Neutral Citation Number: [2024] EWHC 1823 (Comm)

Case No: CL-2022-000467

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/07/2024

Before :

CHRISTOPHER HANCOCK KC

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Between :

FW Aviation (Holdings) 1 Limited	**Claimant**
- and -	
VietJet Aviation Joint Stock Company	**Defendant**

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- -

Robin Loof and Niamh Cleary (instructed by **Quinn Emmanuel**) for the **Claimant**
Alexander Milner KC (instructed by **Elborne Mitchell LLP**) for the **Defendant**

Hearing dates: 17 May 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 16 July 2024.

CHRISTOPHER HANCOCK KC:

1. A trial on liability issues in this case is due to start on 4 June before Picken J. This hearing was fixed to deal with two recently issued applications. The first of those was an application by the Defendant, VietJet, to strike out part of the Claimant's Defence to Counterclaim.

2. I made a decision on this application on Friday, but indicated that I would provide reasons over the weekend. These are those reasons.

3. By way of background:

   a. The claim concerns four Airbus A321 aircraft which were leased to VietJet in 2019, under a form of transaction known as a Japanese Operating Lease with Call Option (JOLCO). The transaction was financed by two banks, Natixis and BNP Paribas, which held various forms of security in relation to the aircraft and the leases.

   b. In 2021, following the Covid-19 pandemic and the consequent cessation of air travel, VietJet defaulted on the rent in respect of the aircraft.

   c. VietJet entered into negotiations with Natixis and BNP regarding a restructuring of its rental obligations. It is disputed whether the negotiations with Natixis led to a binding agreement but, whether they did or not, all discussions came to an end in October 2021 when the banks entered into a deal to sell their respective positions to FitzWalter Capital, a London-based fund. FWA, a FitzWalter entity, then sought to exercise the lessors' alleged rights to terminate the leases, demand the return of the aircraft, and claim various alleged debts, damages and indemnities from VietJet. It is FWA's position that it is entitled <u>both</u> to retain the aircraft <u>and</u> to recover sums totalling c.$300 million from VietJet as a result of the early termination of the leases.

   d. VietJet denies that the leases have been validly terminated or that FWA has validly acquired the rights on which it relies for its claim. In the alternative, VietJet claims relief from forfeiture. VietJet also disputes the quantum of FWA's money claims.

   e. In December 2022 the parties entered into a Consent Order whereby VietJet handed over the aircraft to FWA in Vietnam, without prejudice to either party's case at trial.

   f. Despite having obtained possession of the aircraft 17 months ago, FWA has yet to export them from Vietnam. The reasons for this are in dispute.

<u>Introduction</u>

4. Paragraphs 29.2.5(a)–(d) of FWA's Defence to Counterclaim plead, as a reason why relief from forfeiture should be refused, remarks said to have been made by VietJet's Vice-Chairman, Mr Donal Boylan, at a meeting on 10 August 2022. It is common ground that the meeting was conducted on without prejudice terms. VietJet applies to strike out this material on the basis that it is inadmissible because it is subject to without prejudice privilege ("**WPP**").

Legal principles

Unambiguous impropriety: the Defendant's submissions.

5. The Defendant submitted that the basic principles are well-known:

   a. WPP is a rule of admissibility: *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1301C (and in that respect differs from legal professional privilege).

   b. The rule is founded both "*upon the public policy of encouraging litigants to settle their differences rather than litigate them to the finish*" (*Rush & Tompkins* at 1299) and on "*the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence*" (*Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2445).

   c. One exception to the rule is that evidence of WP negotiations can be admitted "*if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'*" (*Unilever* at 2444). The phrase "*unambiguous impropriety*" comes from Hoffman LJ's judgment in *Forster v Friedland* (CA, 10 November 1992), where he said that "*the value of the without prejudice rule would be seriously impaired if its protection could be removed by anything less than unambiguous impropriety*".

