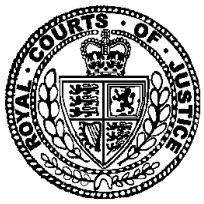

Neutral Citation Number: [2023] EWHC 1431 (Comm)

Case No: CC-2023-BHM-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KBD)

Birmingham Civil Justice Centre
The Priory Courts, 3, Bull Street, Birmingham B4 6DS

Date: 15 June 2023

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

(1) St. James's Place Wealth Management plc **(2) St. James's Place (PCP) Limited** **(3) St. James's Place Partnership Services Limited**	**Claimants**
- and -	
Kevin Charles Dixon-Nutt	**Defendant**

- -
- -

Paul Nicholls KC (instructed by **DAC Beachcroft LLP**) for the **Claimants**
Thomas Robinson (instructed by **Lewis Silkin**) for the **Defendant**

Hearing date: 28 February 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ WORSTER

HHJ WORSTER

Introduction

1. The parties to this litigation have brought two claims. The first in time was issued by Mr Dixon-Nutt against St James's Place Wealth Management plc in June 2021. By that claim Mr Dixon-Nutt seeks a declaration that he was entitled to the payment of certain fees arising from financial products he issued to clients of St James's Place Wealth Management plc pursuant to an agreement between those parties dated 2 July 2018. He also makes a claim for damages to be assessed (the "Dixon-Nutt claim"). The second claim was brought by St James's Place Wealth Management plc and two other entities in the same group (referred to collectively as "SJP") against Mr Dixon-Nutt in May 2022 alleging breach of contract and/or misrepresentation. The claim is for the rescission of the agreement of 2 July 2018 and damages (the "SJP claim"). Given their common issues, the two claims are being case managed and tried together.

2. At the material times, Mr Dixon-Nutt was a financial advisor. Between 2003 and 2018 he was self-employed, and was an appointed representative of SJP for the purposes of the Financial Services and Markets Act 2000. That relationship was governed by the terms of an appointment letter and a Partner Handbook. In 2018 Mr Dixon-Nutt entered into an agreement with SJP (in effect) to transfer his business to them. SJP claim that he misrepresented the true position of his business to them. By the agreement of 2 July 2018 Mr Dixon-Nutt warranted (in simple terms) that he had conducted his business in accordance with the terms of his appointment with SJP and had disclosed all information which would materially affect a purchaser for value of his business.

3. Subsequently a former client of Mr Dixon-Nutt ("Mr T") made a complaint to SJP about Mr Dixon-Nutt. SJP settled Mr T's complaint in January 2019 and made a payment to him of £258,000. As part of the complaint process, Mr T provided SJP with a recording of a meeting he and others had had with Mr Dixon-Nutt on 3 November 2017. The recording was made without Mr Dixon-Nutt's knowledge and consent, and contains some material which may be helpful to SJP in the current litigation with Mr Dixon-Nutt. Mr Dixon-Nutt's position is that this recording is inadmissible because it is protected by the without prejudice rule.

4. In its claim against Mr Dixon-Nutt, SJP allege that he was lent money by his client Mr T, and that the loan was funded by the client withdrawing money invested with SJP. That would have been a breach of Mr Dixon-Nutt's contractual arrangements with SJP, and consequently a breach of the July 2018 agreement. SJP also say that had that client loan been disclosed to them, they would not have entered into the agreement of 2 July 2018 and paid Mr Dixon-Nutt for his business. In addition, SJP rely upon other misconduct (to use a general word) on the part of Mr Dixon-Nutt apparently referred to in the recording of the meeting with Mr T. Mr Dixon-Nutt denies that he acted in breach of his contract with SJP. He agrees that he took a loan from Mr T, but not one which involved the withdrawal of investments Mr T held with SJP or which was a breach of his contractual arrangements with SJP. He denies any breach of the July 2018 agreement or that SJP are entitled to any of the sums they claim.

5. SJP have relied upon the recording of the meeting of 3 November 2017 in pleading their case in the SJP claim, and would intend to use that recording in evidence to support what they plead. SJP's case is summarised at paragraph 41 of the Particulars of Claim in the SJP claim:

> *The Defendant breached [the agreement of 2 July 2018] inasmuch as [certain of the warranties in that agreement] were not true, having regard to the Client Loan, and the facts and matters referred to in paragraphs 21.1 to 21.4 above, in paragraphs 22.1 to 22.3 above, and paragraphs 23.1 to 23.3 above.*

