Neutral Citation Number: [2023] EWHC 2388 (TCC)

Case No:[REDACTED](‘Part 7 Claim’)
Case No [REDACTED](‘Part 8 Claim’)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 27 September 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

AZ	**Claimant (Part7 Claim) Defendant (Part 8 Claim)**
- and -	
BY	**Defendants (Part 7 Claim) Claimants (Part 8 Claim)**

- -

Mr Thomas Crangle (instructed by FG(sols) LLP) for the Part 7 Claimant/Part 8 Defendant
Mr Carlo Taczalski (instructed by SH(sols) LLP) for the Part 7 Defendants/Part 8 Claimants

Hearing date: 6 September 2023

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JUDGMENT

This judgment was handed down on 27 September 2023 at 2pm. This is an anonymised and redacted version of a judgment which remains to the parties as set out in paragraph 129 below, until further Order of the Court.

Mr Justice Constable:

1. AZ brings a Part 7 Claim to enforce the decision of an adjudicator, Mr Derek Pye ('the Adjudicator') issued on 7 June 2023 ('the Decision'). During the adjudication, AZ deployed material which BY contended at the time, and before this Court, was subject to without prejudice privilege. By Part 8 Proceedings brought by BY, it seeks declarations relating to the status of the allegedly without prejudice material, and a declaration that as a result of the inadmissible material, the Decision is unenforceable. By Order of Mrs Justice O'Farrell the two claims were heard together.

2. In order to determine the matters in dispute, I have had regard to the witness statements served by AZ from Mr DH, a partner at FG(sols) LLP, Mr AS and Mr MS, both of AZ, and the statements served by BY from Mr RN, a partner at SH(sols), Mr CL and Mr NOD, both directors at THE EA, the Employer's Agent, and from Ms RG and Mr RP, both of SAM, BY's asset manager. Whilst account has been taken of the views expressed in the witness statements, the task of determining the nature of the communications has, of course, depended principally upon a review of the material itself, construed objectively. It is for this reason that neither Party sought to cross-examine any of the witnesses.

3. The underlying dispute arises out of works (the "Works") to replace the stair core pressurisation systems to a Building ("The Building"). The contract for the Works (the "Contract") was intended to be let to AZ. An issue in the adjudication, and which may be subject to further substantive proceedings, is whether a contract was finalised between the parties. The Adjudicator happened to determine that there was a finalised contract. Nothing in this judgment, when referring to 'the Contract', is intended to indicate any determination of that issue by me.

4. The following issues fall to be decided across the determination of the Part 7 and Part 8 Claims:

    (1) What was the nature of the communications taking place during 2022?

    (2) Were the particular documents submitted to the Adjudicator about which complaint is made subject to without prejudice privilege?

    (3) Were the documents, as a result, inadmissible?

    (4) Is the Decision, as a result, unenforceable?

    (5) Should I make, as a matter of principle, any determination about the other documents about which complaint is made, but which are not relevant to issues (3) and (4) above?

    (6) If so, what is that determination?

5. Issues (1) and (2) turn on considering the chronological sweep of interaction between AZ and BY and/or its agents, from the evolution of a dispute in 2021 to the indications in 2023 that negotiations were over. Before conducting this, however, it is necessary to consider the legal framework as it applies to without prejudice

communications, the limited circumstances in which they are admissible and the extent to which, if submitted to a decision-maker, it may make the decision unenforceable.

B. The Law : Without Prejudice Privilege

6. Both Mr Taczalski and Mr Crangle agreed that the starting point is the authoritative statement in the House of Lords' decision in *Rush v Tompkins* [1989] AC 1280:

> "*The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290 , 306:*
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> > *"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151 , 156, be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*
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> *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." (Emphasis added)."*

7. I am also guided by the helpful summary appearing in HHJ Havelock-Allan's judgment in *RWE Npower Plc v Alstom Power Limited*:

‘*(1) The justification for the privilege attaching to without prejudice communications is not only the public policy of encouraging the negotiated settlement of disputes but also the express or implied agreement of the parties that such communications should be treated as confidential. (2) The fact that a document is marked "without prejudice" is not conclusive as to its status, although it is often a strong pointer. As a general rule a document marked "without prejudice" is privileged unless it was not written as part of a process of negotiation or with the intention of promoting compromise. The test for determining whether the privilege applies is an objective one. As Laddie J held in* <u>*Schering v CIPLA*</u>*: "The court has to determine whether or not a communication is bona fide intended to be part of or to promote negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient". (3) Once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for doing so is absolutely plain. There are certain exceptional circumstances where it may be permissible to admit into evidence without prejudice communications which are privileged.*’

8. In *Muller v Linsley & Mortimer* [1996] PNLR 74, 77 Hoffman LJ, identified one such exception, relevant to the submissions advanced by AZ. He said:

> “*…Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute.”*

9. The existence of this exception was reiterated in *Unilever Plc v The Proctor & Gamble Co.* [2000] WLR 2436, in which Robert Walker LJ said:

> ‘*Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.*
>
> *(1) As Hoffmann L.J. noted in Muller's case, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible….*
>
> …
>
> (2) *Even if there is no concluded compromise, a clear statement which is made by one Party to negotiations, and on which the other Party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in Hodgkinson & Corby v Wards Mobility Services [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.*’

10. These exceptions potentially give rise to the following practical issue. A Party may claim that certain communications are required to be considered in the context of a claim advanced that a concluded compromise agreement was reached, displacing the original dispute about which the parties had been negotiating. However, that claim may fail because no concluded agreement was in fact reached. In these circumstances, the underlying dispute remains, undisplaced, before the decision-maker. Similarly, an estoppel may be raised, but fail because (for example) no prejudicial reliance is made out. However, by reference to the material deployed in support of the unsuccessful claim that the dispute had been compromised, or that an estoppel has arisen, the decision-maker has potentially seen a raft of documents adverse to one of the parties in relation to the extant dispute. Although neither counsel was aware of authority dealing with the point, it seems to me clear that the decision-maker must in these circumstances explicitly consider whether having had sight of the adverse documents means that they should no longer determine the dispute by reference to the test of apparent bias. If they consider the apparent bias test is met, they should decline to determine the remaining dispute. If they consider that, notwithstanding the sight of the communications, they can nevertheless fairly (judged by the test of apparent bias) proceed to consider the dispute, they should do so. This is for at least two reasons. First, if a decision-making process in which the decision-maker has seen certain documents would properly be impugned by the test of apparent bias, it is illogical that the same result does not pertain in circumstances where an exception to the rule is deployed, but ultimately not justified. Second, parties would more readily seek to deploy without prejudice documents purportedly justified by one of the exceptions and side-step the without prejudice rule, and this would considerably undermine the public policy justifying the rule. I do not accept, as advanced by Mr Crangle at one point, that it is only in cases where the deployment of the 'compromise' exception is shown to be a deliberate strategic device designed to avoid the rule that this position pertains. A Party may have a legitimate belief in the existence of the compromise, but if they turn out to be wrong, there is no reason why the apparent bias test should not remain the touchstone guiding the manner in which the underlying dispute should be determined. This approach is, in my view, essential to uphold not just the public policy behind the without prejudice rule, but confidence in the fairness and compliance with natural justice of decision-making processes (be it in adjudication or otherwise).

11. Mr Crangle relied in oral submissions upon the recent case of *A&A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago* [2022] UKPC 39. This case dealt with, amongst other things, the admissibility of material under the exception relating to the conclusion of an agreement in circumstances where enforceable agreements could be reached in relation to variations on a variation-by-variation basis even where no-all-embracing agreement is reached. Nothing set out in the preceding paragraph cuts across the principles identified by the Privy Counsel in *A&A*, and I did not take Mr Crangle to be submitting otherwise.

12. In *Unilever*, Robert Walker LJ gave the following further guidance:

> '*Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" (Hoghton v. Hoghton (1852) 15 Beav. 278 , 321), has a wide and compelling effect. That is particularly true*

where the "without prejudice" communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.

