THE HIGH COURT

[2023] IEHC 448

[RECORD NO. 2021/4517 P]

BETWEEN:

ACORN WAVE LIMITED

PLAINTIFF

AND

TOMÁS Ó RIAIN

DEFENDANT

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 21st day of July, 2023

INTRODUCTION

1. In this application, the Plaintiff seeks to strike out parts of an affidavit sworn on behalf of the Defendant. The affidavit in question was sworn to ground an application for security for costs. The strike out application is made on the basis that material protected by "*without prejudice*" privilege is disclosed, specifically, the contents of an email dated the 1st of May, 2020. Of note, the material in question relates to communications which were not expressed to be "*without prejudice*" at the time they were sent, although later correspondence was expressly conditioned as "*without prejudice*". Furthermore, the Plaintiff has itself referred to the contents of this email communication in subsequent open correspondence as between solicitors.

BACKGROUND

2. The Plaintiff was engaged by the GAA from 2019 in relation to changes it wished to achieve in respect of its ticketing services. At that time the GAA was contracted with Tickets.ie as an external service provider and was interested in bringing ticketing functions internally

within the operations of the GAA. Consequent upon initial engagement with the Plaintiff, the GAA explored with Tickets.ie the possibility of acquiring rights in the ticketing software then in use with a view to engaging the Plaintiff for the purpose of carrying out the ticketing function internally. In tandem with the GAA's efforts to acquire rights in respect of the existing ticketing software, the Plaintiff provided services in relation to the development of the proposed new internal ticketing service.

3. While it is common case that the Plaintiff was retained by the GAA to carry out certain work in anticipation of the intended transfer of function, the parties are not agreed as to the terms upon which this engagement occurred. In very broad terms the Plaintiff contends that it was engaged on a multiyear contract to provide the ticketing services whereas the GAA maintain that the agreement was in the nature of a retainer agreement and an agreement to provide testing and preparatory work and to make available resources (human and technical) to allow for transfer in the event that an agreement was achieved with Ticketmaster.ie. It is the GAA's position, however, that the entry into a contract of the nature contended for by the Plaintiff was wholly dependent on the conclusion of a deal with Tickets.ie in the first instance, which ultimately could not be achieved. The GAA contend that it was at all times clear that engagement of the Plaintiff in respect of the operation of a new ticketing service was entirely dependent on agreement with Tickets.ie to secure the existing software platform and license.

4. When it became clear that a deal could not be agreed with Tickets.ie for the purchase of rights in the software it used for the GAA ticketing, the GAA advised the Plaintiff in or around January, 2020 of its intention to initiate a tender process to engage with prospective ticketing service providers after the conclusion of its existing contractual arrangements with Tickets.ie in December, 2020. The Plaintiff was invited to participate in this tender process. All the while the Plaintiff maintains that it continued to carry out services for the GAA. The contractual basis for this work and the extent to which this work occurred and/or was authorised by the GAA are issues in the proceedings.

5. Matters came to a head on the 24th of April, 2020 when the Plaintiff emailed to say that it proposed to invoice for Quarter 1 of 2020. In this email the Plaintiff appeared to envisage an ongoing relationship between the Plaintiff and the GAA without reference to the failure on the part of the GAA to acquire rights in the Tickets.ie software and an intervening tender process involving other parties. This email presented an understanding of the then contractual

relationship between the Plaintiff and the GAA, which the GAA disputes. Following receipt of this email it appears that the Plaintiff was advised on the 27th of April, 2020, by telephone, that the GAA had preferred the submission of a third party in the tender process. The Plaintiff was asked to vouch the expenditure incurred in respect of an advance received by it from the GAA in circumstances where a contract was not being offered going forward.

6. By email dated the 29th of April, 2020, Mr. Murphy of the Plaintiff wrote to Mr. Mulryan of the GAA in relation to a purported multi-year contract and works done outside the scope of the so-called "*retainer agreement*". By email in response on the 30th of April, 2020, Mr. Mulryan addressed what he considered to be misconceptions contained in the email of the 29th of April, 2020 and requested a reconciliation of the costs incurred between January, 2020 and April, 2020 and the sum of €175,000 paid on the 11th of December, 2019.

