Neutral citation number: [2019] EWHC 2065 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

No. BL-2018-001820

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 2 July 2019

Before:

HIS HONOUR JUDGE HODGE QC

(Sitting as a Judge of the High Court)

B E T W E E N :

Sternberg Reed Solicitors

Claimant/Appellant

- and -

Andrew Paul Harrison

Defendant/Respondent

MR JAMES MATHER (instructed by **Sternberg Reed Solicitors**) appeared on behalf of the **Claimant/Appellant**.

MR GEORGE THOMAS (instructed on a **Direct Access Basis**) appeared on behalf of the **Defendant/Respondent**.

A P P R O V E D J U D G M E N T

(Please note this transcript has been prepared without the aid of documentation)

JUDGE HODGE QC:

1 This is my extemporary judgment on a claim issued in the Commercial Court on 6 July 2018 by a firm of solicitors appealing an arbitration award on costs made by Mr Anthony Glaister FCIArb on 12 June 2018 on a point of law under section 69 of the Arbitration Act 1996. The appeal raises an interesting, and apparently novel, point of law on the true scope of the exclusionary rule which prevents reference to offers made with a view to settling a live dispute.

2 The claimant (and appellant) is represented by Mr James Mather (of counsel) and the defendant (and respondent to the appeal) is represented by Mr George Thomas (also of counsel). The defendant was a partner in the claimant firm of solicitors until he retired on 28 February 2015. The dispute that went to arbitration concerned the extent of his entitlements as an outgoing partner under the terms of a partnership agreement dated 1 July 2007. By the time of the arbitration hearing in December 2017, the only live issue between the parties was whether, as the defendant contended, his closing profit share should be adjusted to take account of work in progress on a case carried out on a conditional fee basis (a case called 'Miguel') but whose success had only crystallised after the defendant's retirement.

3 As regards the defendant's financial entitlements generally, since the production of an experts' joint report on 6 September 2017, it had been common ground that:

(1) Whilst the defendant was, in principle, entitled under the partnership agreement to payment in respect of the value of his share in the partnership, agreed to be worth £73,922, this was payable in five annual instalments. The claimant's obligation to make payment of each such instalment was subject to a contingency of profits thresholds being met in each relevant year. The obligation to make payment was also, of course,

effectively contingent upon the continued existence of the claimant firm of solicitors; and

(2) As at 30 June 2016, there was a deficit on the defendant's current account of £24,528. After the payment of the first instalment of the defendant's equity share, his current account (as at 15 June 2017) was still in deficit to the tune of £15,606.

4 Following the arbitration hearing, the arbitrator issued an award dated 18 December 2017. By that first award, the arbitrator dismissed the defendant's claim in respect of the conditional fee agreement issue. Having recorded that the only issue to be determined was that issue, the arbitrator recited the agreed financial position in the terms I have already outlined. On the issue of costs, the arbitrator awarded the claimant 70% of its costs up to the date of the experts' report and all of its costs thereafter. The reduction for the earlier period was on the basis that the claimant should have been quicker to provide information to the defendant relevant to his entitlements.

5 At paragraph 67 of the first award (headed 'Costs'), the arbitrator said this:

> "Whilst the respondents have succeeded as regards the most substantial issue namely how the Miguel matter impacts on the accounts 2012 to 2015, these arbitration proceedings began when the claimant was provided with very little documentation as to what his entitlements were. Considering that the arbitration began almost two years after his departure, some degree of earlier disclosure would have narrowed the issues in these proceedings. The resulting delays were referred to in the claimant's submissions and this impacted both on the progress of the arbitration and to a lesser extent on the consequential amendments to the way the claimant put his case. Earlier and more fulsome disclosure might well have saved considerable time and costs.

> In accordance with my discretionary powers under section 61 and if I make a subsequent determination under section 63(3) of the Arbitration Act 1996, the costs should follow the event as the respondents have substantially succeeded save that their recoverable costs, up to the date of the experts' joint report dated 6 September 2017, shall be limited to 70% only."

In that passage, the present claimant is referred to as "the respondents" and the present defendant is referred to as "the claimant" because it was he who had initiated the reference to arbitration.

6 Following the making of that first award, the defendant challenged that costs decision. In particular, the defendant contended that the arbitrator should have taken into account the contents of certain correspondence which the claimant asserts was 'without prejudice'. Taking account of that correspondence, the defendant claimed that he had bettered an offer to settle for £65,000 which he had made in the course of that correspondence. By his second award, the arbitrator determined that he was entitled to take account of the correspondence; and he substituted for his first costs decision a determination that each side should bear their own costs.

7 The arbitrator began his second award by referring to the fact that he had made a substantive award on 17 December 2017 in which he had concluded, on the basis of what had been submitted to him, that the claimant had substantially succeeded and that therefore the defendant should pay a proportion of the claimant's recoverable legal costs and his own costs as arbitrator (which he assessed at £9,500), and that both parties should have leave to refer back to the arbitrator as regards the determination of the costs awarded and interest thereon.

8 In subsequent correspondence, the defendant had asked the arbitrator to reconsider his award for costs in the light of settlement offers made which he had not seen. The alternative had

been to appeal his award, or at least that part of it that had determined the costs. The arbitrator recorded that both parties had agreed that he should do so to avoid the consequential additional costs and delay that a referral to the courts would involve. In addition, the arbitrator agreed to waive his charge.

9 The arbitrator indicated that he had similar powers to that of the civil courts in making an appropriate costs order. CPR 44.2(4) was said to be very much reflected in the drafting of section 61(2) of the Arbitration Act 1996. That provides that:

> "...the tribunal shall award costs on the general principle that costs should follow the event except where it appears to [it] that in the circumstances this is not appropriate in relation to the whole or part of the costs."