At a meeting of that sort the discussions between the parties representatives may contain a mixture of admissions and half-admissions against a Party's interest, more or less confident assertions of a Party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Simon Brown L.J. put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt L.J. put it in Muller v. Linsley & Mortimer [1996] P.N.L.R. 74 , 81, a concept as implausible as the curate's egg (which was good in parts). As it happens, the minutes of the Frankfurt meeting are exhibited in redacted form in which the redacted parts of the document appear to amount to about 90 per cent. of its contents.

This guidance is relevant where, as here, AZ do not dispute that certain without prejudice communications and meetings did take place in 2022. It characterises the period as one where there were two parallel streams of communication, some without prejudice and some open. This will often be the case where the parties have to continue to communicate on the practicalities of an ongoing project alongside commercial negotiations around areas of dispute. However, whilst two completely separate streams of communication (between different people, and or differently marked, for example) might present no evidential problems, there is likely to be greater difficulty where communications are mixed. As Robert Walker LJ then concluded:

"Whatever difficulties there are in a complete reconciliation of those 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 the Rush & Tompkins case [1989] A.C. 1280 , 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

13. Finally, of relevance to the competing arguments advanced in this case are those cases dealing with a Party wishing to change the status of the negotiations. As indicated above, Mr Crangle said that these cases are not relevant because on a proper understanding of the nature of the communications was that there were always two streams – one of without prejudice negotiations and the other, open. It was not the case, therefore, where the stream of without prejudice negotiations became open. As such, he does not dispute the principle, relied upon by Mr Taczalski, that the burden is

upon the Party wishing to change the basis of negotiations to bring the change to the attention of the other Party.

14. It is unsurprising that this is not disputed as a matter of principle (as opposed to relevance) given that it is stated clearly in *Cheddar Valley Ltd v Chaddlewood Ltd* [1992] 1 WLR 820 at 826 (cited with approval by Sir Anthony Mann in *Jones v Lydon* [2021] EWHC 2322(Ch)):

> "*In my judgment, however, where negotiations begin without prejudice, as indeed these began on 1 August, and, what is more, where they are expressly made without prejudice to begin with, which again is this case, it is incumbent on the Party who changes the basis of such negotiations to spell out the change with clarity. It may not be enough merely to say the word 'open'.*"

15. The test of whether he has done so is an objective one (see *Jones*).

16. Therefore, I distil from the foregoing the following principles relevant to the matters before me:

(1) the without prejudice rule is founded partly in public policy and partly in the agreement of the parties;

(2) the court has to determine whether or not a communication is bona fide intended to be part of or to promote negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient;

(3) the fact that a document is marked "without prejudice" is not conclusive as to its status, although it is often a strong pointer;

(4) where negotiations are expressly made without prejudice to begin with, the burden is upon the Party who wishes to change the basis of such negotiations to do so explicitly and with clarity. Whether they have done so is assessed objectively;

(5) whilst parties may be communicating both openly and on a without prejudice basis concurrently, the court must exercise extreme caution in embarking upon a dissection of the communications, or discussions in meetings, so as not to undermine the public policy objective;

(6) once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for making an exception is absolutely plain;

(7) one such exception relates to when the issue is whether without prejudice letters have resulted in an agreed settlement. In this situation, the correspondence is admissible, because it contains the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. However, where the without prejudice letters have not in fact resulted in an agreed settlement which has replaced the original dispute about which the parties were negotiating, the decision-maker, having seen the without prejudice material, must then assess their own ability to go on to decide the remaining dispute fairly, in accordance with the principles which govern apparent bias and the rules of natural justice.

C. The Law: Without Prejudice Communications and Apparent Bias

17. The earliest authority in which the Court has considered the proper approach to be taken when an adjudicator has been told of or seen without prejudice communications is *Specialist Ceiling Services Norther Limited v ZVI Construction (UK) Limited* [2004], BLR 403. The analysis of HHJ Grenfell took as its starting point the decision of the Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700. This was confirmed as the correct approach in *Volker Stevin Ltd v Holystone Contracts Ltd* [2010] EWHC 2344 (TCC) in which Mr Justice Coulson addressed the problems associated with the introduction of "without prejudice" material in adjudication at [20]:

> *"The issue is whether the adjudicator's knowledge of the fact that a 'without prejudice' offer had been made by Holystone to Volker meant that, however unconsciously, he was biased towards them. The relevant test is set out by the Court of Appeal in In Re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700. Lord Phillips put it in this way:*
>
> > *"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.*""