6. The Defendant submitted that the law in relation to the "unambiguous impropriety" exception was definitively reviewed and restated by the Court of Appeal in *Motorola Solutions v Hytera Communications* [2021] QB 744. In that case, a party was alleged to have threatened, during a WP mediation, to respond to an adverse judgment by moving assets to China to impede enforcement. The Court of Appeal refused to admit the evidence. Males LJ (with whom Lewison and Rose LJJ agreed, stated as following (omitting citations):

> *57. From this review of the cases I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and…there has been no scope for dispute about what was said, either because the statement was recorded…or because it was in writing…. I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare…*
>
> *62. … the cases have firmly and rightly set their face against any erosion of the without prejudice rule, even if that means that some statements disclosing or constituting impropriety, albeit not unambiguously so, retain the protection of the*

> *rule. The policy choice is that the public interest in the settlement of litigation generally outweighs the risk of abuse of the privilege in individual cases.*
>
> *63. There are sound reasons for this choice in addition to those already discussed. In particular, a party who is unable to adduce evidence of statements made without prejudice is no worse off so far as the evidence is concerned than if those statements had never been made or the settlement negotiations had not occurred. But a party who is drawn into satellite litigation about the admissibility of statements made without prejudice would have been much better off if he had refused to negotiate at all…*

7. Even where the issue arises at an interim stage, there is no scope for asking simply whether there is a "*good arguable case*" for the exception to apply:

> *64. … Rather, the position should be that the test remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it. In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply.*

8. Having held that the alleged threats had not been unambiguously proved, the Court did not need to go on to consider whether they were sufficiently improper to engage the unambiguous impropriety exception. Nevertheless, Males LJ addressed that question and concluded that they were not. He noted that, while the claimant's interpretation of what was allegedly said was "*plausible*", the defendant's explanation was "*at least equally so*": the evidence therefore did not establish unambiguous impropriety ([73]).

9. Males LJ further supported his conclusion on the basis that:

> *74. It is, moreover, common for potential problems of enforcement to be a factor to which both parties will be alive in international litigation and it would be unfortunate if that was a subject which could not be discussed in settlement meetings for fear of being interpreted as a threat to move assets improperly. This is a context in which one party's "colourful or even exaggerated language" (to borrow Hoffmann LJ's phrase in Forster v Friedland) may well be viewed by the other party as a threat or even blackmail.*

10. In summary, therefore, it was submitted that the test for admissibility under the "unambiguous impropriety exception" involves both (i) an evidential test, whereby the conduct relied on must be unambiguously proved to have occurred, and (ii) a qualitative test, whereby the conduct must be unambiguously improper in character.

Unambiguous impropriety: this case

11. Here the pleaded case of impropriety is that:

    a. *Mr. Boylan made the following remark: "You can wait till you go to court and get an English judgement and then go to Singapore too and Vietnam and get another judgement. I cannot speak for the Vietnamese government but my sense is they are not going to collaborate with anyone from the UK or Singapore or anywhere else, and this could go on for years, but that's not a threat, that's just an observation, a Donal Boylan observation."*

    b. *Later in the same conversation, Mr. Boylan acknowledged that "you have terminated the leases and you have the right to demand the aircraft be [returned]", but warned that "you can go through a court process in the UK to obtain that and you will probably fairly quickly get a judgement in your favor, then you will have to go through a process in Vietnam and you will soon discover how Vietnam works"*.

12. FWA says that these words "constituted threats that, if FWA did not accept some form of offer from VietJet: (1) VietJet would do everything in its power to frustrate the processes involved in FWA enforcing its legal rights and/or exporting the Aircraft from Vietnam; and (2) the Vietnamese government would take some form of unspecified steps to disallow the enforcement of an English judgment in Vietnam and/or frustrate the export of the Aircraft".