7. In response, in an email which is at the heart of the application before me, Mr. Waldron of the Plaintiff wrote to Mr. Mulryan of the Defendant on the 1st of May, 2020. It is clear from this email that the parties were not in agreement as to the contractual basis upon which services had been provided and a minimum payment was identified as being the sum acceptable in respect of what was characterised on behalf of the Plaintiff as an early agreed termination of the contract. Following on from this email of the 1st of May, 2020, the question of continued engagement on a "*without prejudice*" basis was raised in a telephone call in the second week of May, 2020. The parties were not agreed as to whether this telephone conversation occurred on the 11th or 14th of May, 2020. By email dated the 18th of May, 2020, Mr. Mulryan on behalf of the GAA wrote with reference to an email sent on the 12th of May, 2020 in the following terms:

> *"In response to your original email below, I would just like to re-confirm that our call last Monday and all subsequent and related correspondence is and remains on a "without prejudice" basis, at your request. You did not reference this in your email below but the same principle applies to it as well as this email."*

8. The reference in the email of the 18th of May, 2020 to the "*original email below*" was to the email of the 12th of May, 2020. Insofar as there is a divergence in evidence as to when the conversation raising "*without prejudice*" privilege for the first time took place, the reference

to a conversation "*last Monday*" dates the without prejudice telephone call to Monday, 11th of May, 2020. I consider it most likely this conversation occurred on the 11th of May, 2020. This is also consistent with subsequent email correspondence which through the language used gives some temporal indications in relation to when "*without prejudice*" privilege was invoked. In an email in response to the email of the 12th of May, 2020 sent on the 19th of May, 2020, Mr. Waldron of the Plaintiff states:

> *"it would be much preferable to discuss this in the open manner, again without prejudice, as we did last week."*

9. It seems clear from the foregoing, that the parties actively engaged in discussions on an agreed "*without prejudice*" between the 12th and 19th of May, 2020. Indeed, I do not understand there to be any dispute in respect of the privilege applying to negotiations during this period.

10. Thereafter, there was further correspondence on an open basis through solicitors in June, 2020 in which the Defendant sought repayment of a sum of €120,000 in respect of unvouched costs from the advance payment of €175,000 made on the 11th of December, 2019. Importantly, the Plaintiff's solicitors referred to the contents of email dated 1st of May, 2020 over which it now asserts privilege in its letter before action which issued on the 7th of August, 2020 in framing the within claim.

EVIDENCE

11. Affidavits filed in respect of the Motion include Affidavits of Mark Waldron sworn the 12th of January, 2023 and the 24th of February, 2023 on behalf of the Plaintiff; Replying Affidavits of Mr. Ger Mulryan sworn the 30th of January, 2023 and the 3rd of March, 2023 on behalf of the Defendant; and an Affidavit of Ronan Murphy sworn the 24th of February, 2023.

12. Diametrically opposing positions are adopted on behalf of the Plaintiff and the Defendant on affidavit as to the character of the parties' exchanges at the end of April, 2020 when the Plaintiff was advised that it was not the successful tenderer. It is confirmed on behalf of the Plaintiff that the Defendant's representative was advised by Mr. Waldron that the Plaintiff had been "*shafted*" and that the Plaintiff considered the Defendant to be in breach of

agreement. On behalf of the Defendant Mr. Mulryan accepts that the Plaintiff was disappointed not to obtain the tender but he says he read the exchange of emails on the 29th of April, 2020, 30th of April, 2020 and the 1st of May, 2020 as the Plaintiff engaging in stating a position intended to achieve its best advantage in relation to:

i. The subsequent negotiation of the final accounting between the parties where the GAA had advanced the sum of €175,000 for the purpose of booking agreed transitional resources in anticipation of the delivery of the Tickets.ie software code in December, 2019. This payment was made in anticipation of the successful conclusion of the tickets.ie deal which did not proceed;
ii. To seek to position the Plaintiff to secure a future contractual relationship with the GAA outside of the confines of the recently concluded tender process.

13. It appears from the Affidavit evidence that it was the Plaintiff's representatives (Mr. Waldron and Mr. Murphy) who introduced the concept of "*without prejudice*" communication during a call which is likely to have been held on the 11th of May, 2020. It was requested that privilege should apply as and from the date of the call. It is common case that this conversation took place more than a week after the email exchange of the 1st of May, 2020.

14. In affidavits sworn on behalf of the Plaintiff the position adopted is that the email of the 1st of May, 2020, which predated the exchange where it was agreed that correspondence would be "*without prejudice*", is evidence that:

i. The parties were in dispute at the time of the issue of the email;
ii. The email represented a good faith attempt to settle the said dispute;
iii. The Plaintiff intended that his email be confidential in the context of *bona fide* negotiations to settle the said dispute;
iv. The parties agreed that the email was subject to "*without prejudice*" privilege by the terms of their subsequent agreement on the 18th of May, 2020.