10 The arbitrator recorded that the defendant had claimed the balances due to him of his capital, current, and tax reserve accounts and specifically the profit share relating to the Miguel matter. Both experts were said to have agreed well before the arbitration that the defendant's entitlement for his capital and current accounts was £73,922 or thereabouts, payable by instalments over time in accordance with the triggers outlined in the resolutions annexed to the partnership deed. So long as the average profit per equity partner exceeded either £100,000 or £140,000, the defendant would be paid the proportion of his entitlement after each accounting year. If these average profits went below the £100,000 figure, they would be deferred to the next accounting year. That was said not to have been an issue in the arbitral hearing as those triggers would either be effective or they would not, and over time the capital and current accounts would be paid. That was said to be very relevant to the issue of costs (as would become apparent).

11 As regards the arbitral hearing, it was said not to have been about that: it was solely about the Miguel case, and the defendant was not successful on that claim. On any view, the claimant

had succeeded, and that was said to have been why the arbitrator had awarded the costs to the claimant, subject to the specified discount.

12 The arbitrator proceeded to look purely at the correspondence containing the offers and responses. At paragraph 6, he referred to an offer which he said had been made on 12 December 2015 - but it is common ground that it was, in fact, made on 12 November 2015. An accountant acting for the defendant had set out his views of the current and capital accounts with totals, in his view, due to the defendant of £74,631, which was said to be only "a tad more" than the sum agreed later at £73,922; and this was said, of course, to be subject to "the triggers". The arbitrator recorded that the defendant had offered to accept £65,000 in full and final settlement, to include paying any tax, and to drop all claim to any profit on the Miguel claim. The arbitrator then proceeded to refer to the claimant's response to that on 16 December.

13 There was then reference to the defendant's counter-offer in an email dated 22 December 2015. There were then references to further offers and counter-offers. At paragraph 11, the arbitrator observed that none of the correspondence had been made available until after the substantive hearing, and his decision the previous December.

14 At paragraph 12, the arbitrator firstly dealt with the admissibility of purely 'without prejudice' exchanges as regards costs. He said this:

> "The objective of making either sealed or *Calderbank* offers is to encourage parties to make offers to settle as early as possible. I find it unappealing to disallow offers made on a without prejudice basis simply because they are not marked up 'save as to costs'. I have read the decision in *Cleveland Management Limited v HSBC Pension Trust (UK)* [2013] 3238 I have as much of an overriding discretion to account for all offers that the parties have

> made as the judge had in that case. Thus, I think we have moved on from the restrictions outlined by Megarry J in the 1983 decision of *Computer Machinery Co Ltd v Drescher*. I accept the claimant's argument that I should accept purely 'without prejudice' offers. In saying all this, I do note anyway that the claimant's initial officer (in Colin Howe's email of 12 November 2015) is not apparently made 'without prejudice' although subsequent correspondence became so."

15 At paragraph 13 the arbitrator expressed his bafflement as to why the parties had not made any attempt at any stage to mediate.

16 At paragraph 14, the arbitrator referred to the defendant's submission that his offers were made applying a substantial discount to the sums recovered in the arbitration and agreed to be paid. His submission was that as his initial offer at £65,000 (gross of tax payments) was comfortably beaten in the arbitration at £73,922, then the arbitrator should not order the defendant to pay any costs at all, and that his erstwhile partners should pay his costs. After all, the Miguel matter had been discounted from the defendant's offer. In essence, the arbitral hearing was said to have been a "complete red herring".

17 At paragraph 15, the arbitrator recorded that the claimant said that the defendant had misrepresented the nature of the offers made as all repayments of equity shares, and that any agreed entitlements, would be subject to triggers within future accounting years which were, by their nature, uncertain. The defendant (the claimant said) had sought immediate payment of the initial £65,000 and then of the net second offer (subject to a twelve-month window) of £30,000. Therefore, he could not be said to have beaten any offer as further instalments might not have to be made, or were otherwise deferred to future accounting years, or might perhaps never be paid if the firm never made average profits per equity partner over £100,000 or might not exist at all to make those future payments if it were to cease business. That was said to

be the contingency element to which the arbitrator had referred earlier. Hence the claimant considered that it was entitled to the repayment of its costs by the defendant without any of the discount which the arbitrator had applied in his initial award for the laborious way that matters had been dealt with by the partnership before the experts had met up in around the autumn of 2017.

18 At paragraph 16, the arbitrator said that the question of whether the defendant's offers should or should not have been accepted was not an easy one. On the one hand, in purely financial terms, the defendant had indeed been making a discounted offer and had been awarded a greater sum by agreement than in any of his various offers. But whilst acknowledging that the offers made by the defendant were less than the sum awarded, there was, said the claimant, no certainty. The costs of overall success were pretty ambivalent, and the instant case was said to prove the point. Applying like tests to those required in CPR Part 44, the arbitrator said that he had to have regard to all the circumstances, to include the parties' general conduct, the element of success, whether it was reasonable for one party to pursue a particular claim, or if there was an element of exaggeration. Whilst not bound by the CPR test, the arbitrator said that he ought to take those factors into account unless he was simply to stick with costs following the event, as he did in his initial award.

19 At paragraph 17, the arbitrator said that the difference between agreeing for a sum to be paid immediately and agreeing for a sum to be paid over a period of time in accordance with a formula was the degree of uncertainty as to whether future payments would be made. To an extent, any agreement, even one payable within 28 days, had that degree of uncertainty as to whether that one payment could be made. Payment over one, two, or in this case five years carried with it the higher risk, and the higher the uncertainty that future profits would not be sufficient to make the payments from that accounting period, or at all if the partnership could not make any further payments anyway.