6. Paragraphs 21 and 22 of the SJP Particulars of Claim are as follows:

> *21. On or around 3 November 2017, the Defendant was present at a meeting with Mr T, Mr T's wife and a third party. During the course of the meeting, the Defendant made the following statements ("the Oral Statements"):*
>
> *Particulars of Oral Statements*
>
> *21.1 He had been "f***ing about with" insurance certificates on an aeroplane he jointly owned with Mr T.*
>
> *21.2 He had forged invoices related to the re-fitting of the same aeroplane.*
>
> *21.3 He had borrowed money from his clients.*
>
> *21.4 He had lied to a client about the existence of wine purchased as an investment.*
>
> *22. The Defendant made the following further written statements in emails that he sent to Mr T on 16 November 2017 and 8 January 2018 ("the Written Statements"):*
>
> *Particulars of the Written Statements*
>
> *22.1 "I am also preparing a spreadsheet of all and as accurate costs as possible, for everything to do with GRYSE [the aeroplane], although you may be aware of the vast majority by now. Some original records I no longer have, but the approach I am taking is that "if it can't be proved, it didn't exist" (Email of 16 November 2017)*
>
> *22.2 "I realise that I have an illness/addiction, which will take a monumental effort to recover from, but I want you to be certain about one thing – **I will make every effort in my being, to repay and put right what I have done** – I just need to be given a chance to do so …" (Email of 16 November 2017; bold in email)*
>
> *22.3 "… Every moment of every day, I am conscious of what I have done, and find it hard not to see those actions as having been done by another. However, many of my other actions were as the person that I really am, and I am now fully aware of the enormity of my unconscious stupidity. For what we had, I would humbly ask that you recognise this …" (Email of 8 January 2018)*

7. Mr Dixon-Nutt accepts that he was at a meeting on 3 November 2017 with "*Mr T, Mr T's wife and a third party*". The third party was Jonathan Ball. There is an issue as to whether Mr T's identity should be made public, but the parties are content that I refer to him as Mr T for the present. That issue can be determined in due course. The issue on this application is raised by paragraph 17 of his Defence to the SJP claim. Having made a number of points, Mr Dixon-Nutt says this:

> *17.7 The Recording reveals that the purpose of the meeting relied upon by SJP was for Mr T… , Mrs T… and Mr Ball to identify liabilities of [Mr Dixon-Nutt], including to Mr T…, and reach agreement on how they would be settled.*
>
> *17.8 The Recording is accordingly a recording of a without prejudice meeting.*

The emails relied upon at paragraph 22 of the SJP Particulars of Claim are said to be covered by the same without prejudice privilege.

8. Mr Dixon-Nutt then made this application to strike out paragraphs 21 and 22 of the Particulars of Claim in the SJP claim, and any other references to this material, as an

abuse of process pursuant to CPR Part 3.4(2)(b). The application was supported by a witness statement by Mr Dixon-Nutt's solicitor dated 11 July 2022.

9. SJP disagreed that the meeting was covered by without prejudice privilege. On 3 October 2022 the court directed that the parties agree a transcript of the recording. That was done, and I refer below to a number of passages from the transcript by reference to a page number with the prefix "T". On 3 February 2023, SJP's solicitor made a short witness statement in opposition to the application, confirming that SJP disagreed with Mr Dixon-Nutt's case that the meeting on 3 November 2017 was "without prejudice", or that the emails which followed it were caught by that privilege. At paragraph 7, the solicitor confirms his instructions that the recording came into SJP's possession when two senior employees of SJP met with Mr T in October 2018 to discuss a complaint he was making against Mr Dixon-Nutt. Mr T had given one of those employees a copy of the recording contained on a memory stick.

10. Mr Dixon-Nutt made a witness statement in support of his application dated 13 February 2023. I also have a witness statement from Mr Ball (the "third party") dated 14 February 2023. I refer below to some of the evidence they give about the meeting and its purpose.

11. The issue on this application is whether the meeting on 3 November 2017 between Mr and Mrs T and Mr Ball on the one side, and Mr Dixon-Nutt on the other, was between parties to a dispute who were genuinely attempting to negotiate a compromise. If they were, then subject to the application of the recognised exceptions to the Without Prejudice rule, the recording is prima facie inadmissible and the application to strike out succeeds. If they were not, then the application fails. Whilst there was some argument about the emails, the reality is that they are to be seen as part of the same process and the same decision should be made in respect of both the oral and the written statements.

12. The question of whether the meeting and the emails are without prejudice is one to be determined objectively on the evidence available on this application. The transcript and the emails are admissible for that purpose, as are the witness statements from those who participated. In the circumstances of this case, the subjective intentions of the participants are also relevant, albeit those subjective intentions are to be objectively ascertained.

