A sacred right?

The Royal Court of Guernsey has dismissed an application to admit privileged communications. Joseph de Lacey discusses

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The Royal Court of Guernsey has reaffirmed the protection afforded to 'without prejudice' (WP) communications, in the specific context of a trustee application under the second limb of a *Public Trustee v Cooper* application. In *Rothschild Switzerland (CI) Trustees Ltd v W* [2017], Her Hon Hazel Marshall QC dismissed an application to admit certain WP communications into evidence. The court held that the two principles protecting such communications, public policy and contract, were not easily subjugated. The court would therefore jealously uphold WP privilege unless an exception to the rule, as set out in *Unilever plc v The Proctor & Gamble Co* [1999], applied.

Summary of the case

The application was made in the context of a prolonged dispute in relation to a wealthy family's trusts. One of the adult beneficiaries, D (represented by Harcus Sinclair LLP), wished for her interests to be separated from the family trust structure. Attempts had been made to effect a separation for near on a decade without success. Disputes raged as to:

- the value of the trust assets; and
- the proportion of the value of the trusts that D would be appointed on a separation.

In December 2016 the trustees considered that they had come to a fair decision as to separation, and applied for the court's blessing.

Trustees' decision and the ensuing applications

D considered the decision to be unreasonable. In order to test the decision-making process, D applied for disclosure of documents evidencing the decision and the decision-making process, permission to adduce expert evidence as to the trusts' value, and permission to cross-examine the trustees.

D's mother and brothers (also beneficiaries of the trusts) resisted D's application and made their own application, for disclosure against the trustees. They also applied for permission to admit into evidence the contents of communications which had been held between the parties under the auspices of WP privilege. The application asked that the following three categories of documents be admitted to evidence:

- a position paper prepared on behalf of D for a mediation: the position paper was headed 'Without prejudice and subject to mediation';
- an email exchange between the parties' solicitors, and a letter following the exchange from the trustees' solicitors, all headed 'WP' or 'Without Prejudice'; and
- a further email exchange between the trustees' solicitors and D's solicitors referring to the content of WP discussions between the respective firms on behalf of their clients, and a subsequent letter from D's solicitors, again headed 'Without Prejudice'.

Context of the WP communications

Open communications had been exchanged by the parties' solicitors during the course of the dispute. WP

communications (both meetings and correspondence) also took place. As will be well known to practitioners, the position adopted by parties in open correspondence is often quite different to that which is adopted in WP correspondence. That is the nature of such communications: one is attempting to reach compromise and, in the hopes of doing so, may concede certain points or make certain concessions in contrast, sometimes stark contrast, to the open position. There is nothing surprising, unusual or improper about this. Parties are encouraged by the court to seek compromise and it was D's position that this is what the WP correspondence sought to achieve. See, for example, CPR r1.4(f) – helping the parties to settle is one of the court's active case management tools, which tools must be used in order to further the overriding objective. CPR r1.3 states that the parties are required to help the court further the overriding objective.

There was equally nothing surprising or unusual in D expecting that such correspondence, marked 'Without Prejudice' or 'WP', would be afforded the usual protection; that is, that the contents of the correspondence be barred from entry into evidence. Written and oral communications made during a dispute, and made for the purpose of settling the dispute, and which are stated to be or are by implication *without prejudice* may not generally be admitted into evidence: see *Rush & Tompkins Ltd v Greater London Council* [1988] at 739. The underlying policy reason, as stated in *Cutts v Head* [1983], is as follows:

> 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... may be used to their prejudice in the course of the proceedings. They should... be encouraged freely 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.

Implicit in this principle is the understanding that what is said openly, and what is said privately on a WP basis, may be dissimilar. That is not something that litigators will find surprising.

Arguments for the lifting of the privilege
The applicants' case was as follows:

- an application invoking the court's blessing (a *Public Trustee v Cooper* (limb 2) application) was not a matter which attracted the operation of the WP privilege at all;

There was nothing surprising or unusual in D expecting that such correspondence, marked 'Without Prejudice' or 'WP', would be afforded the usual protection.

Court's preliminary comments
At paras 12-15 the judge set out the relevant legal principles to be applied. She explained that the foundation of the privilege is partly public policy, and partly contractual (see *Avonwick Holdings Ltd v Webinvest Ltd* [2014]):

- The public policy foundation is that there is merit in encouraging early settlement. It leads to 'jealous preservation' by the courts of the ability of the parties to speak freely in the hope of settlement, without fear of statements made while speaking freely being used against them in subsequent hearings (para 13). There must be a dispute in existence but the court will give that term a wide meaning.