20 Whilst recognising that he was not dealing with Part 36 offers, the arbitrator took some cognisance of the tests that were used there: the reverse costs imposition was triggered where a claimant failed to obtain a judgment **more advantageous** than the defendant's Part 36 offer, or that judgment against the defendant was **at least as advantageous** to the claimant as the proposals contained in the claimant's Part 36 offer.

21 At paragraph 18, the arbitrator said that undoubtedly the defendant's offer in November 2015 (had it been accepted) had been more advantageous to him in terms of certainty of payment but less advantageous in terms of the value as it was discounted. Maybe the claimant would not have made profits over the trigger point for some years so that no payments would have had to be made whilst that was so. But payment was 'deferred' and not cancelled out. The discounted offer of £65,000 was significantly less than the gross figure of £73,922 agreed and in the award. Maybe, in the defendant's mind, a bird in the hand was worth two in the bush, or maybe he had done an actuarial calculation as to what an earlier, but lesser, payment might be worth. In the claimant's mind, there may have been the very real concern that the partnership profits might not match expectations, and that significant payments could be deferred within the contractual framework, rather than something less being paid up front.

22 At paragraph 19 the arbitrator noted that had the Miguel claim been withdrawn altogether, rather than using it as a stick to beat the claimant with, there might have been a very real opportunity to have bridged the very small difference between the parties on the capital and current accounts that had really been agreed years previously. The timing of those payments became the most significant block to an earlier settlement. Whilst the arbitrator would not have put the Miguel claim into the 'hopeless' category, it had always been going to be an uphill struggle for the defendant to succeed. The arbitrator entirely accepted that the defendant had agreed to waive that claim in 2015 and 2016 if one or other of his offers were

successful. That tactic had come with significant risk, and with diminishing benefit as the hearing loomed.

23 At paragraph 20, the arbitrator said this (substituting references to the present parties):

> "If I am asked to give an answer to the question of whether the defendant beat the offers made, especially that made in November 2015, I would say that he has - but only in value terms. He will have to await the triggers for the remaining three or so accounting years. That comes with it a degree of uncertainty, but more in terms of when not if. The claimants have the benefit of paying the agreed entitlement over time. In truth neither party has gained much advantages from this arbitral exercise. I am therefore inclined to make a different order akin to CPR 44.2(2)(b) from merely assessing who has 'won' as no one really has won outright and if you are measuring to the extent of the win if there is one, it is small indeed."

24 The arbitrator therefore indicated (at paragraph 21) that he would adjust his initial decision on costs contained in his original arbitral award with a determination that each side should bear their own costs entirely and that his own fee, assessed at £9,500 should likewise be split equally.

25 It is said by the claimant that the arbitrator erred in law in respect of his costs decision in that:

(1) He wrongly held that he had a discretion to take into account the contents of the 'without prejudice' correspondence; and

(2) In any event, he misdirected himself in proceeding on the basis that there was no outright winner in the arbitration which was contrary to his own earlier factual conclusion that

the claimant had been successful and he apparently reached his second costs decision on the sole basis that there was no outright winner.

26 The application for permission to appeal the arbitrator's costs award came before Norris J on 20 November 2018. Having noted that the claim had been transferred from the Commercial Court to the Chancery Division for determination, Norris J ordered that the claimant had permission to appeal from the costs award on the following questions of law:

(a) Whether the arbitrator erred in law in admitting as evidence on the question of costs offers made 'without prejudice';

(b) Whether the arbitrator correctly construed the 'without prejudice' offers made; and

(c) Whether the arbitrator misdirected himself (in the light of the terms of the first award) in holding that "no-one has really won".

27 I turn first to consider the issue of privilege. The claimant notes that at paragraph 12 of his costs award, the arbitrator had held that it was "unappealing to disallow offers made on a 'without prejudice' basis simply because they are not marked up 'save as to costs'." The claimant notes that the arbitrator's attention had been drawn to what Sir Robert Megarry V-C had said in *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379 at page 1382 letter H:

> "For a long while it has been settled law that if letters written 'without prejudice' do not result in an agreement, they cannot be looked at by the court even on the question of costs unless both parties consent ..."

28 The Vice-Chancellor had gone on to acknowledge, and to accept, that where the offer is made not 'without prejudice' but 'without prejudice save as to costs', the offer could be referred to when the court proceeded to make its decision on the issue of costs; but where an offer was

expressed to be simply 'without prejudice' without more, then the court could not look at the offer, even on the question of costs, unless both parties consented. The claimant notes that the arbitrator went on to say that he thought that "we have moved on" from those restrictions. No authority was cited for that proposition and none was said to exist.

29 The only other authority referred to by the arbitrator had been the decision of Vos J in the case of *Centreland Management Limited v HSB Pension Trust (UK) Limited* [2013] EWHC 3238 (Ch). However, that case had been concerned with a Calderbank offer which was clearly admissible on a question of costs. The claimant submits that that authority, far from casting any doubt on what Sir Robert Megarry V-C had said in *Drescher*, had made approving reference to it. The Court of Appeal had also confirmed that the law accorded with Sir Robert Megarry V-C's statement of it. Reliance was placed upon the decision of the Court of Appeal in the case of *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887, [2004] 1 WLR 3026. Reference was made, in particular, to paragraphs [20] to [22], [24] to [28], and [34] to [35] of the leading judgment in that case of Jacob LJ.