The Meeting

13. The dispute for which without prejudice protection is invoked is not one between the parties to this litigation. The dispute Mr Dixon-Nutt relies upon is his dispute with Mr T and Mr Ball, who were friends and business associates of his, and to whom he owed money. In his witness statement Mr Dixon-Nutt refers to the loans he took from Mr T and Mr Ball, and to the purchase, refurbishment, insurance and operation of a plane that he and Mr T funded as a joint venture. It is apparent that he had not repaid the loans.

14. Mr Ball's evidence is that shortly before 3 November 2017 he was telephoned by Mr T. Mr T said words to the effect that:

> *Charlie is being silly because he owes us both money and possibly others and we need to get to the bottom of it, get agreement as to what is owed, and find a solution so that we get repaid, so we need to have a meeting with him to get this sorted out.*

15. Mr Ball then arranged a meeting with Mr Dixon-Nutt. Mr Dixon-Nutt's evidence is that Mr Ball told him it was about his role with Mr Ball's company, and in order to discuss

financial matters. It seems that there was no relevant discussion about his indebtedness to Mr T and Mr Ball prior to this meeting, and certainly no correspondence identifying the nature of any dispute or proposals for resolving it. Mr Dixon-Nutt was not even told that Mr and Mrs T would be at the meeting he had arranged with Mr Ball.

16. In his witness statement Mr Ball summarises the purpose of the meeting from his point of view at paragraph 16. He says that it was not to get admissions of wrongdoing:

> *Rather we (Mr T… if he is to be believed and I) did want to get to the bottom of what [Mr Dixon-Nutt) had been doing and get from him complete clarity about his finances, liabilities and to accept his responsibilities, but also for finding ways of getting everything resolved so that we got repaid and he got back to running his business.*

17. The first matter to note from a reading of the transcript is that it was Mr T and Mr Ball who controlled the meeting. They had the advantage of surprise, and were relentless in pursuing their agenda. The tone of their questions was largely hostile and accusatory. They gave Mr Dixon-Nutt little opportunity to respond, often talking over him. They engaged in threats. The transcript often reads more like an interrogation than a negotiation. Mr T and Mr Ball were looking to recover the money they had lent Mr Dixon-Nutt and set about exploring what else Mr Dixon-Nutt had done, what assets he had and how those assets could be used to pay them. After the meeting had ended, Mr T described it as a "sting"; T/43.

18. Allied to that is the fact that Mr T and Mr Ball were prepared to use some heavy handed tactics. Mr Ball accepts that he was "*fairly heavy handed in the meeting because I wanted [Mr Dixon-Nutt] to realise that this was serious*". He describes himself as being "*pretty angry*". The meeting is timed at 1 hour 49 minutes, and the transcript is to be read as a whole. There are passages where Mr T and Mr Ball tell Mr Dixon-Nutt that they are trying to help him and that he should have come to them before and told them his problems, but that is in the context of their having made some serious threats if Mr Dixon-Nutt does not cooperate with them. The threats are not simply of going to the police or SJP, but of physical violence and worse. Almost the first words spoken are from Mr Ball [T/2]:

> *… I think we need to have a proper conversation Charlie don't we. So do you want to start?*
>
> *After all we've been through this summer, after everything I've helped you with … after the list of debt you've got here … and then you've taken money off of him and that's not on the debts … you've robbed him on invoices on planes … you're a fraud. I would have dealt with this completely differently 10 years ago Charlie, you wouldn't be fucking sitting here now, that's how I would have dealt with it, trust me, you'd have disappeared. You're a fraud. You're robbing off your best friend. I've done nothing but be your friend to you …*

The transcript then records Mr Dixon-Nutt trying to explain that the problem was that since his divorce he has not been able to maintain his lifestyle.

19. The transcript at T/3 is another example of this:

> Mr T: *I knew. I know you are desperate Charlie, because I know what you've been doing to me because I've been investigating you for a month. And I haven't missed one penny. I know where it's all gone, and I have all the witnesses and all the paperwork. Jon and I today and [Mrs T] want to try and rescue your life. This is your last chance. You are in the last chance saloon mate.*

B: *I'm not sure I do. He's convinced me I do. I couldn't give a fuck to be honest with you Charlie. So he's convinced me that this is probably the way forward. So I'm listening today. My point of view is that I just go to the police.*

Mrs T: *If it wasn't for m- Charlie*

B: [interrupting] *I'll bury you, I don't care, just finish it. But you know what? I'm listening today. So let's just get, we're not good cop, bad cop, I'm just listening today. So …*

D-N: [pause]

To say sorry is not sufficient, is it. Um, it's … I've been …

I don't know what I can do, I don't know why I do it. I hate myself for what, for what I've done.