18. In *Ellis Building Contractors Limited v Vincent Goldstein* [2011] EWHC 269 (TCC), Akenhead J also undertook a review of the relevant authorities. At the outset he noted that adjudicators are under a duty to apply the rules of natural justice. He referred in this context to *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) in which the second of the principles identified in that case was that '*any breach of the rules must be more than peripheral, they must be material breaches*.' Following this, Akenhead J continued:

> *"25. The improper deployment of "without prejudice" material in adjudication is something which happens in adjudication as in court although this Court has at least anecdotally seen an increase in this behaviour in adjudication. This often arises because parties represent themselves or are represented by consultants who are not legally qualified and, perhaps, they do not fully understand that truly "without prejudice" communications are privileged and should not be referred to in any legal or quasi-legal proceedings, including adjudication. Whilst if "without prejudice" communications surface in a court, the judge being legally qualified and experienced can usually put it out of his or her mind, it is a more pernicious practice in adjudication because most adjudicators are not legally qualified and there will often be a greater feeling of unease that the "without prejudice" material may have really influenced the adjudicator. This Court can only strongly discourage parties from deploying "without prejudice" communications in adjudication.*"

19. Having then considered *Rush & Tompkins*, *Volker* and *Specialist Ceiling Services*, Akenhead J then summarised the following conclusions at [29]:

> *"(a) Obviously, such material should not be put before an adjudicator. Lawyers who do so may face professional disciplinary action.*
>
> *(b) Where an adjudicator decides a case primarily upon the basis of wrongly received "without prejudice" material, his or her decision may well not be enforced.*
>
> *(c) The test as to whether there is apparent bias present is whether, on an objective appraisal, the material facts give rise to a legitimate fear that the adjudicator might not have been impartial. The Court on any enforcement proceedings should look at all the facts which may support or undermine a charge of bias, whether such facts were known to the adjudicator or not.*"

20. Mr Crangle placed particular emphasis on sub-paragraph (b) of this passage, emphasising the need for a determination that the decision must be shown to be based 'primarily' on the without prejudice material in order for a Court to decline to enforce it. It is doubtful, in my judgment, that Akenhead J intended this part of his judgment to be setting out such a threshold test which must be passed in order for a decision not to be enforced; if it is to be read this way, I would respectfully disagree. The apparent bias test (properly articulated in sub-paragraph (c) of the passage, reflecting *Re Mediciments*) will look at the objective perception of the influence exposure to the material may have had on the mind of the decision-maker. However, apparent bias does not depend, by definition, on actual influence. Take an obvious example: if the only issue for determination by the decision-maker is the proper construction of a contract, it is almost inevitable that the decision-maker will ultimately decide the matter by looking solely or primarily at the words of the contract, and (if, indeed, saying anything at all) expressing the view that the post-contract views expressed by one Party to the other about the merits of their position are entirely analytically irrelevant. Obviously, such post-contract material is analytically irrelevant. In this sense, it could always be said that the without prejudice communications were not 'material' to the decision, let alone primarily material upon which it was based. However, this does not mean that the test of apparent bias cannot be satisfied in these circumstances. A court may properly conclude on the evidence before it that the objective observer would consider that knowledge of one Party's frank admissions as to the weakness of their legal case made under the cloak of without prejudice discussions gives rise to a legitimate fear that the adjudicator took the knowledge of a Party's confessed weakness of their own case into account, possibly even only sub-consciously. Thus, the communications do not have to be 'material' in the sense that they can be shown to have been the basis of a particular conclusion; they do have to be 'material' in the sense they give rise, objectively, to a legitimate fear of partiality.

21. This analysis concords, in my judgment, with the views expressed in *Coulson on Adjudication* (4th Edn) at 12.34, in which the editor states:

> '*It is thought that, if the adjudicator was told of the amount of a without prejudice offer, it might be very difficult for him to continue with the adjudication, because there would be an inevitable question mark about whether*

the result of the adjudication, however inadvertently, was shaped by the amount of the offer'.