15. In response, Mr. Mulryan confirms on behalf of the Defendant that he did not believe at the time of the email exchange on the 1st of May, 2020 that the GAA was in dispute with the Plaintiff and did not contemplate the possibility that the parties would fall into dispute leading to litigation. On the contrary, he avers that he thought that the parties were discussing steps to

conclude matters between the parties in circumstances where the Plaintiff had been advised that they were unsuccessful in a recent competitive process for the appointment of a ticketing services provider to the GAA from the 1st of January, 2021. He confirms that from his perspective he understood the exchange of emails to consist of commercial positioning and discussions arising in a context where he had requested an accounting of an advance payment to the Plaintiff in December, 2019 in the amount of €175,000.

16. Mr. Mulryan further confirms that the phrase "*without prejudice*" was introduced during a call which he dates to some two weeks later. He confirms that he did not fully understand the context or intention in introducing the "*without prejudice*" concept and took advice from the solicitor for the GAA after the phone call. He says that the concept and the implications of its use were then explained to him and in this context he says he became aware for the first time that the parties were in dispute and there was a possibility of litigation between them. He confirms that in sending his email on the 18th of May, 2020, he agreed that communications between the parties as and from 11th of May, 2020 would be considered by the parties to be "*without prejudice*" and that the parties would treat any discussions after that date as confidential and privileged. Mr. Mulryan disputes that the agreement confirmed in his email of the 18th of May, 2020 stretched backwards in time. He says that the phrase "*subsequent and related correspondence*" was intended to capture relevant communications as and from the 11th of May, 2020.

DISCUSSION AND DECISION

17. The primary relief sought by the Plaintiff on this application is:

(i) An Order striking out the Affidavit of Mr. Ger Mulryan sworn the 29th of July, 2022 (and the exhibits thereto) in their entirety or, in the alterative, striking out paragraph 46 of the Affidavit of Mr. Ger Mulryan sworn the 29th of July, 2022 (and Tab 18 of the exhibits thereto), on the grounds that the said Affidavit and exhibits disclose material protected by without prejudice privilege (the "Without Prejudice Material");

(ii) A Direction that the Defendant, its servants or agents refrain from making any further reference to the Without Prejudice Material in these proceedings or otherwise.

18. The parties accept that I have an inherent jurisdiction to grant the reliefs sought if I am satisfied that "*without prejudice*" privilege properly applies to the material in question.

19. The Plaintiff contends that the email communication of 1st of May, 2020 is comprised within a body of "*without prejudice*" communication by reason of either the agreement of the parties and/or the public policy interest in encouraging parties to settle and resolve their disputes out of court. The Defendant's net contention is that the email in question was open correspondence occurring as part of commercial discussions arising from the recent conclusion of a tender process in which the Defendant was an unsuccessful tenderer and is therefore not captured by the public policy basis for treating communication between the parties to a dispute as "*without prejudice*". The Defendant further maintains that the agreement to treat communications as "*without prejudice*" did not apply to correspondence which predated this agreement, and which was not identified as privileged when it was agreed that communication would be "*without prejudice*".

20. I must decide whether the material in question, namely the email of the 1st of May, 2020, is captured by "*without prejudice*" privilege either on an application of public policy considerations or by reason of the agreement of the parties. There are two questions before me. In terms of a public policy application, I must decide whether I am satisfied on the evidence on the balance of probabilities that when the email was sent on the 1st of May, 2020, there existed a dispute, the email represented a *bona fide* attempt to settle that dispute and was sent with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties in proceedings which were contemplated or might reasonably have contemplated litigation, if they could not agree. Alternatively, I must consider whether the parties had agreed that the email sent on the 1st of May, 2020 was "*without prejudice*" and a proper basis for the invocation of such privilege exists.

21. There is little dispute between the parties with regard to the applicable legal principles but the parties adopt opposing positions with regard to the application of these principles to the facts and circumstances of this case. I have been referred in argument to, *inter alia*, *McGrath on Evidence* (3rd ed. 2020); *Foskitt on Compromise* (9th ed. Sweet & Maxwell, 2019); *Passmore on Privilege* (4th ed., Sweet & Maxwell, 2020); *Moorview Developments Ltd. v. First Active PLC* [2009] 2 IR 788; *Purcell v. Central Bank of Ireland* [2016] ECA 50; *In the Matter of QRD*

Development Co. No. 3 DAC [2022] IEHC 498 and *Barnetson v. Framlington Group Limited* [2007] 1 WLR 2442. In *McGrath on Evidence* (3rd ed, 2020), it states at para.10-276:

> *"Litigation privilege is available to all litigants, regardless of their status as natural or legal persons. Where it applies, it is inviolate; it does not require the court to balance the competing interests which may be at play. In order for a claim of privilege to succeed, the party claiming it must establish that the communication in question was made: (i) in a bona fide attempt to settle a dispute between the parties; and (ii) with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties."*