30 I accept that (as submitted by the claimant) that particular Court of Appeal authority makes it absolutely clear that communications expressly made on a 'without prejudice' basis are inadmissible, even for the purpose of costs arguments; and also that the court has no general discretion to disapply the 'without prejudice' rule. That authority makes it clear that the non-admissibility of communications expressly made on a 'without prejudice' basis extends to the deployment of such communications for the purpose of determining issues as to costs.

31 I am satisfied that the arbitrator (as the claimant submits) plainly erred in law in holding that he had a discretion to admit evidence of 'without prejudice' communications. However, the arbitrator did note that the defendant's initial offer in the email of 12 November 2015 was not apparently made 'without prejudice', although subsequent correspondence became so. It

therefore becomes necessary to consider whether that first communication was in fact written on a 'without prejudice' basis.

32 The claimant submits, in reliance on another (and earlier) decision of Sir Robert Megarry V-C in *Chocoladefabriken Lindt & Sprungli AG v The Nestlé Co Ltd* [1978] RPC 287 that where there is an offer to settle a live dispute, the court can infer that any such offer is intended to be covered by the 'without prejudice' rule. The Vice-Chancellor went on to say that it was also doubtful whether the court had any general discretion to admit evidence which would otherwise be excluded as being 'without prejudice'.

33 At pages 288 to 289, the Vice-Chancellor said that it was plain that the courts favoured the protection of discussions which had taken place between actual or prospective litigants with a view to avoiding the expense and burden of litigation, and were very ready to hold that discussions made with that purpose were inadmissible in evidence. Men ought to be able to attempt to "buy their peace" without prejudicing their positions if the attempt failed and hostilities broke out or continued. The mere failure to use the expression 'without prejudice' did not conclude the matter. The question was whether there was an attempt to compromise actual or impending litigation, and whether from the circumstances the court could infer that the attempt was in fact to be covered by the 'without prejudice' doctrine. If an offer was intended to be an open offer, made with prejudice, then it was a common practice for that to be stated in terms in the offer. Although it was also common to include that expression if an offer was intended to be 'without prejudice', much that was plainly intended to be 'without prejudice' was discussed without any express statement being made to that effect. One had only to think of the numerous discussions that took place between litigants and their advisors outside the doors of the court to see that. The Vice-Chancellor's recollection was that when he was at the Bar, he never even heard the words 'without prejudice' used when such discussions were taking place so plain was it that the discussions were upon that footing.

Where there was some dispute, and an attempt was being made to settle it, the Vice-Chancellor thought that the courts should be ready indeed to draw the inference that the attempt was to be 'without prejudice'.

34 It should be noted that those observations were made not in relation to any discussion of the admissibility of evidence of those negotiations on any issue as to costs. Rather, the issue before the Vice-Chancellor was whether the communications were admissible in evidence on a motion for interim injunctive relief. In other words, whether they were admissible on the substance of the dispute.

35 The observations of the Vice-Chancellor in that case have been endorsed in later authorities. In *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, the matter was considered in the judgment of Lord Griffiths (with which the other four members of the House of Lords all agreed). At page 1299 letter G to page 1300 letter B, Lord Griffiths said this:

> "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."

36 Later, at page 1300 letter E, Lord Griffiths acknowledged that in certain circumstances, the 'without prejudice' correspondence might be looked at to determine a question of costs after judgment had been given. Reference was made to the Court of Appeal decision in *Cutts v Head* [1984] Ch 290 which had recognised the admissibility, on issues as to costs, of correspondence expressly headed 'without prejudice save as to costs', or in which some other reservation as to the potential deployment of the correspondence on issues of costs had been expressly made.

37 The *Rush v Tompkins* case was, of course, concerned with the question whether the 'without prejudice' rule continued to apply even after settlement of the litigation between the parties to the 'without prejudice' communications. It was held by the House of Lords that the 'without prejudice' rule protected such communications from being disclosed to third parties even after the settlement of the litigation between the communicating parties.

38 The claimant submits that it is plain from the context of the communications at issue here, including the initial communication of 12 November 2015, that the parties' intention was for them to be treated as 'without prejudice' in their entirety. For the claimant, Mr Mather developed that submission during the course of his oral submissions to the court. He submitted that when one looked at the correspondence as a whole, it was impliedly 'without prejudice'. He submitted that on the facts of this particular case, one should not separate out the initial email of 12 November. Although that email was not expressly headed 'without prejudice', it was said to be an email that had engaged the 'without prejudice' rule. It was a settlement offer made in the context of a live dispute. There was nothing expressed within it to say that it was intended to be written on an 'open' basis. The claimant's response to that

initial offer from the defendant had been an email of 16 December 2015 which had rejected the offer from the defendant and had made a counter-offer. That was expressly headed 'without prejudice'. It had evoked a response from the defendant on 22 December 2015 which, in its turn, was expressly headed 'without prejudice'. That email had made a further counter settlement offer. Mr Mather submitted that the way to analyse the exchange of emails was that there was an opening offer on 12 November which was, at best from the defendant's point of view, ambiguous as to its status because it did not expressly say that it was an open offer. Subsequently, the parties proceeded to negotiate expressly on 'without prejudice' terms.

39 The first counter-offer headed 'without prejudice' had come from the claimant, and the defendant's response on 22 December had been to accept that negotiations should proceed on a 'without prejudice' basis. It would have been open to the defendant to say in that later email that his original offer had been an 'open' offer but he had not done so. Rather, he had accepted that the negotiations should proceed on a 'without prejudice' basis. He had not even responded on a 'without prejudice save as to costs' basis. There was therefore a clear agreement to negotiate on 'without prejudice' terms. Mr Mather submitted that the only sensible way of construing the exchanges of emails was to resolve the initial ambiguity by treating the initial email of 12 November as also having been written on a 'without prejudice' basis. The claimant had been insistent on negotiating on a 'without prejudice' basis and the defendant had been content to proceed along those lines. In his reply, Mr Mather submitted that one could not infer an intention on the part of the defendant to make an open offer because the email of 12 November could not be considered in isolation from the subsequent exchanges of emails. The defendant had not reserved the right to refer to the first offer on the question of costs.