22. In such a case it would not be possible to demonstrate that the decision was 'primarily based' upon the without prejudice material. However, I agree that such a situation may nevertheless give rise to apparent bias. It is the existence of the 'question mark' which is being addressed by the objective apparent bias test. Thus, concluding that such a question mark exists does not depend on establishing that the decision was 'primarily decided' on the basis of the material. That said, if such a conclusion is the proper one, it is likely as Akenhead J said, that the decision would not be enforced. It is equally the case that where no such question mark exists – particularly, for example, in circumstances where the decision-maker knows only of the fact of offers being made (which fact is wholly unsurprising) rather than the amount of any offer - the decision will be enforced notwithstanding the disclosure of without prejudice material.

23. It is not necessary, therefore, to state the test to be applied as more or less than that set out in *Re Mediciments* and quoted in the passage from *Volker* set out above.

24. Before turning from the law relating the potential consequences of the deployment of without prejudice material, I turn briefly to the recent case of *Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd* [2020] CSOH 19, upon which both counsel made submissions. In this case, the Scottish Court of Session (Outer House) (having conducted a review of the cases referred to above), concluded as follows at [38]:

> '*The current case is far removed from the scenario deplored by Akenhead J. The current case was not a situation where the adjudicator was improperly made aware of an irrelevant and collateral "without prejudice" offer to settle which he ought to put out of his mind. In the current case the question of the admissibility of the "without prejudice" letters was one which the adjudicator had to decide as one of the central issues in the adjudication. The adjudicator was legally qualified. It was the adjudicator himself who identified admissibility as being a central issue. The adjudicator gave both parties an opportunity to make submissions on the question. He considered their submissions and the case law to which he was referred and came to a reasoned decision on the question. It cannot be said that the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias.*'

25. Both counsel submitted that the authority is not directly relevant in circumstances where this Court is in fact determining the question of whether the material submitted was without prejudice in the Part 8 claim. I agree. I would add, however, that I do not regard this as authority which goes further than stating, in the circumstances before the Court in that case, the test of apparent bias had not been made out. It is not authority, I would suggest, for the proposition that just because an adjudicator has turned his or her mind to the question of admissibility of the material, and received submissions from both parties, a challenge to that decision would not, at least under the law of England and Wales, be successful as a matter of principle. The question of admissibility is a question of law. It is trite that generally, adjudicator's decisions will be enforced notwithstanding the fact that they contain an error of law. But an

error as to the admissibility of without prejudice material is an error of law that could potentially impact the fairness of the decision-making process in accordance with the rules of natural justice. It is similar, in this sense, to an error of law by an adjudicator in assessing the extent of their own jurisdiction. It is an error which can affect the enforceability of the decision. If, therefore, a court concludes (contrary to the determination of the adjudicator) that material was in fact without prejudice *and* that the test of apparent bias is made out, the decision should not be enforced. Not only is this the correct result analysing the position from first principles, it seems to me it also accords with the important public policy behind without prejudice communications, and, in the words of Akenhead J, is consistent with the Court's strong discouragement to parties from deploying "without prejudice" communications in adjudication.

D. Issues 1, and 2: What was the nature of the communications taking place during 2022 and were the particular documents submitted to the Adjudicator about which complaint is made subject to without prejudice privilege?

[PARAGRAPHS 25-94 REDACTED]

95. I therefore conclude that the nature of the communications taking place during [REDACTED] within the documents included within Appendix A to the Part 8 Claim were without prejudice. It follows that the particular documents submitted to the Adjudicator about which complaint is made were subject to without prejudice privilege.

96. As to the first Part 8 declaration sought, I am satisfied that I can declare that:

'the Negotiations [REDACTED] were without prejudice.'

97. I am not prepared to make a general declaration as to their admissibility in proceedings, or adjudications, generally as this may depend upon the nature of the proceedings (as set out in the second declaration sought). I have made, in the body of this judgment, specific findings about most if not all the documents listed in Appendix A to the Part 8 Particulars of Claim. I do not regard it as necessary to embody those findings in a specific declaration over and above the wording of the declaration set out above.

98. I am also satisfied that I can declare that the Negotiations did not result in any concluded agreement (as sought in the third declaration).