22. As noted by Clarke J. in *Moorview Developments Ltd v First Active plc* [2009] 2 IR 788, at p.820 (quoted with approval at para. 16 of Hogan J.'s judgment in *Purcell v Central Bank of Ireland* [2016] IECA 50 and at para. 36 of Roberts J.'s judgment in *QRD Development*):

> *"the overriding principle is that a very heavy weight indeed needs to be attached to without prejudice privilege".*

23. This observation was made after consideration of the following passage from McGrath, *Evidence* (1st ed, 2005, at para.10-128), which Clarke J. (at p. 820) agreed: *"represents the law in this jurisdiction"* and which has since been repeated at para. 10-296 of the third edition as follows:

> *"It is submitted that, ultimately, the question is one of policy and the parameters of the privilege should be dictated by the balance of public interest. In general, the balance of public interest will favour giving an expansive interpretation to the privilege. The privilege achieves its objective of promoting settlements by guaranteeing non-disclosure of the contents of the negotiations. This guarantee fosters the candour which is critical to the settlement process and which is undermined by disclosure for any purpose. It is only where parties can be sure that they can speak their minds and give their views in confidence, and that nothing said can be used to their prejudice, that the necessary candour can be forthcoming. Thus, the privilege should be applied to exclude evidence of without prejudice negotiations except where it can be clearly shown that greater damage to the interests of justice would be effected by non-admission than by disclosure."*

24. In *QRD Development Company No.3 DAC* [2022] IEHC 498 Roberts J. observed as follows (at para. 25):

"There is no doubt that the law recognises and protects without prejudice privilege. The "without prejudice" rule is a rule governing the admissibility of evidence but it is not simply a technical rule of evidence. Privilege is a substantive legal right. The without prejudice rule confers a privilege which, unlike legal professional privilege, is a joint privilege and cannot be waived unilaterally by only one party to the negotiations.

25. At para. 26 Roberts J. derived the following (non-exhaustive) principles from the authorities:

"1. Material subject to without prejudice privilege (either oral or documentary) is not admissible in evidence and may only be disclosed to the court with the consent of the parties. Marron v Louth County Council [1938] 72 ILTR 101.

2. The without prejudice rule is founded partly in public policy and partly in the agreement of the parties. The fundamental rationale for without prejudice privilege is to encourage parties so far as possible to settle their disputes without resort to litigation. The rule is designed to support the policy of encouraging parties to negotiate and to discuss the relative strengths and weaknesses of their cases with candour, secure in the knowledge that any concession made in the without prejudice discussions cannot be used against them in the course of the proceedings. If litigants could not explore these matters on a without prejudice basis the potential for settlement and compromise would be greatly undermined. Purcell v Central Bank of Ireland [2016] IECA 50. Unilever Plc v Procter & Gamble [2000] 1 WLR 2436.

3. In order for without prejudice privilege to apply, there must have been a bona fide attempt to settle a dispute – the critical feature of proximity for this purpose is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. In that regard, the crucial consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree – per Auld LJ in Barnetson v AXA Framlington Group Ltd [2007] EWCA 502.

4. While labels or headings such as "without prejudice" can be of assistance to the Court's analysis, these labels are not determinative – the test is one of substance rather than form. Where negotiations have commenced on a without prejudice basis, the courts will generally find that any subsequent communications were intended to be privileged also unless they find very clear evidence of an intention to change the character of the negotiations to open negotiations. If the status of negotiations is intended to change at any point, the party who changes the basis of such negotiations should spell out the change with clarity. Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 4 All ER 942 .

5. Once it has concluded that a chain of correspondence relates to negotiations directed at a settlement, a court should be reluctant to dissect the correspondence by admitting some sections and not others. Moreover, the protection of without prejudice privilege is not limited to admissions made in the course of negotiations; the entirety of the negotiations are privileged. - Unilever Plc v Procter & Gamble [2000] 1 WLR 2436. Moorview Developments v First Active Plc [2009] 2 IR 788.

6. If without prejudice negotiations succeed, the fact of the successful compromise is admissible evidence in any subsequent proceedings between the same parties. The logic is that once the offer is accepted, the reason for non-disclosure ceases and the fact of the compromise is admissible in evidence. Moorview Developments v First Active Plc [2009] 2 IR 788. Quinlivan v Tuohy (unreported High Court 29 July 1992)."

26. Roberts J. went on to identify six exceptions to the without prejudice rule. As no case has been made that the without prejudice material in this case falls within any of the said exceptions, it is not proposed to consider them further. Of note, ultimately in *QRD*, Roberts J. refused the application to strike out the material over which privilege was asserted finding that it was open correspondence entered into after a binding agreement had been reached and negotiations had ended. Roberts J. was satisfied, however, and it was not disputed, that correspondence up to the point where agreement was reached was captured by "*without prejudice*" privilege and ought not to be disclosed.

