rule.

    They submit that any material falling within these exceptions can properly be put before the Court.

2. In order to understand the arguments on admissibility it is necessary to set the scene by defining the issues. The Plaintiffs are manufacturers of steel strapping in various sizes and colours. They buy their raw material from several suppliers in various countries including France and Italy. They claim on 19 unpaid invoices dated between October 1994 and February 1995 in the total sum of £186,749 pursuant to 4 Purchase Orders given between August and December 1994. On each occasion the Plaintiffs confirmed the prices applicable to the orders. The Defendants took no points about the prices detailed with each item, the orders were fulfilled and invoices rendered.

3. The Defence can be summarised as follows:
    1. Standard Condition 14 on the reverse of the Purchase Orders provides that "where credit is due" from the Plaintiffs to the Defendants, the latter can withhold payment of "any invoice or account until notification in writing" is received from the Plaintiffs. This would have the effect that a credit due of £1,000 could hold up a payment of £100K but this is something to be argued on the Order 14 Summons. Whether Condition 14 formed part of the contract, and if so what was its effect; was it a penalty or void under the Unfair Contract Term Act 1977, are issues in the case.
    2. There are credits due, or set-offs.
        (a) £70,000 claimed by the Defendants as a rebate for large orders. There was an arrangement to this effect in December 1992. The Defendants claim it was carried forward to 1993 and 1994 and that they qualified for the 7% band by placing an order for 1044 tonnes on 7.12.94.

    The Plaintiffs contend that the rebate was for goods actually shipped during the year or alternatively that the order of 7.12.94 never resulted in a concluded contract so that 1044 tonnes never entered the rebate calculation.
    (a) £12,000 inflation of price due to the Plaintiffs' failure to operate a price fluctuation agreement by producing documentary evidence of increased steel prices. The Plaintiffs say there was no such agreement, only a broad understanding, and that in any event the Purchase Orders were placed by the Defendants after the Plaintiffs had notified them of the new higher prices.
    (b) Unquantified loss for breach of an alleged warranty or representation that the Plaintiffs' raw material cost was Ffr.1975 per tonne. The Plaintiffs dispute this.
    (c) £2,000 for short deliveries which are conceded by the Plaintiffs for the purposes of the 0.14 proceedings.
    (d) Late deliveries resulting in loss of sales.
    (e) A counterclaim for loss of profit on the order of 7.12.94 for 1044 tonnes. The Plaintiffs say there was no contract and that in any event the Defendant knew that their production capacity was such that they could only fulfill it at 300 tonnes per month. The Defendants had ordered less than 1000 tonnes in the preceding 11 months.

4. There is no dispute about material coming into existence before 3.3.95. The dispute concerns:
    (a) Transcripts of conversations with Mr Panagis and Mr Mailiis and himself which Mr Harold taped.

(b) Correspondence from 3.3.95.
(c) References in the affidavit to this material.

5. There are also some passages in the Defence which would have to be reconsidered were I to uphold the Master's decision.

6. The Plaintiffs contend and the Defendants accept that, from 3rd March, the various exchanges between the parties were "without prejudice" . The question is whether various passages identified by the Defendants can be put before the Court. I do not propose to set out in extenso the disputed passages but merely to give a concise summary with references to the documents. I adopt the Defendants' headings.

7. Meeting Harold/Panagis 7th April (MH4 PP 7-22)

1. It was contended that the entire meeting was a mere assertion of rights, each side taking its stance before the negotiating process began. The Defendants relied on BUCKINGHAMSHIRE COUNTY COUNCIL v. MORAN [1990] CH 623.
2. At page 9 it is said that there is an admission by Mr Panagis of a price adjustment agreement (issue (b)): *"Yes, this was a, let's say, a gentleman's word which was not written somewhere"* contrary to the case advanced on behalf of the Plaintiffs that there was no such agreement, while accepting that price increases would be limited proportionately to raw material increases after discussion between the parties. The agreement or arrangement was said to have been made in February 1994 but there is nothing in the contemporary correspondence, particularly a letter written on 3rd March, to suggest any clearcut agreement as opposed to some informal arrangement, and Mr Harold's version later in the meeting tends to fall short of a clearly defined legal obligation.
3. Also on page 11, Mr Panagis says that his claim is covered by a form of insurance: some form of export credit guarantee. This would be relevant to consideration of Condition 14 and the Unfair Contract Terms Act. The Defendants contend that this is a freestanding piece of informtion not forming part of any negotiating process and so falling within the first exception. The Plaintiffs say that it touches the merits because it touches Condition 14 and the Act; and in any event, taken in context, the provision of this item of information is part and parcel of the general discussions.
4. Again on page 11, Mr Panagis appears to admit that the Defendants were not aware of the Plaintiffs' production capacity. The Defendants comment that even if it does appear to amount to an acceptance of Mr Harold's assertion, it is clear elsewhere that Mr Panagis was saying that Mr Harold did know, although he was disputing it. Having seen all the material, the inference that I would draw is that Mr Harold had a fair general idea of the Plaintiffs' production capacity without necessarily being able to reduce it to an exact figure in tonnes per month.