E. Issue 3: Was the material admissible in the Adjudication.

[PARAGRAPHS 99-101 REDACTED]

102. The [REDACTED] email was being relied upon not to set up a binding agreement replacing the underlying dispute, alleged breach of which amounted a fresh cause of action. The 'agreement' was being relied upon as collateral, and prejudicial, material seeking to undermine the contractual position which BY had adopted. In essence, it was being said that BY had conceded (i.e. 'agreed') in the [REDACTED] meeting that AZ's contractual position was justified. Use of without prejudice material is not admissible for these purposes. The exception to the without prejudice rule is generally not invoked unless the agreement said to have come into existence is one which has

replaced the underlying dispute which was the subject of without prejudice negotiations.

103. BY objected to the use of the without prejudice material. Its Response was served under protest and without prejudice to its breach of privilege objections.

[PARAGRAPHS 104-109 REDACTED]

110. The allegation of the [REDACTED] Agreement remained, however, collateral in the sense that it was not an agreement/compromise itself being sued upon. It was an agreement the existence of which, it was said, evidenced an alleged inconsistency in BY's asserted contractual position. It was, in effect, being relied upon as a form of admission on the part of BY that their stated position was unsustainable. This does not fall within the exception to the without prejudice rule referred to by Hoffman LJ (as he was then), in *Muller v Linsley & Mortimer*. The purpose for which the material was deployed was not, in reality, to establish an offer and acceptance forming a contract which replaced the cause of action previously in dispute – this is clear not least because no such contract was sued upon. Instead, the [REDACTED] meeting and email were relied upon to establish (or corroborate) the truth of the facts which were impliedly admitted within the meeting and email, namely that the obligation to [REDACTED] lay with BY and/or that AZ were entitled to additional sums in respect thereof. That is not a purpose for which without prejudice material may be legitimately deployed. The material was, in my judgment, inadmissible; and will be inadmissible in any proceedings which deal with the same issues as considered by the Adjudicator, unless some other exception which I have not considered is legitimately invoked in the context of those particular proceedings.

111. Even if I am wrong about this, I have concluded that there was no binding compromise agreement reached. Even if the deployment was legitimate, in circumstances where no such agreement was in fact concluded, it is incumbent upon the decision-maker thereafter to reflect upon their ability to resolve the extant dispute (which was not compromised as a result of without prejudice negotiations) fairly having seen documents which contain material (such as explicit or implicit admissions) adverse to one Party.

112. Thus, irrespective of the legitimacy of the deployment of the material, it is necessary to turn to the test of apparent bias in the context of whether the Decision is enforceable.

F. Issue 4: Is the Decision, as a result, unenforceable?

113. As I have set out above, it is for me to consider whether, in all the circumstances, a fair-minded and informed observer would conclude that there was a real possibility that, having seen the without prejudice material, the Adjudicator was biased.

114. Both parties make submissions founded upon the Decision.

115. The Adjudicator set out the issues which he had to decide. Principal amongst these was what he termed 'the Contract Interpretation Issue'. He then identified a number of sub-issues, and one of these was 'the Privilege Sub-Issue' [REDACTED]

116. In relation to the Privilege Sub-Issue, the Adjudicator concluded that he did not consider that there was any evidence to support a view that the purpose of the [REDACTED] meeting was to reach a commercial settlement on the whole Contract.

He concluded that it appeared to be more of a technical/commercial meeting to discuss specific issues [REDACTED] . The Adjudicator concluded that the meeting [REDACTED] was an 'open' meeting to find a way forward, and that it was not intended to compromise all matters on the Contract. Having done so, he then went on to decide that a number of matters were unequivocally agreed, including the fact that [REDACTED] would be carried out again as a variation. Quite possibly because the Adjudicator had not seen the full run of without prejudice communications which clearly place the [REDACTED] meeting and email in its proper context, the Adjudicator was, in my judgment, wrong to reach these conclusions.

[PARAGRAPHS 117-121 REDACTED]

122. In my judgment, the submissions of Mr Crangle focus too heavily upon, from the face of the Decision, the reasoning expressed in order to support the conclusion that his consideration of the [REDACTED] was ultimately immaterial to the outcome of the Decision.