27. Crucial points of distinction between this case and *QRD* insofar as the material considered privileged is concerned include the fact that it was manifestly clear in QRD that

there was a dispute and that legal proceedings were in contemplation because a statutory demand had been delivered by Notice pursuant to s. 570 of the Companies Act, 2014 when the negotiations over which privilege was asserted commenced. Furthermore, these discussions were agreed to be "*without prejudice*" and correspondence bore the heading "*without prejudice*" with the result that the parties' intentions were clear. The disputed documentation was documentation which issued after agreement was reached which was not headed "*without prejudice*". While the agreement itself was the product of "*without prejudice*" negotiations, the public policy interest in promoting compromise of disputes without recourse to litigation was not served by precluding reference to the product of those negotiations. The situation here is also different to that in *QRD* in that privilege is now asserted in respect of a course of dealing which pre-dated negotiations (as opposed to post-dated) which were subsequently conducted expressly on a "*without prejudice*" basis.

28. Similarly, the issue for the Court (Clarke J.) in *Moorview* was not whether the parties intended that privilege should apply to their negotiations but whether "*without prejudice*" privilege was properly invoked to resist discovery of documents relating to negotiations by reason of the existence of both a genuine dispute and an attempt to avoid litigation or instead was asserted so that the material over which privilege was claimed was not discoverable in third party proceedings. An issue also arose as to the ambit of the privilege and whether it was limited to admissions against interest occurring during privileged negotiations or all matters the substance of the negotiations. It was in this context that the Court's assertion that heavy weight indeed needed to be accorded to *"without prejudice"* privilege needs to be understood. The decision is not authority for a broad application of "*without prejudice*" privilege irrespective of the intentions of the parties when in negotiations which seek to avoid litigation.

29. While the decisions in cases such as *Moorview*, *QRD* and indeed *Purcell* helpfully identify general principles, they are of limited value in guiding the application of principle in this case. Greater parallels exist between the facts and context of the application in this case and those in *Barnetson v Framlington Group Ltd* [2007] 1 WLR 2443. In *Barnetson v Framlington Group Ltd* (referenced in Roberts J.'s judgment in *QRD Development* and relied upon in argument before me) the appellant, having been appointed in March 2005 as the respondent's chief operating officer for a two-year term, wrote to the respondent's chairman in October, 2005 claiming certain share entitlements, after which he was informed that he would be dismissed. A period of negotiations ensued (including a draft compromise agreement), and

in December, 2005 the claimant wrote threatening legal proceedings. Proceedings issued in April, 2006. The employer applied to strike out from a witness statement references to compromise terms which had been offered during negotiations in November, 2005, and to a letter sent in December, 2005.

30. At first instance, the judge refused the application, holding that that the disputed passages in the witness statement referred to exchanges before the commencement of litigation at a time when there was no basis for potential litigation and therefore no dispute. On appeal, Auld L.J. (with whom Longmore L.J. and Toulson L.J. concurred) observed at para. 27 that:

> *"for the 'without prejudice' rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun".*

31. At para. 34 he said:

> *"However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made."*

32. Allowing the appeal and holding that the relevant exchanges were protected by "*without prejudice*" privilege, Auld L.J. stated (at para. 36) that the procedural history demonstrated that, at the time of the relevant exchanges, the parties:

"were already well and truly at odds as to his contractual entitlement. All that followed over the next six or so weeks of exchanges, including those the subject of Framlington's claim of privilege, amounted to wrangling over the terms of that entitlement, not discussions as to variation of them as the judge found."

33. Central to Auld LJ's decision in *Barnetstown* as I read the decision was the fact that the negotiations in question occurred against a background where proceedings were contemplated or might reasonably have been contemplated if the parties could not agree. The evidence in that case established that the parties were not merely adopting negotiating positions to secure a commercial outcome. Instead, witness statements confirmed that negotiations were aimed at resolving any claims and avoiding the prospect of Mr. Barnetson bringing formal claims before the courts. As Auld LJ observed at para. 37:

"[t]he amount of money in issue between the parties and the manner and content of the negotiations were such that both were clearly conscious of the potential for litigation if they could not resolve the dispute without it."