8. Telephone Conversations Panagis/Harold 18th April 1995 (MH4 pp 26-39)

1. Pages 30-32. Mr Panagis concedes that the price of steel between July 1994 and January 1995 had been Ffr.1984 per tonne (issue (b) price adjustment) an increase of Ffr.9. It is said that this is contrary to paragraph 13 of Mr Panagis' affidavit where he describes prices during that period as "very volatile" and clearly dishonest. The Plaintiffs comment that prices had gone as high as Ffr.2184 and that there are a number of references to the instability of prices during this period.
2. At pages 34-35 it is said that Mr Panagis refused to give Mr Harold a steel price before July 1994 (issue (c) misrepresentation of cost of materials) and that this was contrary to what was pleaded in the Reply at paragraph 5(c)(ii) and amounts to advancing a dishonest case. The Plaintiffs say that this assertion is factually wrong: Mr Panagis did in fact give prices for January and February 1994. The paragraph in the Reply does not deal with the provision of information for the purposes of negotiating price increases but with the Plaintiffs'obligation to give notice of any increase in accordance with the Defendants' conditions.

Further, the Defendants contend that both passages are concerned with the provision or non-provision of information independent of any offers to compromise the disputes between the parties.

9 Telephone Conversation Panagis/Harold 19th April (MH4 pp 40-41)

1. On Page 40, Mr Panagis informs Mr Harold that the Plaintiffs' raw material price between January and July 1994 was Ffr.1835 (relevant to issue (c)) and also asserts:- "I am not sure where the

Defendant obtained the figure of Ffr.1835". In addition on 5th May, Mr Panagis said that the price in January 1994 was Ffr.1835 and that it did not change until the last quarter of that year. The Plaintiffs say that the price of Ffr.1835 was a mistake stemming from reference to a superseded Daval Invoice (21419) as opposed to the one priced at Ffr.1975 (24599) both of which are exhibited to Mr Panagis' affidavit. In addition, when the material is read as a whole, there is overwhelming evidence that Mr Harold did know that the price was Ffr.1975. The Defendants comment that there cannot have been a mistake because Mr Harold had reminded Mr Panagis of the higher price on 20th April 1995 (MH3 page 63) and that Mr Panagis had responded to that letter on the 28th (MH3 page 65) at some length, albeit without mentioning the price.

2 On page 41, Mr Panagis concedes that there was an oral agreement that there should be no price increase until the Defendants were shown the Plaintiffs' materials invoices (issues (b) and (c)). The Plaintiffs comment that this is another reference to the "gentlemen's word": that there was an informal agreement or arrangement but nothing definable in legal terms.

10. The Defendants contend again that both these matters are admissible as simple freestanding pieces of information in addition to being admissible under the second exception.

11. **Telephone Conversation Maillis/Harold 15th May 1995 (MH4 pp 93 – 106**
It is said that Mr Maillis concedes the existence of a "price adjustment agreement" contradicting the case advanced by Mr Panagis on behalf of the Plaintiffs and that this constitutes advancing "something amounting to a dishonest case". The Plaintiffs comment that Mr Maillis on a number of occasions says, "Yes" to various assertions by Mr Harold. He could equally have made a non-committal noise; in any event he did not have firsthand knowledge and later indicates that he, too, did not believe that there was any contractual obligation.

12. **Meeting Maillis/Harold 18th May 1995 (MH4 pp 55-92)**
Mr Maillis makes a number of derogatory remarks about Mr Panagis' credibility. The Plaintiffs' answer is that this does not mean that they are advancing a dishonest case whatever Mr Maillis may think of Mr Panagis, because Mr,Panagis' assertions can be measured against the contemporary documents and other factual information.

Correspondence

13. There are two letters dated 6th and 29th March (MH3 pp 60 and 61) advancing the Defendants' claim for a rebate on the footing that the order of the 7th December 1994 should be aggregated into the total orders for the year 1994 in order to meet a target tonnage of 2,000 tonnes. It is said that this is a freestanding assertion of the Defendants' case falling within the first exception. The Plaintiffs' case is that the negotiations plainly started on 3rd March and that during the discussion of 7th April, the claim for the rebate was treated as part of a possible compromise. Accordingly, these two letters cannot be extracted from the exchanges between the parties after 3rd March.