123. This is not, however, the correct approach. As stated above, where a key issue is one of contractual interpretation, the determination of the decision-maker will usually be expressed in a way which limits the reasons to an interpretation of what is found within the four-corners of the contract. Whilst obviously not irrelevant, this is not, of itself, an answer to the question of whether in all the circumstances, a fair-minded and informed observer would conclude that there was a real possibility that, having seen the without prejudice material, the Adjudicator was biased.

124. In my judgment, I conclude that the fair-minded and informed observer considering all of the circumstances of this case would conclude that there was a real possibility that, having seen the without prejudice material, the Adjudicator was unconsciously biased. This is because:

(1) the without prejudice material was placed front and centre within the Adjudication by AZ, and played a significant role in AZ's case. It was put in terms that the material demonstrated that BY were taking a position materially inconsistent to its previously expressed views. The very purpose of without prejudice privilege is to prevent this from happening;

(2) that material contained implicit admissions by BY that were plainly inconsistent with its open position and the contractual position it was arguing for in the Adjudication. In particular, it accepted responsibility (in the context of a commercial negotiation) [REDACTED] (contrary to its open position) and [REDACTED] (contrary to its open position) and [REDACTED] (contrary to its open position);

(3) as such, the material was not just prejudicial and adverse to its interests but also related to central issues in dispute. The substance of the material cannot be likened in any way to an adjudicator knowing of the fact of an offer, or the fact of the existence of negotiations, which as the authorities make clear is something that a decision-maker would readily anticipate. It is much more akin to, and indeed potentially more prejudicial than, an adjudicator knowing the *amount* of an offer;

(4) regardless of the manner in which the Decision was expressed, there is in the circumstances of this case an inevitable question mark about whether the result of the adjudication, however inadvertently or sub-consciously, was shaped by the Adjudicator's knowledge of the concessions/admissions in relation to key aspects of the open dispute made by BY in negotiations. I do not, in coming to this conclusion, intend to express any view as to the merits of either side's contractual arguments;

(5) the inevitable question mark is even more acute when the Adjudicator had formed the view, also in error, that these matters had in fact been agreed (and not just put forward in a commercial offer which might be easier to put out of one's mind).

125. In the circumstances, this is one of the few cases in which a breach of the rules of natural justice, by reason of apparent bias, dictates that the Decision should not be enforced. I therefore dismiss the AZ's application for summary judgment, and grant BY's fourth declaration, namely that the Decision is unenforceable.

G. Issues 5 and 6. Should I make, as a matter of principle, any determination about the other documents about which complaint is made, but which are not relevant to issues (3) and (4) above; and if so, what is that determination?

126. Mr Crangle submitted that any determination in relation to documents not relevant to issues (3) and (4) above would serve no useful purpose and, as such, I should not exercise the Court's discretion to make a declaration.

127. The point can be taken shortly: in considering the run of documents for the purposes of deciding the Part 8 Claim it was necessary for me to, and I have, considered all relevant documents referred to in Appendix A to the Part 8 Particulars of Claim, irrespective of whether they led to an adjudication related complaint. I have determined those declarations I consider appropriate, and have made findings in the narrative of this judgment which apply to all such documents. Insofar as I have not referred to a particular document, I make no finding. I have, as set out above, declined to make more general declarations relating to inadmissibility in future proceedings, which questions must be determined in the context of the particular proceedings. The point of principle does not, therefore, arise.

H. Conclusion

128. The Part 7 Claim is dismissed. The declarations sought by way of Part 8 claim are allowed to the extent identified above. I invite the parties to draw up the appropriate order.

129. In order to preserve the confidential nature of without prejudice material as I have determined it to be in the context of any future proceedings before the Court, I direct that this judgment remain, in its full form, confidential to the parties until such point at which there are no longer issues between the parties to which the ongoing privilege may be relevant. At this point, the parties shall notify the Court, and a full version of this judgment can be made public. However, in light of a number of the matters

canvassed in the judgment of wider importance, I have invited the parties to agree an anonymised and redacted version of the judgment which may, in the meantime, be made public, and thank them for their co-operation in this regard.