13. This does not begin to satisfy the test for admissibility:

    a. As to the evidential aspect, the conversation is itself in dispute. It was not recorded. The only documentary evidence of what was said is Mr Gray's note, but Mr Boylan denies that this is accurate; and Mr Gray is not giving evidence at trial. That in itself should be the end of the matter: the Court cannot conclude that the words were "unambiguously" spoken. This is not one of the "*rare*" cases where the evidence is clear enough to enable the Court to reach a firm conclusion, to an "unambiguous" standard, that the alleged statements were made.

    b. In any event, even if it could be proved "unambiguously" that Mr Boylan spoke the words attributed to him, the qualitative test is not satisfied because the pleaded words do not convey any "unambiguously improper" meaning. Indeed it is not even arguable that Mr Boylan's alleged words "*constituted threats that … VietJet would do everything in its power to frustrate the processes involved in FWA enforcing its legal rights*", still less that they carried that meaning unambiguously.

    c. The most the pleaded words disclose is Mr Boylan's view that (i) FWA might have difficulty enforcing a judgment, and (ii) the Vietnamese government would be unlikely to assist FWA. The second is not remotely improper: VietJet is not responsible for the actions of the Vietnamese government. Nor is the first, as was made clear in *Motorola* at [74] (above).

14. FWA's evidence in response to the application consists entirely of allegations about events subsequent to the WP negotiations, which it says show that VietJet has "*carried out*" the threats said to have been made by Mr Boylan. It should be emphasised that virtually all this evidence is disputed. However, for present purposes it is simply irrelevant. It sheds no light whatsoever on the two questions the Court has to consider, i.e. whether the alleged statements were unambiguously made by Mr Boylan, and (if they were) whether they were unambiguously improper in character. Evidence (*a fortiori* disputed evidence) of subsequent events can neither resolve ambiguity as to what was said at the time, nor create unambiguous impropriety where none occurred.

The Claimant's case on Unambiguous impropriety

15. The Claimant submitted that it is uncontroversial that "One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety": Documentary Evidence, Hollander ed. (14th edn.) (**Hollander**) at [20-037]. There are two stages to the invocation of the exception:

    a. Whether the evidential threshold is met, namely that the "*evidence establishes*" the impropriety: *Motorola Solutions Inc v Hytera Communications Corpn Ltd* [2021] Q.B. 744 [74]; and

    b. Whether the substantive threshold is met once the words used have been established, such that those words constitute threats going beyond what is permissible.

16. As to the evidential threshold:

    a. The conversation was recorded in a contemporaneous note by Mr Gray during the call, and which he clarified immediately afterwards. The present case is therefore closely analogous to cases where there is a direct record of the threats made (such as a recording of the call or a written threat).

    b. Mr Boylan frankly accepts that he does not remember the detail of the discussions and his evidence largely consists of speculation as to what he would have said and what he would have meant. In those circumstances, Mr Boylan's outright denial that he used the words alleged lacks credibility.

    c. Mr Boylan's threats must also be viewed in the context of what subsequently occurred, namely VietJet's campaign in obstructing the export of the Aircraft. It is submitted that the overwhelming evidence is that VietJet has made good on Mr Boylan's threat that it would frustrate the processes involved in FWA enforcing its legal rights and exporting the Aircraft from Vietnam, and that it has enlisted the resources of the Vietnamese state (whether knowingly or unknowingly), in furtherance of its aims.

17. In short, the exceptional circumstances of this case are such that the court can, and should, reach a firm conclusion about what was said by Mr Boylan during the call on 10 August 2022.

18. As to the substantive threshold, in *Motorola* the Court of Appeal (Males LJ) had "*no difficulty in accepting that a threat to transfer assets to a third party otherwise than in the ordinary and proper course of business in order to render a judgment unenforceable may, at least in some circumstances, amount to unambiguous impropriety for the purpose of the exception to the without prejudice rule*", but that the application would depend on the facts of the case (at [39]). Further, it is important to distinguish between the principles which apply to unambiguous impropriety in perjury cases, and those which apply in blackmail cases. In the latter category, it is "*rather easier*" to invoke the WP exception: *Hollander* at [20-40]. Crucially, this is a case of blackmail and not perjury and thus the lower threshold applies.

19. In the present case, the threat made (and carried out) was not merely to transfer assets so as to make a judgment unenforceable. Rather, it was to deliberately disregard an order of the English Courts, by taking steps abroad to negate such order. The threats further insinuated that VietJet, as a powerful Vietnamese company, would be able to cause the Vietnamese Government and / or other public authorities to intervene on its behalf in a manner that would undermine any orders of the English Court. The suggestion that Mr Boylan's statements amount to no more than an observation "*that legal proceedings in Vietnam are long and unpredictable*" cannot be reconciled with the statements that were made, in particular the suggestion that the "*Vietnamese government … are not going to collaborate with anyone from the UK or Singapore or anywhere else*" and the threat that FWA "*will soon discover how Vietnam works*". It is submitted that the threats "*unambiguously exceeded what was 'permissible in settlement of hard fought commercial litigation'*": *Ferster v Ferster* [2016] CP Rep. 42 [23].