34. Referring to terms of the correspondence, at paras. 37 and 38, Auld L.J. said:

" It was a clear indication of Framlington's intention to dismiss him before the expiry of his full contract term, an intention to which Mr Kyprianou and others involved at Framlington adhered throughout the ensuing negotiations. And throughout, Mr Barnetson's stance was that dismissal on the terms proposed by Framlington would be unlawful and/or unfair because they did not conform with his contractual entitlement. It is noteworthy too that, on 13 December 2005, before the final abandonment of the negotiations, he wrote to Framlington, threatening proceedings if the dispute between them was not speedily resolved.

38 The resultant picture is one of negotiations arising out of a dispute as to Mr Barnetson's contractual entitlement on his early dismissal, all against the backcloth of potential litigation if they could not resolve the dispute by compromise. It is not a picture of negotiations to vary his contractual entitlement against the possibility that he might not be dismissed after all, or to accommodate the proposed early dismissal, with no thought given on either side to potential litigation if variation were not agreed."

35. I find the dicta of Auld LJ in *Barnetson v Framlington Group Ltd* [2007] 1 WLR 2443 persuasive in identifying the applicable legal principles in determining whether a dispute which might trigger the application of privilege on a public policy basis exists. However, the judgment does not address the question of the parties' intentions where privilege is applied as deriving from public policy considerations and offers no guidance in this regard. It is further clear from the judgment in *Barnetson* that the Court's conclusions were based on the facts in that case where discussions were obviously directed at the avoidance of litigation arising from what had become a protracted dispute concerning rights under an employment contract.

Whether Privileged as a Matter of Public Policy

36. I have little difficulty in concluding that when the email of the 1st of May, 2020 was sent the parties were attempting to agree how much was owed to the Plaintiff under contract for work done. The exchange of correspondence leading to and including that email could be characterised in several ways. It might be characterised as providing an account of the sums due to the Plaintiff on foot of termination of a contractual relationship in response to a request of a reconciliation with sums already advanced. The correspondence might equally be read in part as posturing by the Plaintiff with a view to fostering an ongoing or future relationship with overtly commercial objectives. It seems to me that a dual purpose is apparent in the correspondence.

37. From the terms of the email of the 1st of May, 2020, I am satisfied that while this correspondence sought to preserve and foster an ongoing commercial relationship, litigation was in contemplation in the event that a satisfactory resolution was not achieved through negotiation. This is apparent from the language used in the email in which the Plaintiff expressly reserved its legal rights under contract before proceeding "*in order to reach a swift conclusion*" to propose "*a minimum amount which could be accepted*" by the Plaintiff in respect of the termination of its services. Accordingly, acknowledging that the correspondence appeared to have a dual purpose, it seems to me that the email of the 1st of May, 2020 passed between the parties at least partly in furtherance of attempts to negotiate a resolution of a claim for sums due and owing, thereby avoiding litigation. As this appears to have been the first quantification by the Plaintiff of the sum claimed, a reconciliation having been requested by

the Defendant with due regard to advances already made, this dispute was in its infancy and to this extent differs from that considered by Auld L.J. in *Barnetson*.

38. Overall, it seems to me that the approach of the Defendant in correspondence at that time (end of April, 2020 – beginning May, 2020) was not to dispute that sums were due but rather to seek to engage in a reconciliation of the costs incurred with the funds already advanced. The contested email was the first email in evidence before me in which the Plaintiff advanced a figure and the basis for calculating such a figure. In so doing the Plaintiff stressed that there were different approaches open to quantifying sums due and this was the most favourable to the Defendant.

39. I propose to proceed on the basis that a dispute existed in this case at the material time and that the correspondence was directed towards negotiating a compromise thereby avoiding litigation. If I am correct in this conclusion, however, a further issue arises for me in deciding whether the evidence establishes that it was the intention of the parties that were negotiations unsuccessful, reference would not then be made to exchanges which took place during the unsuccessful negotiations or whether evidence of such intention is necessary. There is a risk of conflating the distinct basis for privilege applying as a matter of policy rather than agreement. It seems to me that one cannot be entirely divorced from the other and that no matter how pressing the public policy considerations in favour of a broad application of "*without prejudice*" privilege, the intentions of the parties remains relevant.