40 Mr Mather took me to the decision of Andrews J in the case of *Willers v Joyce* [2019] EWHC 937 (Ch) at paragraphs [62] to [63]. There, the judge had held that it had been possible for the parties retrospectively to alter the basis upon which they had previously been communicating. Their earlier communications had been expressly on a 'without prejudice' basis, but by their later correspondence the parties had effectively agreed to treat the earlier settlement negotiations as if they had always been conducted on a 'without prejudice save as to costs' basis. I accept that it is possible for parties expressly to alter retrospectively the basis upon which they have previously been communicating; but it does not seem to me that that decision has any application in the present context, where there was no express attempt to vary the status of the previous email which had not been expressly marked as 'without prejudice'.

41 My conclusion on the status of the initial email from the defendant's accountant of 12 November is this that email was not expressly marked either 'without prejudice' or as an 'open' offer. I do not consider that its status was retrospectively converted to a 'without prejudice' status simply because the later correspondence via email was headed 'without prejudice'.

42 For the defendant, Mr Thomas did point out that by the time the claimant had made its substantive response to the email of 12 November, the offer contained within it had, in fact, already lapsed because a time limit had been put upon it in a later email from the defendant's accountant of 3 December. However, Mr Thomas appeared to accept that the fact that the 12 November offer had already lapsed was really neither here nor there. However, I do not accept that the character of the initial email from the defendant's accountant can be affected by the 'without prejudice' nature of the later communications. Those later communications never, in terms, addressed the status of the initial email of 12 November. However, I would accept, for the reasons given by Sir Robert Megarry V-C in the *Chocoladefabriken* case that since the

12 November email was written in an attempt to settle a live dispute, it should be treated as written on a 'without prejudice' basis, at least so far as the substance of the dispute between the claimant and the defendant is concerned. However, it does not seem to me that that is necessarily conclusive of the admissibility of the email on a question as to costs.

43 I have been taken to a considerable number of authorities on the 'without prejudice' rule during the course of this hearing. I have, of course, considered all of those authorities and, in particular, what was later described by Lord Clarke (in the case *Oceanbulk Shipping & Trading SA v TMT Asia Limited* [2010] UKSC 44, [2011] 1 AC 662) as the "illuminating judgment" of Robert Walker LJ in the case of *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436. That latter case decided that statements made during an expressly 'without prejudice' meeting could not found an action for threatening proceedings for patent infringement under section 70 of the Patents Act 1977. I note (as Mr Thomas invited me to note) at page 2438 letter F of the report, citing from the judgment of Laddie J at first instance, that there was no dispute in that case that both parties had agreed to those discussions being conducted on a 'without prejudice' basis.

44 Mr Mather described Robert Walker LJ's analysis of the 'without prejudice' rule in the *Unilever* case as the most important exposition of the law as it now stands. He submitted that it was absolutely plain from Robert Walker LJ's exposition of the law, and, in particular, the way in which he addressed exception (7) at page 2445 letters C to F of his judgment, that the general 'without prejudice' rule is that 'without prejudice' correspondence is not admissible on questions of costs. That was the starting-point, and it was only diluted if the parties agreed to dilute it.

45 In my judgment, however, that is only the case if there is an express agreement that communications will be 'without prejudice'. In my judgment, when communications take place expressly on a 'without prejudice' basis, then the authorities are clear that they may not

be referred to, even after the determination of the substantive dispute, for the purpose of deciding issues of costs unless the communications had been expressly marked 'without prejudice save as to costs', or the right to refer to the communications on issues of costs is otherwise expressly being reserved. In my judgment, that is clear from Robert Walker LJ's exposition of the 'without prejudice' rule in the *Unilever* case; and it is also clear from the decision of the Court of Appeal in the *Reid Executive* case.

46 Where, however, communications take place to resolve a live dispute and they are not expressly labelled 'without prejudice', then they will be treated as impliedly 'without prejudice' on the substantive dispute, and they may not be referred to until after the determination of that dispute, but they may thereafter be referred to on questions of costs. Since the law has come to recognise the concept of communications on a 'without prejudice save as to costs' basis, I see no reason why the law should impute to parties who do not expressly mark their communications 'without prejudice' an intention that the communications should be treated as impliedly 'without prejudice' for all purposes. It is clear on the authorities, including the case of *Cutts v Head*, that there is no underlying public policy justification that favours any wider exclusionary rule preventing communications not expressly marked 'without prejudice' from being referred to on issues of costs. I see no reason why, where the parties have not chosen to label a communication as expressly 'without prejudice', the law should imply an agreement that that communication should be treated as 'without prejudice' rather than as 'without prejudice save as to costs'.

47 I have not been referred to any case law authority which dictates such a wider construction; and it does not seem to me that any wider exclusionary rule is warranted from the way in which the law was stated by Lord Griffiths in the *Rush v Tompkins* case where, in terms, he talked (at pages 1299 to 1300) of communications seeking to compromise an action as not being "admissible at the trial" and not being capable of being used "to establish an admission

or partial admission". Lord Griffiths was specific in limiting the exclusion of such communications to their deployment as evidence of an admission or partial admission. In other words, he was addressing their admissibility at a substantive trial rather than afterwards on the issue of costs.