Mr T then refers to falsifying invoices being a criminal offence, and (without giving Mr Dixon-Nutt the opportunity to finish his response) says that he is:

… holding off the lawyers at Haywood Aviation as we speak …

and accuses him of ripping him off with the pilot. Mr Dixon-Nutt does not appear to deny the allegation. When Mr T asks him why he didn't come to him and say that he was in over his head and had overcharged him, Mr Dixon-Nutt replies:

It's like a snowball, it just kept go- carries on and on and on …

20. At T/4 Mr Ball pursues his questions about who else Mr Dixon-Nutt has "*robbed*" and refers once again to Mr T using the "*legal route*" but that he will use "*the other route, the proper route*", and says this:

… if you want us to walk out of here with a solution today then you .. this is your last chance.

There follow a number of apologies from Mr Dixon-Nutt.

21. At T/8-9 there is a discussion of the length of the custodial sentence Mr Dixon-Nutt would receive if the matter went to the police, followed by this:

Mr T: *Forging invoices … I mean Charlie?*

Mrs T: *Being a financial adviser and doing that. What would …*

B: *You'd lose SJP*

Mr T: *What the fuck were you thinking. Forging an aviation … to do with aviation … changing emails, forwarding emails with new figures in. Fucking hell!!*

D-N: [stuttering] *I, I don't, I don't know how I did what I did. I don't know what I was thinking.*

22. At T/10 there is this exchange between Mr T and Mr Ball:

Mr T: *Do you know how many conversations we've had about how we're going to deal with you?*

B: *And do you know what I was saying? Fuck him now. Murder him. I don't care*

Mr T: *You know that's not my style Charlie.*

B: *Oh I was like bollocks I'm not interested. Cause I gave you your chance if you remember? He's convinced me over the last three days that this is the right route so that … we are going down that route. Let us help you. Which is being honest now.*

At T/14 Mr Ball says this:

> *And you know one … one phone call to the FCA, one to SJP, and one to the cops … you're not in a good place are you?*

23. The second matter of relevance is that Mr Dixon-Nutt does not appear to deny that he has a liability to Mr T and Mr Ball and that he has to pay it. The passages referred to at paragraph 19 above are examples of this. On other occasions Mr Dixon-Nutt gives no response to the allegations made against him. Sometimes he is apologising and saying that he hates himself or can't understand how he has acted as he has. At times he appears distressed and cries. Sometimes he was given no opportunity to respond. After the meeting had ended Mrs T is recorded as saying this to Mr T at T/45:

> *A lot of the time he did want to talk but no one allowed him to talk, because you guys kept going at him.*

The extent of the loans would have been known to the parties, and it seems that Mr T knew what the consequences of the problems with the plane were, but those liabilities are not expressly quantified at the meeting.

24. Mr Dixon-Nutt deals with whether or not he accepted what was being said to him at paragraph 11 of his witness statement.

> *The meeting was extremely threatening, hostile and accusatory and much of what was alleged is not and was not then true and accurate. I recall disputing a number of allegations, by shaking my head on occasions and on others looking shocked and confused by what was being said or alleged, indicating disagreement. Equally, some things I did agree with. However I could hardly get a word in or gather my thoughts as the other participants, between them, just kept ploughing on largely ignoring my disagreements. As I say, I did accept by answers from me some of what was claimed, but in fairness the meeting was so threatening and hostile that I just wanted it to be over with and in any event my looks of shock, astonishment and disagreement were simply being ignored other than on rare occasions.*

25. That would not necessarily be apparent from a transcript of a recording of the conversation, but it is supported by Mr Ball's evidence that there were a few occasions when Mr Dixon-Nutt showed shock, surprise or disagreement with what he and Mr T were saying. Mr Ball's impression was that Mr Dixon-Nutt agreed with and accepted much of what they were saying, but not everything.

26. The transcript bears out one example of this at T/4. Mr Ball says that it is only him and Mr T at the meeting, but suggests that there would be others in the same position.

B: *… what 20 people that should be sitting in this room today, there be more, there's more and I actually know one of them already, don't start shaking your head.*

D-N: *Who?*

B: *There's people out there …. I've done a little bit of digging. Right*

Mr T: *What about the Doc? All his money? And his wine? He's one, isn't he Charlie ..mm…yes. He's after you. Your friend the Doc. What's he going to say.*

Another couple are then mentioned. Mr Dixon-Nutt says that he has not borrowed money from them. He is asked who he has borrowed from. He says

> *It's you two and the Doc. And that's it.*

27. Thirdly, having "softened him up" in the early part of the meeting, Mr T and Mr Ball move to deal with how Mr Dixon-Nutt is going to repay them. At T/7 Mr Ball refers to a list of things he wants to see including bank statements. He tells Mr Dixon-Nutt that he has to sign the plane over to Mr T today, that he wants Mr Dixon-Nutt's watches, including the one he is wearing, and his shotguns. Mr Ball and Mr T say that they won't make Mr Dixon-Nutt's position public, and that he is to carry on working for SJP to make the money to pay the debts he owes them. They want to see his accounts, and they also want his cars and his motorbikes.