14. There is a fax dated 20th April (MH3 page 63) referring to the price for raw materials between January and July 1994 and July 1994 and January 1995. However, it is accepted that the admissibility or otherwise of this fax must depend on whether the telephone conversations relating to the same subject matter are themselves admissible or inadmissible.

15. I turn now to the law.

16. There was no real dispute between the parties as to the basic principles of law. The starting point is the balance between two conflicting public interests: the promotion of settlements on the one hand and full discovery between parties to litigation on the other. Mr BELTRAMI for the Plaintiffs referred to **RUSH & TOMPKINS v GLC** [1988] 3 WLR 939 @ 942 per Lord Griffiths: *"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem*

in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice". I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation".

17. At page 943D, Lord Griffiths, having considered the "independent fact" exception, said that: *" ..... it should not be allowed to whittle down the protection given to the parties 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. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence".*

18. Next, once the mantle of "without prejudice" has descended, then, subject only to the recognised exceptions, everything said or written in the course of conversations or correspondence is subject to the privilege. The Plaintiffs submit that this being so, the provision or non-provision of information, which the Defendants distinguish from making an assumption or concession purely for negotiating purposes, do not fail outside the privilege.

19. The privilege continues until the party wishing to change the basis on which the negotiations have been conducted brings this to the attention of the other party. The burden of proving that the privilege has been brought to an end lies on the party asserting it. The test whether the burden has been discharged is an objective one: **CHEDDAR VALLEY ENGINEERING LTD v. CHADDLEWOOD HOMES LTD** [1992] 1 WLR 820.

20. The cloak of "without prejudice" is all embracing. In **FORSTER & ORS v. FRIEDLAND & ANOR** (CA 10 NOV 1992), Hoffman, L. J. (as he then was) said at pp 7-8 of the Lexis print: *"It seems to me, with all respect to the judge, that there is no basis in authority or in principle for limiting the rule to negotiations aimed at resolving the legal issues between the parties. There must be many without prejudice negotiations which do not address the issues at all. They are attempts to find an agreed solution which will make it unnecessary for the issues to be debated either in negotiation or in court. All that is necessary, as Lord Griffiths said in **RUSH & TOMKINS LTD v. THE GREATER LONDON COUNCIL** [1989] AC 1280, 43 BUILD LR 1, is that the negotiations must be "genuinely aimed at settlement", that is, the avoidance of litigation. Provided that this criterion is met, the nature of the proposals put forward or the character of the argument used to support them, are irrelevant. One party may ask another for more time, or a reduction in what he has to pay. In support of such a proposal he may urge the weakness of the plaintiff's case or his own lack of money, or their friendly business relations in the past. The communication will be protected if there is an intention to speak without prejudice followed by a genuine proposal or genuine negotiation aimed at avoiding litigation."*

21. A party who wishes to rely on one of the exceptions must demonstrate that the evidence he seeks to introduce goes further than being merely relevant to an issue in the case, good cross- examination material or preventing the true case corning before the Judge. The latter point is made in **CHOCOLADE FABRIKEN LINDT & SPRUNGLI AG v. THE NESTLE' CO LTD** [1978] RPC 287 @ 289 where Megarry, V-C said: *"Mr Watson contended that the effect of excluding this evidence would be to prevent the true case coming before the judge hearing the substantive motion. It is, however, a result of the "without prejudice" rule that otherwise admissible evidence is excluded from the purview of the Court; that is a necessary and inevitable consequence of the rule. I need say nothing about any case in which there are grounds for believing that the rule is going to be used to perpetrate some fraud or dishonesty."*

22. In **DR FAZI-ALIZADEH v. NIKBIN & ORS** (CA I9.3.93), Simon Brown, L.J. said (@ pp 11-12 of the Lexis print): *"... the judge observed that he was wholly unsurprised that the first defendant wanted the transcripts to be before the court. On any view they contained material that, as the judge put it, could well afford a field day for an able cross-examiner, and certainly they appeared capable of bearing the suggestion that the plaintiff had been less than forthright and had perhaps changed his position on various important matters, there being what at best were to be regarded as some very odd exchanges, in particular regarding the forgery issue."*

23. He concluded at page 21: *"I add only this. There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial*

rule is most scrupulously and jealously protected, it will all too readily become eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likely to have participated in discussions with half a mind at least to their litigious rather than their settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitably it must, against the prospects of successful settlement."