48 That also seems to me to be consistent with the approach of Lord Brown in the later case of *Bradford & Bingley PLC v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066. At paragraph [64], Lord Brown noted that the exchanges in the case before him had not been marked 'without prejudice' so there could be no question of any "implied agreement". That was a reference back, in my judgment, to paragraph [63], where reference was made to "an implied agreement based on customary usage and understanding" where an offer was expressed to be made "without prejudice". What Lord Brown was saying was that where an exchange of correspondence is not marked 'without prejudice', there can be no question of any implied agreement based on customary usage and understanding. Lord Griffiths went on to say that the critical question in the case before him was rather whether, adopting the words of Lord Griffiths in *Rush v Tompkins*, it was clear from the surrounding circumstances that the parties were seeking to compromise the action or whether, as Sir Robert Megarry V-C had put it in the *Chocoladefabriken* case, there was an attempt to compromise actual or impending litigation.

49 Where correspondence is treated as being 'without prejudice', not because it is labelled as such, but simply because it is an attempt to compromise actual or impending litigation, there can be no public policy justification for preventing it being referred to on issues of costs as distinct from the issues in the substantive litigation; and I see no basis for implying any agreement that no reference should be made to such correspondence on issues of costs once issues in the substantive litigation have been determined.

50 So, to summarise my decision on this aspect of the case, whilst I would accept that no reference could have been made to the 12 November email on the issues in the substantive arbitration, there is, in my judgment, no reason why the arbitrator should not have had regard to that email when he came to determine the issue of costs. I have no doubt that the arbitrator was wrong in his general statement at paragraph 12 of his award on costs that the law has moved on from the restrictions outlined by Sir Robert Megarry V-C in the 1983 decision of *Computer Machinery Co Ltd v Drescher*. The *Cleveland Management* case referred to by the arbitrator was clearly distinguishable because it was the case of a Calderbank offer made expressly as such. However, since the defendant's initial offer in the email of 12 November 2015 was not made expressly 'without prejudice' (although subsequent correspondence became so), in my judgment it was permissible for the arbitrator to take it into account on the issue of costs.

51 I therefore reject the claimant's submission that the arbitrator should have refused to admit the evidence of that 12 November email on the issue of costs. I therefore reject the consequential submission that there was no proper basis for the arbitrator to re-open his first costs decision. However, Mr Mather goes on to submit that that 12 November email provided no proper basis for re-opening the first costs decision, and that the arbitrator's conclusion to the contrary was the result of a misdirection.

52 The arbitrator had noted (at paragraph 5 of his second award) that the arbitral hearing had been solely about the Miguel case and that the defendant had not succeeded on that claim. He had also recorded at paragraph 5 that the claimant had succeeded, and that was why he had awarded costs to the claimant (subject to the specified discount). The arbitrator had then proceeded to consider the 'without prejudice' correspondence, principally the 12 November email; and had addressed the question of whether the defendant had ultimately beaten the offer he had made by pursuing the arbitration. The arbitrator's conclusion (at paragraph 20)

was that he had done so, but only in value terms. The arbitrator had recognised that the defendant would have had to await the triggers for the remaining three or so accounting years and that that had brought with it a degree of uncertainty; but the arbitrator had said that that was "more in terms of when and not if". The claimant had had the benefit of paying the agreed entitlement over time. In truth, neither party had gained much advantage from the arbitral exercise; and it was for that reason that the arbitrator had taken the view that as no one had really won outright, he should adjust his initial decision on costs and determine that each side should bear their own costs entirely.

53 Mr Mather submits that the arbitrator's decision in that regard was wholly extraneous, and that it had involved a complete failure by the arbitrator to exercise his discretion. The way in which Mr Mather characterised the decision in his oral submissions was that it was "just absurd". The arbitrator had not recognised the contingency that applied to the payment to the defendant of his equity share in the partnership. That was said to be a contingent entitlement which stretched some time into the future. There must be a very real doubt as to whether the partnership would still be around in the later years. The impact of making any payment up-front was said to amount to a dramatic difference, freeing the defendant from the risks inherent in having to wait to see whether the contingencies would be satisfied and whether the claimant firm would remain in existence. In summary, it was submitted that the arbitrator had not been comparing like with like. There had been no true comparison.

54 At paragraph 17 of his skeleton argument, Mr Mather advanced a number of objections to the arbitrator's apparent view that "no-one has really won the arbitration outright". That was said plainly not to be so. The arbitrator had already held that the claimant had succeeded on the claim by successfully defending the defendant's attempt to share in the profits of the Miguel claim. It was said that the arbitrator appeared to have taken no account of that conclusion in making his second costs decision. The arbitrator appeared to have confused the question of

whether the defendant had in any sense beaten his offers with what was said to be the entirely separate question of which was the successful party in the arbitration. It was said that by determining the costs on the sole basis of his self-direction that there had been no outright winner, the arbitrator had been guilty of a complete failure to exercise his discretion as to costs. His conclusion that there had been no outright winner was said to be flatly contrary to his earlier findings that the claimant had been the successful party, and that the defendant could not be said to have been a winner in the narrow respect of whether he had beaten his own offers. Furthermore, it was said that the arbitrator's basis for his decision - specifically that whereas the defendant had offered to settle for £65,000, the value of his share had been held to be in excess of £73,000 – had been a "wholly extraneous" basis given:

(a) That the value of the defendant's share had not been the dispute that had been resolved by the arbitrator since that value had long since been agreed;

(b) That the arbitrator had not, in any meaningful sense, awarded that sum, and no payment had in fact been ordered. As had been the position all along, any payment had been contingent on profit triggers being met;

(c) Crucially, that comparison between those two sums did not provide any guide as to whether the defendant had beaten his previous offers. That was because at the time he had made them, a substantial balance had been owed to the claimant on the defendant's current account (as the arbitrator had, in fact, held); and

(d) That acceptance of the defendant's offer of £65,000 would have involved writing-off the further £24,000 then owed by the defendant to the claimant on his partnership capital account. The net value to the defendant had therefore considerably exceeded the value of his partnership share.