- The contractual foundation is that parties who are aware of the effects of privilege are entitled to agree, expressly or by implication, that the principles of WP privilege apply to their communications. Privilege binds the parties to it and therefore cannot be waived unilaterally.

Furthermore, the court reminded the parties (paras 17 and 18) that a consideration of the materials sought to be admitted in evidence began from the proposition that materials headed 'WP' are deemed privileged and protected unless a case to the contrary is proven.

- on their true construction, the materials were not WP;

- even if they were, the court would be misled if it were not apprised of the contents of the materials, and so an exception to the rule applied; and

- D was estopped from asserting privilege.

***Public Trustee v Cooper* applications – a safe haven from privilege?**
As above, it was said that the application to which the argument related was not a dispute at all – the trustees were seeking the court's blessing pursuant to its supervisory jurisdiction. Therefore, the privilege could not apply. This argument was firmly rejected. The family dispute by this stage had lasted for nearly a decade and the *Public Trustee v Cooper* proceedings themselves had been issued in 2013. Plainly there was a dispute.

A contested application, as in this case, was a dispute; what was contested was the merit of the trustees' application. Even though the trustees had adopted a neutral position, there was plainly a dispute between the beneficiaries.

The present case was very different to an uncontested *Public Trustee v Cooper* application. That was more of a 'courtesy' appearance, and quite different to the present dispute. The privilege was designed to assist settlement. That plainly applied.

A blessing application was determinative of the parties' rights. Underlying this application therefore was a recognition of competing interests. A blessing application would prevent further dispute. The blessing application could be seen as an attempt to resolve the underlying dispute between the beneficiaries.

subject to privilege, the trustees' solicitors had reserved their right to change the views expressed in the letter at a later date, without the contents of the letter being used against them.

Accordingly each of the materials to which the applicants argued WP privilege did not attract, did enjoy that protection.

The rule was partly contractual; parties are able to confer the privilege on to their communications, even where such communications might not fall within the usual situations.

The privilege was to be given a wide application. It was a key component of public policy underlying the court system.

An ordinary and intelligent layman familiar with the concept of privilege would expect communications, stated to be WP, to attract that protection.

Disregarding the nature of the blessing application, the rule was partly contractual; parties are able to confer the privilege on to their communications, even where such communications might not fall within the usual situations. The mutual use of 'WP' or similar headings by each of the parties was telling.

Were the materials properly to be regarded as 'without prejudice'?

Rather unsurprisingly, the applicants did not pursue their argument that the mediation position statement did not attract privilege, a case that the court considered unarguable. The applicants concentrated their fire on a single letter written by the trustees' solicitors, a large City law firm, which, it was said, did not contain WP statements but merely a statement of the position. Again this was rejected. The letter was 'in the nature' of a WP communication and the label 'WP' given to the letter was obviously intended to 'have some effect'.

It did not matter that the same letter could have been written openly. By marking the letter as

Are the materials admissible under the exception to the 'without prejudice' privilege rule? Would the court be misled if not apprised of the contents?

In *Unilever*, eight exceptions to the WP doctrine were set out. A further ninth was added in *Pearson Education Ltd v Prentice Hall India Private Ltd* [2005]. This additional exception applied to the duty of an applicant for a *Mareva* injunction (a freezing injunction) to give full and frank disclosure to the court. By analogy, said the applicants, the blessing application conferred upon the trustees the same obligation as that which applied to without notice applications for injunctions, which required them to disclose all matters which were material or potentially material to their decision. That duty, it was suggested by the applicants, overrode any considerations of the WP doctrine. Without consideration of the WP communications, the court was at risk of being misled (see the Commercial Court's decision in *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2010]). One of the *Unilever* exceptions the applicants alleged was a duty 'not to mislead'. For D, it was said that there was no exception for 'misleadingness'. There was no authority to support the contention that, even if it did exist, it should apply to this case. The truth of the application was that D's mother and brothers were arguing that D had taken a 'different attitude' in WP communications to her attitude now before the court. If this was misleading, which was not admitted, the proper argument of the applicants fell within the ambit of the exception against 'unambiguous impropriety'. The test for that exception, set out in *Unilever*, was not that there was inconsistency between one's open and WP positions. The 'unambiguous impropriety' exception was a very narrow exception, as explained in *Forster v Friedland* [1992]:

> ... the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition.