28. The meeting proceeds to deal with a number of issues relating to Mr Dixon-Nutt's finances. These included the sale of Mr Dixon-Nutt's house, the value of his father's house, what he would inherit, the potential cost of his mother's care, and whether his accountant was to be trusted to provide accurate information. It is to be noted that even during these passages of the meeting, Mr Dixon-Nutt says very little, and when he does he is often talked over. The mood seems to lighten a little, but Mr T and Mr Ball continue to apply pressure. At T/14 Mr T says this:

> *We could get our money back from SJP tomorrow. And I'm telling you, that is what will happen if you break the agreement that we now strike. You have a chance to rebuild your life.*

Mr T and Mr Ball call Mr Dixon-Nutt pathetic for contemplating suicide, but paint a picture of a way out of these problems for Mr Dixon-Nutt if he cooperates with them. There is further discussion of the value of Mr Dixon-Nutt's assets. T/17-18 deals with cars and motorbikes, T/19 with houses and future accommodation, T/20 with Mr Dixon-Nutt's share options in SJP, T/21-22 with his income, his watches and his property in France, T/23 with his pension.

29. There are a number of remarks made in the meeting by Mr Ball, Mr T and Mrs T which might be said to reflect their approach to the meeting. At T/8 Mr Ball says this:

> *And you work out or we work out a way of paying the debt down*

At T/24 Mr T says this:

> *Over the next week with Chris* [Mr Dixon-Nutt's accountant] *we'll work out a payment plan*

see also the reference to a "payment plan" at the foot of T/31.

At T/30 Mrs T gives Mr Dixon-Nutt a list so that he can remember what, by then, has been agreed about how Mr Dixon-Nutt would be raising money to pay Mr T and Mr Ball, and reorganise his finances:

Mrs T: *Guns to Sportarm, email to Arkle Finance to say we're settling, [Mr and Mrs T] are settling the debt on the aeroplane, sign the plane over to us which you've done; get rid of Fittleton Manor; and find a house for rent.*

Mr T: *And cars and motorbikes to Jon*

B: *And watches …*

30. Fourthly there are a number of remarks made which reflect the fact that the parties to this meeting were reaching an agreement. I have already referred to what Mr Ball says at T/4:

> *If you want us to walk out of here with a solution today then you … this is your last chance.*

At T/14 Mr T refers to the consequences *"if you break the agreement that we now strike*". At T/23, in the context of keeping what has been agreed between themselves, Mt T says:

We don't want to talk about the deal we've done or anything like that.

And at T/31 Mr T says that he will tell two named people that *"an honourable settlement has been made*".

31. Finally so far as the meeting is concerned, Mr Robinson drew attention to the following. Firstly, the references to going "the legal route" at T/4, and to Mr T holding the lawyers off; see above and at T/24 (albeit these are lawyers acting for others). The submission is that this shows that the meeting was aimed at avoiding the litigation of a dispute. Secondly, it is submitted that both Mr T and Mr Ball were willing to make concessions:

Mr T: *... I'm happy for you to pay me the interest I agreed with you on the £230K and if the share options are really real and your pension is really real and you can repay the 230, I am happy to go with just the money I would have made had it been in the unit trust, OK?*

B: *I'll do the same on the 150K ... I won't take the interest, I'll have it – I'll occur the interest, I won't roll it up, so I'll just have the money back in 2-3 years time. Now, what we're going to do is, park [the] main debt over here, the bits you owe [Mr T] for screwing him on the plane will come out of the watches, and come out [of] all those little bits and pieces. If there's any money left, we'll hold it for you ... and we'll put it ... have that money as back up, a relief fund for you ... so that will be getting rid of the cars, cleaning up all your debts, getting your house renewed, moving house, get yourself resorted. And then your main debt is not payable until .... 2020, 2 years when you are back on your feet and you're sorted...*

I do not read that as Mr T or Mr B conceding liability for anything, but giving Mr Dixon-Nutt time to pay in accordance with the "discussions" they had been having about Mr Dixon-Nutt's assets. Indeed Mr Ball appears to contemplate the position were there to be any money left over.