40. It is long established as a matter of Irish law that a party to negotiations cannot be forced to negotiate under the cloak of privilege if the other party does not wish to do so. This is reflected in the dicta of Fitzgibbon J. in *Marron v Louth County Council* [1938] 72 I.L.T.R 101 (cited in McGrath at 10-287) where he stated:

> *"It is quite true that it is not open to one party when marking a letter "without prejudice" to force that view on the other party, if the other party refuses to accept it and repudiates it; the first party cannot make the answer "without prejudice" unless the other party accepts the view that their answer is "without prejudice.""*

41. While negotiations which commence on a "*without prejudice*" basis may be rendered open by evidence of an intention to do so, conversely, negotiations which commence on an open basis may be found to have changed to a "*without prejudice*" basis at a later point and any communication from that point will be protected. As Murnaghan J. stated in *Marron:*

> *"Letters marked "without prejudice" should not be read in Court. But in this case the first two letters, namely, the letter sent by the workman's solicitor to the County Council and the reply thereto, were not so marked and showed that the parties were contemplating a discussion of the case and had entered into negotiations for a settlement. I think that the Judge was entitled to infer that the substantial correspondence which followed these two letters—and there was material in these two letters on which he could so infer—constituted "reasonable cause" for delay in instituting proceedings under the Act while the negotiations lasted."*

42. It is the intention of the parties rather than the public policy in promoting resolution without recourse to litigation which is decisive in achieving the change from open to "*without prejudice*" discussions. Negotiations to settle disputes where litigation is in contemplation are not always conducted with the intention that offers made should not subsequently be disclosed. As noted in *McGrath on Evidence* (at para. 10-285) sometimes a party will, for tactical or other reasons, make an offer to compromise in open correspondence or negotiations. If that is the case, then the contents of those negotiations will be liable to production and admission in evidence and there are countervailing policy considerations in recognising the benefit of open correspondence. I agree, therefore, with the statement in *McGrath on Evidence* that in determining whether privilege applies it is essential to establish whether the communication at issue was made with the express or implied intention that it would not be disclosed if negotiation failed. It seems to me that this must be so even when deriving privilege from a public policy base rather than express agreement.

43. Turning then to the facts of this case, if it were the intention of the parties that negotiations would be conducted on a "*without prejudice*" basis, then it was open to them to invoke "*without prejudice*" privilege in express terms. While the absence of the words "*without prejudice*" is by no means determinative of the question, it is a relevant consideration in deciding what the parties' intentions were and whether the documents are privileged. It is

therefore significant in my view that there was no mention of "*without prejudice*" privilege in this case until a telephone conversation which occurred on the 11th of May, 2020. At that point, the Defendant sought advice as to the meaning and effect of such privilege before reverting in writing to confirm agreement to same. The actions of the Defendant in this regard are not consistent with a contention that the parties understood and intended that their exchanges were privileged and would not be disclosed if negotiations were unsuccessful. In turn, the Defendant's email confirming that "*subsequent and related correspondence*" was on a "*without prejudice*" basis did not convey that this reflected the Defendant's intention ever before the Plaintiff made this request in a telephone call the previous week.

44. Furthermore, notwithstanding that the Plaintiff now asserts privilege over the email of the 1st of May, 2020, it is impossible to ignore that it has previously sought to rely on the contents of this email in open correspondence as between solicitors. To my mind this does not reflect the existence of an understanding on the part of the Plaintiff that the correspondence over which it now asserts privilege was always intended to be privileged and therefore could not be relied upon in evidence.

45. As against these considerations, I note that the emails from Mr. Mulryan on behalf of the Defendant bore a legend asserting that the correspondence was confidential. I accept Mr. Mulryan's evidence that all emails generated from his email account bore this legend and that the correspondence with the Plaintiff did not attract a special degree of confidentiality when compared with other commercial correspondence emanating from his email account. There is a clear and important difference between correspondence being confidential and correspondence being privileged. The former does not preclude its production in evidence in *inter partes* litigation whereas the latter does. Accepting that the correspondence was understood to be confidential as between the parties does not therefore persuade me that it was thereby intended that the correspondence could not be produced in evidence in subsequent litigation in view of the other evidence which weighs against the existence of such an intention.

46. I have concluded that while the email of the 1st of May, 2020 is part of an ongoing chain of communication which continued from the 18th of May, 2020 on a "*without prejudice*" basis, it has not been established that when the email was sent on the 1st of May, 2020 the parties intended at that early stage of what has become an entrenched dispute that their correspondence could not be referred to in evidence should recourse be had to litigation. I cannot deduce from

the fact that the negotiations were continued on a "*without prejudice*" basis that they commenced on that basis. While there are circumstances in which an intention that negotiations be conducted on a "*without prejudice*" basis may be inferred notwithstanding that the parties do not explicitly advert to this, it seems to me that the evidence as to the parties understanding and positions at material times in this case is not compatible with an inferred intention that the contents of correspondence generated could not be relied upon. Rather I am satisfied from the evidence that the parties did not share this understanding until after a telephone conversation raising the issue almost two weeks after the email of the 1st of May, 2020.