The Exceptions

24. The first is not a true exception but something falling outside the mantle. It is relied on by the Defendants particularly in relation to the meeting of 7th April. This is the "*mere assertion of rights*" not carrying any express or implied offer to negotiate; for example, to adapt **BUCKINGHAMSHIRE COUNTY COUNCIL v MORAN** [1990] CH 623 @ 634-5, if an occupier facing a claim for possession by the true owner asserts, *"I have been in exclusive possession of this land for more than 12 years; your claim has no prospect of success".*

25. The second is a true exception, the admission of the independent (or freestanding) fact not connected with the merits of the case. The origin of the exception lies in **WALDRIDGE v. KENNISON** (1794) 1 ESP 142: an admission that a document was in the handwriting of one of the parties. This case was regarded as exceptional by Lord Griffiths in **RUSH & TOMPKINS v. GLC**. The existence of the exception was recognised by Knox, J. in **IRS v. CATTERALL** (1993) ICR 1 @ 5.

26. The next, and perhaps the more important, exception is "unambiguous impropriety" or abuse of process. It is well recognised but apparently seldom found to be applicable. Cogent evidence of fraud, blackmail or obvious dishonesty is required. In **FORSTER v. FRIEDLAND**, Hoffman, L.J. said (@ page 9): *"I accept that a party, whether Plaintiff or Defendant, cannot use the without prejudice rule as a cloak for blackmail".*

27. At page 10 he continued: *"These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."*

28. In **DR FAZL-ALIZADEH v. NIKBIN & ORS**, Simon Brown, L.J. said at page 16. "*I turn therefore to the crucial question whether these particular conversations ought nevertheless to lose the protection of the rule because they disclose misconduct of a kind sufficient to displace it. The approach to this issue too is now plain, having recently been clarified by this court's decision in* ***FORSTER & ORS v. FRIEDLAND & ANOR****, transcript 10th November 1992."*

29. He then referred to the passage in the judgment of Hoffmann, L.J. set out above and added: *"As the judge below pointed out, the critical expression there is "****unambiguous impropriety****"".*

30. The only case in which the exception seems to have been applied is **HAWICK JERSEY INTERNATIONAL LTD v. CAPLAN** (26 Feb 1988), Mr Anthony May QC (as he then was). Having reviewed the facts and the law as it then stood he said at page 13: *"As I have said, the discussions transcribed onto the transcripts with which I am concerned contain prima facie evidence: firstly, that the transaction with which these proceedings are concerned was not a loan and, secondly, that these ex hypothesi false proceedings were being used as a bargaining counter in negotiating about the other proceedings. I accept that in each interview Michael Caplan was, on the face of it, rather on the offensive; but he clearly gave both the Goldbergs ample opportunity to say not only that the loan proceedings were unjustified but that they would be withdrawn. I have seen no offer of withdrawal nor any indication other than that if settlement were not reached, the Goldbergs would proceed with these proceedings. Accordingly, I am concerned with a situation where, firstly, there are plain admissions, the effect of which would be that these proceedings are dishonest and, secondly, express or implicit assertions that nevertheless they will be persisted in. In my judgment, these circumstances fall plainly within the test propounded by Goff, J. on page 689 of* ***BUTLER v. BOARD OF***

TRADE *and I hold that prima facie these discussions do contain threats to further an ex hypothesi dishonest purpose".*

31. Mr BELTRAMI for the Plaintiffs submitted on the authorities that the party wishing to establish the exception must demonstrate clear and unambiguous evidence of impropriety in the conduct of the case and that the Court should not be astute to find it in the words of a layman when the party seeking the exception has used covert means to tape record what the other party believed to be settlement negotiations. There was evidence in the taped conversations that Mr Harold was trying to give the impression that there was no tape recording while at the same time seeking to obtain favourable admissions.

The Law and the Facts

32. Consideration of not only the transcripts but the correspondence and other documents reveals inconsistencies, ambiguities, lack of clarity and potential cross-examination material but, in my view, nothing that approaches the standard required for "*unambiguous impropriety*". The passages and letters sought to be excised as freestanding assertions of fact do not come near the "*exceptional"* category envisaged by Lord Griffiths. The meeting of 7th April, taken as a whole, was clearly part of a process that began on 3rd March but, more importantly, includes mutual offers aimed at continuing the commercial relationship between the parties. In my judgment, there is nothing to take any passage in the transcripts or any of the correspondence outside the without prejudice privilege. I have no hesitation in dismissing the appeal.

33. I conclude by expressing my gratitude to Counsel for their research of the unreported authorities and the excellence of their arguments.

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