32. **The E mails**

The first was sent by Mr Dixon-Nutt to Mr T on 16 November 2017. Mr Dixon-Nutt's father had just died, and the email is understandably emotional. The subject is "What I've done". It refers to the betrayal Mr T must feel, and to an explanation Mr Dixon-Nutt is preparing which he would like Mr T to read. He is preparing a spreadsheet of the costs in relation to the aeroplane they had, and towards the end of the email says this:

*.. I want you to be certain about one thing – **I will make every effort in my being to repay and put right what I have done** – I just need to be given the chance to do so.*

The words in bold are in the email.

33. The second was sent by Mr Dixon-Nutt to Mr T on 8 January 2018. The subject is "… debt". He says that he understands the position Mr T has taken on the plane, and continues:

I remain confused by a number of points, and had hoped that you and I could have sat down together, to clarify everything ....

There were references in the meeting to the parties to it meeting again, indeed to there being regular monthly meetings in the future. That apparently had not happened.

As the plane is now owned by you, I am grateful that you will be selling it to reduce my debt to you.

On the subject of the timeline to repay my debt, I am governed by the processes in place at SJP, and was advised on Friday that a realistic expectation for "receipt of payment" would be late May/early June. Believe me, if you can, but I wish it could be quicker!

I know you have said that you would be happy to meet with me, once the debts have been repaid, but I would again beg you to grant me one short meeting, that may allow some comfort and increased clarity for us both.

Every moment of every day, I am conscious of what I have done, and find it hard not to see those actions as having been done by another. However, many of my other actions were as the person I really am, and I am now fully aware of the enormity of my unconscious stupidity.

34. The emails are of some assistance in assessing the nature and purpose of the meeting. They appear to confirm that Mr Dixon-Nutt does not dispute his liabilities to Mr T. He is remorseful and acknowledges his debt. The first email says that he wants to repay the debt. The second is concerned principally with the timeline for the repayment of the debt. If there had ben some dispute, the emails would have been an opportunity to raise such an issue. That said Mr Dixon-Nutt was no doubt still conscious of the threats Mr T and Mr Ball had made at the meeting, and that if they went to the authorities and SJP, the consequences for him would be serious.

The Without Prejudice rule

35. The existence of the "without prejudice" rule, and the policy reasons for it, are well-known and well-established; see David Richards LJ giving the leading judgment in *Berkeley Square Holdings v Lancer* [2021] EWCA Civ 551 at [23]. His exposition of the rule begins with Oliver J's statement in *Cutts v Head* [1984] Ch 290 at 306:

> *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 as 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…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.*

36. In the following paragraph of his judgment, David Richards LJ cites this passage from the judgment of Lord Hope in *Ofulue v Bossert* [2009] UKHL 16 at [12]:

> *I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgment against her in these proceedings. The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection.*

37. The generosity of the application of the rule was also referred to by Robert Walker LJ (as he then was) in *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 at [2443]:

> *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).*

38. The court will take a broad view of the application of the rule; see Sir Geoffrey Vos C in *Suh v Mace* [2016] EWCA Civ 4 at [22], and recognise that discussions which are genuinely aimed at the settlement of a dispute will attract the protection of the rule even though the particular document (or conversation) or part of it may not be directly about a settlement or include a settlement offer. The matters SJP rely upon in this case arise almost in passing, but if the meeting looked at in the round was about the settlement of a dispute the court will not "salami slice" the meeting into the open and the protected material. Nor is it necessary for the document or discussion to be labelled or agreed to be "Without Prejudice". The substance of the communication is the determining factor.

39. Consequently, for the protection to arise, there must be a genuine attempt to compromise a dispute between the parties to the discussion. What amounts to a dispute for these purposes?

40. In *BE v DE* [2014] EWHC 2318 (Fam), Bodey J considered whether a document setting out a compromise of a wife's financial claims on divorce prepared by a husband and presented to his wife over dinner attracted the protection of the without prejudice rule. The wife wanted the document in because she considered that it supported her case that the English court should have jurisdiction to hear her divorce. Bodey J considered whether there was a dispute for the purposes of the rule at [23]:

> *First, was there here a dispute or a sufficiency of a dispute between the parties? Whilst this clearly does not require the existence of legal proceedings, it must surely mean a reasonably cohate and definable issue or series of issues, not just a number of reciprocal differences or grievances which might or might not prove soluble with reflection and discussion. The husband says he was endeavouring to settle the wife's financial claims, but she had not yet made any (except purely formally in her petition, of which the husband was unaware). He speaks of a separation and of a potential divorce, although he was still hoping to avoid it. According to the wife, she for her part was wanting to save the marriage and to work out a modus vivendi. For her, this was just an unhappy couple discussing their marriage difficulties over dinner. Each had, it is true, issued a petition but as I have said neither knew so. Therefore they could not have been addressing that and, in any event, their motivations in issuing their petitions were merely 'protective'. In all the circumstances, I am not persuaded that there was as yet in*

existence a dispute or sufficiently definable dispute between this couple which the law envisages and requires for the without prejudice protection to attach.