55 Those criticisms are, in turn, addressed in detail by Mr Thomas at paragraph 71 of his skeleton argument; and Mr Thomas also makes the point that if the arbitrator had ignored or forgotten about the dispute in the arbitration as to the Miguel claim, then clearly he would have awarded the defendant his costs. The reason why no one had won outright was because, although the claimant had won on the Miguel issue at the hearing, the defendant had recovered more in the overall arbitration than he had offered to accept on 12 November 2015.

56 Moreover, the reference as to who had been successful in the proceedings was said to be misleading. The proceedings had involved a reference to arbitration because of a failure by the parties to agree the valuation of the defendant's equity share. It was correct that the claimant had succeeded on the only live issue as to valuation that had remained outstanding by the time of the arbitration hearing; but in the overall proceedings the defendant had not lost because the valuation placed on his equity share in the arbitration had been greater than the amount he had offered to accept on 12 November. There was no passage in the second award on costs that was said to suggest any confusion in the arbitrator's mind between those two concepts.

57 The fact that the arbitrator had identified no outright winner had not involved a failure to exercise his discretion. Rather, the arbitrator had chosen to exercise his discretion as to costs on the basis that he had formed the view that there had been no outright winner. The conclusion that there had been no outright winner, and the final decision - a discretionary one - as to where the costs should fall, were said to raise entirely different issues. Courts frequently made no order for costs for precisely that reason.

58 The arbitrator had found that the claimant had been successful on the matters at the arbitration hearing but that had been before he had been made aware of the defendant's 12 November offer. The arbitrator had not concluded that the defendant could not be said to have been a winner. Rather, he had concluded that the defendant had beaten his own offer, albeit by a

small extent. Moreover, the arbitrator's reduction in the margin, or value, of the defendant's win had only been attributable to the deferred element of the payments. In financial terms, the arbitrator had found that the defendant's discounted offer of £65,000 had been significantly less, albeit in terms of value, than the gross figure of £73,922 that had been agreed and reflected in the award.

59 It was said that the claimant's submissions also ignored the nature of the arbitration. The arbitrator's terms of appointment had been to determine the value of the defendant's partnership share. It is correct that on 6 September 2017, three months before the hearing, the parties' experts had agreed a valuation, apart from the value of the Miguel claim, of £73,922; but the defendant had offered to accept a sum significantly less than this valuation two years before the award. The defendant's offer had included the assumption of the tax liability by the defendant; and it had also made it clear that no account would be taken of the value of the Miguel claim. There was said to have been no confusion in the arbitrator's approach to the issues in the arbitration. He had been clear that the claimant had won on the only live issue at the arbitral hearing; but he had concluded that, in overall terms, albeit very narrowly, the defendant had achieved a more advantageous valuation than he had been prepared to accept in November 2015. The arbitrator could not be said to have taken any irrelevant or impermissible matters into account.

60 Mr Thomas submitted that the arbitrator's overall decision that each party was to bear its own costs was plainly within his very broad discretion as to costs. To the benefit of the claimant, he had taken a very stringent view of the extent to which the margin by which the defendant had beaten his own offer should be deemed to be narrowed. There was said to be no ground for restoring the first costs award because the offer which the defendant had relied upon had been an admissible offer, and the arbitrator had properly taken it into account; it had been

reflected in his decision that there had been no overall winner; and there should therefore be no order as to costs.

61 I have to remember that this is an appeal on a point of law under section 69 of the Arbitration Action 1996. As the claimant recognised at paragraph 18 of the claimant's written skeleton argument, the principles that I have to apply on this appeal are to be found in the decision of Hamblen J in the case of SOS *Corporación Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 1 CLC 85. They are to be found at paragraphs [30] through to [32] of the judgment. There it is made clear that an arbitrator's award on costs can only be challenged by an appeal on a question of law under section 69 of the Arbitration Act 1996. It has to be shown from the reasons given by the arbitrator that his award of costs was unlawful, in the sense that there were no grounds on which the arbitrator could properly in law have made the order which he did, or that he made the order on grounds which he could not properly in law have taken into account, or that he failed to exercise his discretion at all.

62 In summary, the court must ask whether the arbitrator took account of wholly extraneous matters, or whether the arbitrator failed to exercise his discretion on any identifiable grounds at all, thereby abdicating his responsibility of making a rational decision and (as it was put in one of the cases), in effect had simply tossed a coin. The authorities recognise that the circumstances must be extreme, and the instances rare.

63 Since the basis upon which the arbitrator departed from his earlier provisional decision on costs was derived from the 12 November offer, the court must go on to consider the question that was addressed by Vos J in the *Centreland Management* case (previously cited). From paragraphs [28] and [33] of the judgment in that case, it is clear that the question the arbitrator should properly have posed was whether the defendant in this case "had achieved more by carrying on" than he would have done had his offer been accepted, or whether the claimant had failed to achieve more by rejecting the offer than it would have done by accepting it.

64 The arbitrator's conclusion was that the defendant had beaten the offer that he had made on 12 November, but that he had only done so in value terms. He would still have to await the triggers for the remaining three or so accounting years. That brought with it a degree of uncertainty; but the arbitrator's conclusion was that that had been "more in terms of when not if". The claimant still had the benefit of paying the agreed entitlement over time. The arbitrator's conclusion was that neither party had gained much advantage from the arbitral exercise.