Equally, in *Savings & Investment Bank Ltd v Fincken* [2003]:

> It is not the mere inconsistency between an admission and a pleaded case... that loses the admitting party the protection... It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in exceptional and needy circumstances.

There was no analogy between the duty of full and frank disclosure in injunction applications, and the duty in a blessing application. In the former case, the requirement for full and frank disclosure was the consideration for the court impinging on the rights of a party not before the court (para 38). Furthermore, the authorities cited by the applicants supported the requirement that the existence of WP communications be revealed to the court, but not their contents. Finally, the only potentially relevant arguable exception, the unambiguous impropriety exception, did not apply, as it was confined to 'proof that it is the WP privilege itself which is being abused'.

The court also referred to other principles, which stood against the application being successful:

- The risk of satellite litigation in respect of different parties' views as to what had happened and what was said in without prejudice meetings was undesirable.
- There was no good countervailing reason why the materials should be before the court – the trustees were free to admit that WP communications had taken place and should in any event have ample open evidence before the court to explain the decision made to the judge.
- Even if the trustees had made their decision in light of assumptions as to positions taken in WP communications, they had expressly said that they were open to further submissions by the beneficiaries as to the decision and the beneficiaries would be able to contest it should they wish to do so.
- The blessing application was more concerned with process than substance. The trustees were not required to come to the *right* decision, but rather to come to a decision that was not irrational or perverse, or one which no reasonable trustee could make. Admission of the WP materials might be required if their decision could only be explained by reference to them. However, the court warned, that in itself would be startling, and were it the case, the trustees' decision-making process might be called into question.

Was D estopped from asserting privilege?

The court dealt with this point quickly. The context of WP negotiations was 'an unpromising context' for the making out of an estoppel argument and there was no evidence that the trustees had acted to their detriment.

Final comments

The court also considered two questions arising from the application:

- the court confirmed that it is open to the parties to state that WP communications or discussions had taken place; and
- the court considered that it would not be an infringement for a party who had made a statement under the banner of WP privilege to then make the same statement on an open basis, so long as the open communication contained no reference to the content of earlier WP communications.

Conclusion for practitioners

Accordingly, the application was dismissed.

It is plain from the judgment that in order to admit into evidence the content of WP communications, it was not sufficient that one party considered contradictory statements to have been made openly and in WP communications. It was not enough that the context of the application – the trustees' *Public Trustee v Cooper* application for a blessing – required *full and frank* disclosure by the trustees of all relevant considerations. What was required was evidence of an abuse of the privileged occasion. A contradiction between one's open and WP positions was not abuse – it was the necessary result of attempts to compromise. Public policy considerations guard the WP banner jealously.

In light of the case law and, I suggest, common practice, it was perhaps unsurprising that the court would not find the materials to be admissible. A key foundation of our adversarial system is the sanctity of such communications. Without such rigid protection, litigants would be unwise to embark upon negotiations for fear of their statements made in the hope of compromise being used against them in open court. As was said in *Savings & Investment Bank*:

> Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

It is neither in the interests of litigants, nor the court, for the negotiating abilities of the parties to be constrained by the spectre of disclosure of one's WP statements in open court. The courts are keen to move litigation away from the courts and into mediation/ADR processes, in order to save the very high costs of advocate-led resolution of disputes at trial and the costs and delay that go with that process. The above judgment therefore is a welcome reminder of the sanctity of WP communications and an endorsement of the use of WP communications to resolve disputes of all kinds. ■

Public policy considerations guard the WP banner jealously.

Avonwick Holdings Ltd v Webinvest Ltd & anor
[2014] EWCA Civ 1436

Cutts v Head
[1983] EWCA Civ 8

Forster v Friedland
(1992) unreported, Court of Appeal, Hoffman LJ, 10 November

Linsen International Ltd & ors v Humpuss Sea Transport PTE Ltd & anor
[2010] EWHC 303 (Comm)

Pearson Education Ltd v Prentice Hall India Private Ltd
[2005] EWHC 636 (QB)

Public Trustee v Cooper
[2001] WTLR 901

Rothschild Switzerland (CI) Trustees Ltd & ors v W & ors: The 'R' Trusts
(2017) Guernsey Judgment 43/2017, Royal Court of Guernsey, 2 October

Rush & Tompkins Ltd v Greater London Council & anor
[1988] 3 All ER 737

Savings & Investment Bank Ltd v Fincken
[2003] EWCA Civ 1630

Unilever plc v The Proctor & Gamble Co
[1999] EWCA Civ 3027