41. The facts are very different to the facts of this case (although the wife regarded her husband's attempts to get her to agree the document as a "cynical ambush to bully and coerce her") but the need for something "reasonably cohate and definable" is a helpful notion to apply more broadly.

42. It is unnecessary that there be any prior negotiation for the rule to apply. If that were the case, then an "opening shot" in negotiations would not be covered, when it plainly is. But where that opening shot is simply an assertion of one party's claim and nothing more than that, then prima facie it is not protected; see *Buckinghamshire County Council v Moran* [1990] Ch 623 at 635, where the letter in question showed no willingness to negotiate. In this case the absence of any articulated dispute prior to the meeting is said to be evidence that there was no dispute to negotiate.

43. Just as the assertion by one party of their rights does not (of itself) attract the protection of the rule, so the admission of that liability by the other party is not protected. There would be no dispute. The rule is not to be extended to cover a dispute about how to pay an admitted liability. That was made clear by the decision of the House of Lords in *Bradford and Bingley Building Society v Rashid* [2006] 1 WLR 2066; see in particular the speech of Lord Brown at [72]-[73]:

    [72] If the without prejudice rule is to apply not merely to attempts to resolve a dispute over the existence or extent of a liability but also to discussions as to how an admitted liability is to be paid, that would seem to me a very substantial enlargement of its scope. ...

    [73] In my opinion the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. ...

    No "statements or offers" were made here with a view to settling a dispute. Since the debt was admitted, there was no dispute. As Mr Fenwick QC aptly put it in argument, Mr Rashid was simply asking for a concession; he was not giving one.

44. The issue is one to be determined objectively. In this case there is a suggestion in a letter from SJP's solicitors of 29 September 2021 that the meeting was orchestrated by Mr T with the specific aim of eliciting admissions from Mr Dixon-Nutt that could subsequently be used against him, hence it was surreptitiously recorded, and a copy passed to SJP. That is how the matter appeared to SJP's solicitors, rather than being evidence of Mr T's intentions. In any event, even if that were part of Mr T's purpose it would not prevent the meeting attracting the protection of the without prejudice rule if an objective analysis showed that there had been some negotiation of a dispute.

Discussion

45. Mr Nicholls KC submitted that not only was there no articulated dispute prior to the meeting, but that a reading of the transcript failed to show Mr Dixon-Nutt raising any dispute about the claims made by Mr T and Mr Ball. The meeting was about how those claims could be paid. Mr Robinson refers to the evidence from Mr Dixon-Nutt and Mr Ball to the effect that whilst Mr Dixon-Nutt agreed with a lot of what was being said, he had signified his disagreement to some matters by more than words. He submits that the purpose of the meeting must have been to reach some form of agreement or settlement. Why else have the meeting? The transcript includes references to finding a "solution", to there being "an honourable agreement" and to the "deal" they have done. The rule is a broad and generous one, and should encompass this meeting.

46. I can accept that Mr Dixon-Nutt was shaken by the attitude of Mr T and Mr Ball towards him, and the threats they made. Indeed, I note that the transcript records Mr and Mrs T discussing the meeting afterwards, and catches Mrs T's comment that Mr Ball had "*frightened the shit out* [of Mr Dixon Nutt]"; T/43. Some of the conduct of Mr T and Mr Ball in that meeting is questionable, and if it prevented Mr Dixon-Nutt from raising a dispute, then SJP should not be allowed to take advantage of the effect of that conduct.

47. However, the question remains as to whether there truly was a dispute to which the without prejudice rule could attach. There is a limit to the evidence that Mr Dixon-Nutt and Mr Ball gave in their witness statements. Mr Dixon-Nutt refers in the early part of that witness statement to the loans he took from Mr T and Mr Ball, and to the joint venture with Mr T involving the plane. He does not say that there was a dispute as to the payment of those loans. Nor does he deny that he defrauded Mr T in relation to the plane, and that he was obliged to pay him back for that. The sums involved may not have been worked out, but he had agreed to do that, and in the first email he refers to the preparation of a spreadsheet setting out his costs. The one reference to Mr Dixon-Nutt shaking his head and expressing his disagreement with what was being put to him in the meeting related to the number of other people he owed money to, not to the fact that he owed money to Mr T and Mr Ball [T/4]. That is not sufficient to raise a "dispute" for these purposes. The question of who else Mr Dixon-Nutt owed money to was of relevance to what his available assets amounted to, and how he was going to repay Mr T and Mr Ball.