Whether Privileged as a Matter of Agreement

47. As set out above, by email dated the 18th of May, 2020, Mr. Mulryan stated:

> *"(i)n response to your original email below, I would just like to re-confirm that our call last Monday and all subsequent and related correspondence is and remains on a "Without prejudice" basis, at your request. You did not reference this in your email below but the same principle applies to it as well as this email."*

48. As noted at para. 18 of Mr. Waldron's First Affidavit, the 12th of May, 2020 email (which is referred to in the 18th of May email as the "*original email*" and which Mr. Mulryan agreed was "*without prejudice*") repeated the offer made in the email of the 1st of May, 2020, in identical terms (including as to rationale). This prompts consideration of whether the email of the 1st of May, 2020 is "*related correspondence*" to an email chain which was agreed to be "*without prejudice*".

49. The email thread from 12th to the 19th of May 2020 did not include the email of the 1st of May, 2020. While the email formed part of the sequence of engagement between the parties (having regard to its purpose and terms, including the direct quotation of the most relevant part of the email in the 12th of May 2020 email) and while I am mindful of the exhortation in QRD that I should be reluctant to dissect parts of correspondence by admitting some sections and not others, I cannot treat the correspondence as part of a privileged chain in the face of evidence to the contrary. In this case the evidence demonstrates that there was a deliberate decision

communicated following legal advice to agree that correspondence subsequent to and related to the email of the 12th of May, 2020 should be covered by "*without prejudice*" privilege.

50. The term "*subsequent to and related*" can be interpretated disjunctively or conjunctively. On a plain English reading of the phrase as it appears in the email of the 18th of May, 2020 and noting that the issue of "*without prejudice*" privilege was directly addressed for the first time in the previous week, I am satisfied that it should be interpreted as Mr. Mulryan says he intended it, namely as applying to correspondence which was both subsequent and related to the email of the 12th of May, 2020. This interpretation appears to me to have been shared by Mr. Waldron when he wrote by email on the 19th of May, 2020 referring to open discussions on a "*without prejudice*" basis the previous week thereby ringfencing the temporal parameters to the "*without prejudice*" engagement which had occurred as being over the course of the previous "*week*". This cannot sensibly be read as extending to the email communication on the 1st of May, 2020.

51. Accordingly, on a plain English and common sense construction of the terms used on the 12th of May, 2020 as confirmed by the context and the surrounding engagement evidenced in emails exchanged at that time, I do not construe the exchange between the parties as indicating that correspondence which predated the 12th of May, 2020 and dating to the end of April and beginning of May, 2020 as being captured by the agreement to correspond on a "*without prejudice*" basis in respect of subsequent and related matter. It seems to me that an intention to engage on a "*without prejudice*" as opposed to an open basis cannot be extended any earlier than the 11th of May, 2020 when the question of "*without prejudice*" engagement was first raised. This interpretation appears to have been shared by the Plaintiff's solicitor when they considered themselves at liberty to refer to the email of the 1st of May, 2020 in open pre-litigation solicitor's correspondence dated the 7th of August, 2020. On the evidence in this case, I am satisfied that the parties have agreed on the specific treatment of some and not other correspondence as "*without prejudice*". The parties did not intend and have not agreed that this treatment would be extended to the email of the 1st of May, 2020 or earlier correspondence.

52. From an interest of justice perspective, I might just add one final observation. Although it is not an issue for me, I do not read the email of the 1st of May, 2020 as having the effect of precluding the Plaintiff from contending for a different sum in legal proceedings to the sum indicated in that email as the minimum sum acceptable. This is particularly so in view of the

dynamic at that time as evidenced in the correspondence whereby the Plaintiff was still endeavouring to salvage a commercial relationship with the Defendant. Afterall, the figure was posited as a minimum figure when the Plaintiff was also endeavouring to foster an ongoing contractual relationship. This so-called minimum figure at that time and in the context in which it was offered was never accepted and is not therefore legally binding on the Plaintiff. It remains a matter of law and evidence at the hearing of these proceedings as to whether sums were due to the Plaintiff and, if so, the proper quantification of same. I am satisfied that where this case proceeds to hearing before a judge who will be mindful of the duty to determine the case based on the law and the evidence as to the contractual entitlements arising, there is no real risk of injustice to the Plaintiff from reference to this email.

CONCLUSION

53. For the reasons set out, I do not consider that material referred to at paragraph 46 of the Affidavit of Mr. Ger Mulryan sworn on the 29th of July, 2022 is privileged and therefore inadmissible in evidence. Accordingly, I refuse the application to strike out either the Affidavit in its entirety or the said paragraph 46.

54. If the parties do not confirm agreement as to the form of a final order within a period of 7 days from electronic delivery of this judgment, arrangements will be made for the matter to be listed before the end of this legal term to hear the parties in respect of any matter arising for the purposes of finalising this application.