65 That conclusion had been based upon two things. The first was the arbitrator's knowledge of the outcome of the arbitral hearing. That had been resolved, as the arbitrator appreciated, in favour of the claimant. But by the time the arbitrator had come to make his final award on costs, the arbitrator had also had the benefit of knowing, secondly, that there had been an admissible offer to settle which had been made on 12 November 2015. The arbitrator was entitled to look at that offer and to ask himself whether either party had gained much from that offer not being accepted, and from the matter thereby proceeding to arbitration. The conclusion which the arbitrator had drawn was that neither party had gained much advantage from the arbitral exercise. On the one hand, the defendant should not have pursued the Miguel claim; but, on the other, the whole matter could have been resolved without the need for any arbitral hearing at all if the claimant had accepted the defendant's offer of 12 November. That would have given the defendant certainty, but at the expense of a lesser sum. That sum would have been payable immediately, and not deferred for future years, and subject to contingencies.

66 The arbitrator had effectively concluded that neither party had gained much advantage from the arbitral exercise. He did not make an award of costs in favour of either party. Effectively, he formed the view that if one asked who had won, there had been no real winner and, to the

extent that there had been, any win had been a small one indeed. On that basis, the arbitrator had left each side to bear their own costs entirely.

67 I ask myself the questions that I am mandated to ask by the *SOS Corporación Alimentaria* case: Was there a complete failure by the arbitrator to exercise his discretion at all? In my view, no. He weighed up all the factors and arrived at his decision. Was his decision based on wholly extraneous matters, in the sense that he reached his decision on grounds which were impermissible in law? In my judgment, no. He was entitled to have regard to the 12 November offer. He weighed it up and he reached his conclusion that, as a result of the existence of that offer, and notwithstanding the outcome of the arbitral hearing, there was no real winner. That, it seems to me, was a matter for the arbitrator's decision and not for the court to override him. It was an evaluative decision, and one which the arbitrator reached in the exercise of the generous ambit of his discretion as to costs. It does not seem to me that it amounts to an error of law which this court should seek to correct.

68 So, for those reasons, expressed at somewhat great length, I dismiss this appeal.

L A T E R

69 On the issue of costs, the defendant, as respondent to the appeal, has been entirely successful. It does not seem to me that it is appropriate to make any reduction in the level of costs. The reality is that the claimant chose to bring this appeal. It has succeeded on an issue, namely that the arbitrator erred in the view he took as to the admissibility, in general, of 'without prejudice' communications; but insofar as the real foundation for the arbitrator's costs decision is concerned, namely the status of the 12 November email, because it was not headed 'without prejudice' I have held that the arbitrator was entitled to have regard to it. Therefore, the limited success of the appellant has not in any way affected the outcome of this appeal.

70 This is a case in which the appeal has been dismissed. Had the appeal not been brought, the defendant would not have incurred these costs. Because he is a litigant in person, the costs that he can recover are relatively modest, and it does not seem to me that it would be just, in the exercise of my discretion as to costs, in any way to discount the level of his recovery to reflect the fact that the respondent (and defendant) has not been successful on all the matters that he has argued when he has been entirely successful in bringing about the dismissal of this appeal.

71 So, I will award the defendant his costs. It is appropriate that I should undertake a summary assessment in view of the length of the hearing and the level of costs sought to be recovered. It would not be cost-effective to direct a detailed assessment. The level is relatively modest. The fact is that Mr Thomas will have spent, effectively, all morning in court today, albeit only listening to a judgment and making his application for costs at the end of it; and therefore I propose to award the defendant his costs of the appeal, which I will summarily assess in the full amount claimed (as adjusted) of £9,417.40.

JUDGE HODGE: Is there any reason why those should not be paid within 14 days?
MR MATHER: My Lord, no.
JUDGE HODGE: So they will be paid within 14 days as usual.

L A T E R STILL

72 Having delivered my substantive judgment, I am now faced with an application by the unsuccessful claimant for permission to appeal. Mr Mather has rightly drawn my attention to the provisions of section 69(8) of the Arbitration Act 1996 which governs appeals under the Act where there is an appeal on a point of law under section 69. I am not to give permission to appeal unless I consider that the question is one of general importance or is one which, for some other special reason, should be considered by the Court of Appeal.

73 I am satisfied that the question is one of general importance. I also have to bear in mind that if I do not give permission to appeal, that is the end of the matter. However, in addition to

being required to be satisfied that the question is one of general importance, it seems to me that I must also consider whether there is a real prospect of the appeal succeeding.

74 In my judgment, for the reasons that I have given in my substantive extemporary judgment, although the point is a novel and interesting one, now that it has been argued out before me, it does seem to me that it admits of only one answer, and that is the answer that I have given to it. Where there is an open offer to settle litigation which is not marked expressly 'without prejudice,' I have held that it can be referred to, not for the purpose of the substantive issues, but when the court comes to consider questions of costs thereafter or (in the context of an arbitration) when an arbitrator comes to do so. I have held that there is no public policy reason why such an offer should not be capable of being deployed on issues of costs; and I have found that there is no basis for implying or imputing to the parties an agreement that it should not be referred to on issues of costs, as distinct from the substantive issues in the underlying litigation.

75 Given the emphasis that is placed upon attempts to settle litigation, I see no real prospect of the Court of Appeal taking a different view. I am conscious that this will then be the end of the road; but I see no real prospect of the appeal succeeding and so, although it is a question of general importance, I do not consider that I should give permission to appeal. If there is no real prospect of the appeal succeeding, I do not consider that there is any other reason why permission to appeal should be given.

76 So, for those reasons, I refuse permission to appeal.

CERTIFICATE

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