48. On the evidence before me I find that there was no dispute other than as to how these debts were going to be paid. That went beyond time to pay and involved a detailed examination of Mr Dixon-Nutt's financial position. It also involved the use of threats and the taking of some property there and then (the plane and a watch from Mr Dixon-Nutt's wrist). Mr Dixon-Nutt may have been "railroaded" into accepting the proposals for payment put forward by Mr T and Mr Ball, but that "negotiation" (if it can be called that) was about the payment of undisputed liabilities.

49. Similarly, the "solution" Mr T and Mr Ball refer to in the transcript was about getting their debts paid. That is what they mean when they refer to the "deal" or "agreement" they were making. As part of that "deal" Mr T and Mr Ball were saying that they would keep the matter private and not go to SJP, or the FCA or the Police (or as Mr Ball puts it at T/16: "*We're not going to bury you Charlie …"*). This was undoubtedly "heavy handed", but there was no dispute that the money was owed. That conclusion is reinforced by the terms of the emails. They proceed from an acceptance of the underlying liabilities. Consequently I conclude that the without prejudice rule does not attach to the meeting or the emails.

50. **Exceptions to the rule**

SJP's secondary case is that if the meeting is covered by the without prejudice rule, one or more of the exceptions to that rule apply and the material is admissible. Mr Nicholls KC relies upon waiver and unambiguous impropriety. He did not pursue the argument that where an agreement has been reached the communications which led to it becomes generally admissible.

51. Firstly waiver. Mr Dixon-Nutt is said to have waived the protection of the rule by relying upon the recording of the meeting in his Defence. The early sub-paragraphs of paragraph 17 allege that SJP may not rely upon what was said in the meeting because they knew it was made without Mr Dixon-Nutt's consent and for Mr T's personal gain. It is said that this invokes the recording and "necessarily waived the privilege". Mr Nicholls KC submitted that Mr T had waived his privilege by providing a copy of the recording to SJP, and that if Mr Ball had a privilege then it was properly seen as Mr T's privilege.

52. I agree that Mr T has "waived privilege", but Mr Ball has not. More importantly Mr Dixon-Nutt has not. Pleading that the recording of a meeting was obtained for certain purposes does not mean that it was "deployed" so as to lose the protection of the without prejudice rule. Moreover I regard the argument as an overly technical one, because later in the same paragraph of the Defence Mr Dixon-Nutt expressly asserts that "privilege". The Defence is to be read as a whole. If the rule had applied, it would not have been waived.

53. Secondly unambiguous impropriety. At paragraph [25] of his judgment in *Berkeley Square* David Richards LJ says this:

> *The strength of the policy reasons for the "without prejudice" rule is demonstrated by the decision of this court in Savings & Investment Bank Ltd v Fincken [2003] EWCA Civ 1630. The claimant sought to amend its particulars of claim to refer to statements made by the defendant at a without prejudice meeting, which showed that he lied in an earlier affidavit of means, which was itself the central issue in the claim. This court, reversing the decision below, refused to permit the amendment. The without prejudice statement did not fall within any exception to the general exclusionary rule. Rix LJ, with whom Carnwath LJ agreed, said at [62]:*
>
> > *"It is of course distasteful for this or any court to avert its eyes from an admission which, subject to any point about value, appears to incriminate Mr Fincken in lying in a sworn document. However, in the tension between two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway – unless the privilege is itself abused on the occasion of its exercise."*

54. The passage emphasises the point that the unambiguous impropriety exception does not arise simply because the maker of the protected statements would be shown to be perjuring himself if the material were admitted. The impropriety must attach to the maker's claim to the protection in the first place. To paraphrase Sir Geoffrey Vos C in *Suh v Mace* (supra) at [29]; this is not the sort of case like those mentioned by Hoffman LJ in *Forster v Friedland* … where the person seeking protection for the discussions was threatening the other party, in the course of a conversation for which privilege is claimed, that he would give perjured evidence or blackmail the other party unless he agreed to the proposed settlement. What is alleged here is that Mr Dixon-Nutt will later deny the admissions he made. That is not an attempt to use the exclusion of the evidence as a cloak for perjury, blackmail or other unambiguous impropriety.

Conclusion

55. The facts of this case are unusual. But notwithstanding the generosity of the without prejudice rule, the meeting between Mr and Mrs T, Mr Ball and Mr Dixon-Nutt on 3 November 2017 falls outside its protection, and is admissible, warts and all. The application to strike out is dismissed.