20. Further, as at August 2022, the threats were only suggestions of what VietJet might do. On any view the situation is different now following subsequent events. The threats are no longer a situation of what Cockerill J recently called "*mere puffery*": *King v Stiefel* [2021] EWHC 1045 (Comm) [361]. Rather, they were a warning that VietJet would do precisely what it has subsequently carried into effect. It is therefore submitted that VietJet's threats meet such tests for the exception as were laid down in *Ferster* and *Motorola*, such that this case therefore is one of the 'truly exceptional' occasions when the without prejudice materials ought to be admitted.

Discussion and conclusions.

21. I start with the question of unambiguous impropriety, and the relevant test in this regard. I have concluded that even if it is not common ground that the approach in the *Motorola* case is the correct one, then in my judgment it is.

22. Applying this test, I have concluded that there was no unambiguous impropriety so as to lead to a loss of privilege in what was clearly a without prejudice conversation. I have reached this conclusion for the following reasons:

a. There is in my judgment real room for doubt as to what was in fact said. The Court of Appeal in *Motorola* indicated that cases not involving statements made in documents or recorded on tape which led to a loss of privilege would be rare – see paragraph 57. Although Mr Gray's note of the conversation was made shortly after it took place, whether it was accurate is disputed, and I do not think that I can fairly determine this dispute at present.

b. Secondly, in my judgment, the contents of the statements do not amount to threats, within the meaning of this exception. In my judgment, the conversation is more naturally interpreted as a warning as to difficulties of enforcement in Vietnam, rather than threats that VietJet would deliberately flout orders of the English Courts and/or procure a decision that the Vietnamese courts would not enforce those orders.

23. I should also say something about the suggestion that what happened here was blackmail, and that a different test applies to that set out in *Motorola* in such a case. Firstly, in my judgment, a warning of difficulties of enforcement is not to be equated with blackmail. Secondly, the suggestion made that Hollander on Documentary Evidence supports the conclusion that a different test is to be applied in relation to blackmail than other types of impropriety is not one that I, for my part, would accept, although I do not have to decide this. What I would say is that the principal case referred to (that of *Ferster v Ferster* [2015] EWHC 3895 (Ch)) preceded the decision in *Motorola* by some time, and that the facts of that case were very different. The threats were made in writing and involved threats to publicise matters which might lead to severe consequences to a party and his family.

24. For the reasons I have set out, I find that, subject to the question of waiver, to which I now turn, there was here no unambiguous impropriety.

Waiver

25. I turn therefore to the question of waiver.

The Claimant's submissions.

26. It is well established that a party to without prejudice negotiations who deploys the content of without prejudice negotiations waives its right to insist on the protection of the rule in relation to those negotiations if the counterparty accepts that the negotiations may be referred to: *Briggs v Clay* [2019] EWHC 102 (Ch) [80].

27. VietJet only issued its application on 1 May 2024, almost nine months after service of the ARDC. No explanation has been given for this delay. Further, in the intervening period, VietJet served a trial witness statement from Mr Boylan, the sole focus of which is to respond in detail to the allegations set out in the ARDC. Service of Mr Boylan's evidence carried with it the clear implication that VietJet intended to rely on that evidence at trial and to call Mr Boylan to give evidence at trial. Although VietJet has sought to reserve its position as to whether the evidence is admissible, such a reservation does not prevent privilege from being waived: See, in the context of legal

professional privilege: *Digicel Ltd v Cable & Wireless Plc* [2009] EWHC 1437 (Ch) [31]; *Re Yurov* [2022] EWHC 2112 (Ch) [35]. The allegations also cannot be said to be confidential, having been reported in the media.

28. These being the Claimant's written submissions, Ms Cleary concentrated in her oral submission on the fact that the Defendant had served a witness statement from Mr Boylan, on the footing that that witness statement would be relied on at trial. She argued that the service of that statement amounted to deployment of the statement within the meaning of the Yurov decision, which applied the dicta of Auld LJ in the earlier Court of Appeal case of Re Factortame [1997]. EWHC (Admin) 445. Having indicated an intention to make use of the statement, including the account given therein of the contents of the without privilege communications, this amounted to a clear waiver of the right to claim privilege in respect of the contents of the conversation.

The Defendant's submissions.

29. The Defendant submitted, firstly, that FWA cannot rely on the fact that it has itself illegitimately breached WPP on other occasions. A unilateral decision by FWA to breach privilege is self-evidently not capable of amounting to a waiver by VietJet: it is merely illegitimate and abusive.

30. VietJet has not remained silent in the face of this persistent abuse by FWA. To the contrary, it has repeatedly made clear that the negotiations are privileged and that privilege is not waived: see (i) the letter from Herbert Smith Freehills (VietJet's then lawyers) of 4 October 2022, (ii) its letter of 6 April 2023 (in response to FWA deploying the material in evidence for a without-notice hearing before Waksman J but then requesting the Judge not to take it into account), (iii) VietJet's current solicitors' letter of 9 August 2023, (iv) its Reply to Defence to Counterclaim, (v) Mr Boylan's witness statement, and (vi) its submissions at the Disclosure Guidance Hearing on 10 November 2023.

31. FWA has therefore always known that VietJet asserts privilege in the negotiations. It cannot be permitted to gain an advantage from its own decision to ignore that fact and repeatedly breach privilege unilaterally.

32. The fact that FWA's (illegitimate) allegations have been reported on in the media is equally immaterial. Whether viewed as a matter of implied contract or public policy, the fact that the allegations have received a degree of publicity provides no reason why VietJet should not be allowed to prevent the material being relied on before the trial Judge. To the contrary, it would be extraordinary if FWA could derive such an advantage from its own prior breaches of privilege.

33. For completeness, however, even if Herbert Smith Freehills' letter arguably could give rise to a waiver, the question would be whether, on an objective evaluation of VietJet's conduct, and in the context of the purpose of the privilege, it would be unjust for VietJet to argue that the allegations are privileged from production to the court at trial: *Suh v Mace* [2016] EWCA Civ 4 at [37]. A waiver is not to be lightly inferred: *Briggs v Clay* [2019] EWHC 102 (Ch) at [73].

34. Finally, in oral submissions, the Defendant emphasised that the act of putting in a witness statement in support of the claim to privilege could not amount to a waiver of that claim. As a matter of policy and justice, it would be wholly wrong if a party against whom an allegation of loss of privilege was made could not put in evidence to refute that allegation without running the risk of waiving the very privilege that it was sought to protect.

Discussion and conclusions.

35. I have concluded that there was here no waiver of the right to claim privilege in respect of the without prejudice communications. I have reached this conclusion for the following reasons.

    a. First, I reject the submission that there has been a delay in objecting to the use of the material such as to justify the assertion that there has been some sort of representation leading to a waiver. First, the general principle is that silence does not amount to consent. Secondly, I bear in mind that a waiver of privilege is not lightly to be inferred. Thirdly, on the evidence before me, objection was consistently taken to the use of the material.

    b. Turning to the witness statement of Mr Boylan, then in my judgment the decision to serve this witness statement cannot be said to amount to a waiver of the privilege in relation to the without prejudice conversation. I did not find the cases relating to legal professional privilege of any real assistance. That privilege is a unilateral privilege, and it is up to the party who is entitled to assert that unilateral privilege to decide whether to assert the privilege or not. Conversely, the privilege relating to without prejudice communications is a bilateral, or joint privilege. If it is to be waived, both parties must agree to that waiver. The service of a witness statement asserting that privilege, and designed to show that the privilege has not been lost for some other reason, cannot in my judgment sensibly be construed as a waiver of the privilege.

36. I am grateful to all Counsel for their assistance, and I would be grateful if an appropriate order could be drawn up to give effect to this judgment.