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PRIVILEGE

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LEGAL PROFESSIONAL PRIVILEGE: WHERE ARE WE?

INTRODUCTION

1. All legal systems which recognise the right of a litigant to communicate with his own lawyers in confidence have to confront an inevitable tension between two valid, weighty, yet competing public interests: (1) the need for all relevant evidence to be presented to the court in order for it to determine a dispute justly, and (2) the need for an appropriate respect for privacy, and a workable and realistic adversarial legal system.

2. There has been a series of recent decisions in the higher courts about the scope of legal professional privilege. This paper attempts to do two things: (1) to provide a brief and general overview of legal professional privilege; and (2) to summarise the overall effect of those recent decisions.

OVERVIEW

(a) What is legal professional privilege?

3. Legal professional privilege entitles a litigant to refuse to reveal to the other side the contents of certain types of communication. It is often used to justify the refusal to disclose documents, but it can also justify, for example, the refusal of a witness to answer questions where the answers would reveal the content of privileged communications. It is now generally understood that the privilege, where it applies, applies to communications, not "documents" or "information".

4. There are two important and general pre-conditions to any assertion of legal professional privilege. First, confidentiality is a necessary (but not a sufficient) feature: no privilege can attach to a communication which has ceased to be confidential. (This is related to, but separate from, from the concept of "waiver" of privilege, which is a route through which privilege might be lost, and which

typically depends on ideas of voluntariness[1] and fairness.[2]) Secondly, the communication must not have come into existence as part of a criminal or fraudulent enterprise.[3] Note that this so-called "iniquity exception" applies where the *purpose* of the communication is fraudulent or iniquitous, not (merely) where the subject matter of the request for advice is.[4] There is, after all, a world of difference between the situation where a person asks a solicitor whether what he has done is a crime or is a private law wrong (where the solicitor's answer will be privileged) and one where he asks a solicitor to help him carry out a crime or a private law wrong (where the answer will not be privileged, even if the lawyer is innocent).

(b) The types of legal professional privilege

5. The law distinguishes between two categories of legal professional privilege: (a) litigation privilege, and (b) legal advice privilege. A communication might, in principle, be covered by either, by both, or by neither category.

6. *Litigation privilege* applies to communications between lawyers and their clients, or between lawyers and third parties, which come into existence after litigation is contemplated or commenced, and which are made with a view to such litigation for the purpose of (a) obtaining or giving advice, (b) collecting evidence, or (c) obtaining information. Litigation privilege is "essentially a creature of adversarial proceedings", and cannot therefore exist in non-adversarial contexts.[5]

7. *Legal advice privilege* applies to communications between lawyers and clients made confidentially with the dominant purpose of receiving legal advice. It may apply in the absence of commenced or imminent litigation.

8. It has long been appreciated that litigation privilege is broader in scope than legal advice privilege, which only applies to "client-lawyer" communications.[6] As will be

[1] See, e.g., British American Tobacco v United States of America [2004] EWCA Civ 1064
[2] See, e.g., Lillicrap v Nalder [1995] 1 WLR 94
[3] R v Cox and Railton (1884) 14 QBD 153
[4] See the discussion in R v Central Criminal Court, ex parte Francis & Francis (a firm) [1989] 1 AC 346 per Lord Goff at 397.
[5] In re L [1997] AC 16
[6] See Wheeler v Le Marchant (1881) 17 Ch D 675.

seen below, it had perhaps not, until recently, been fully appreciated how much narrower legal advice privilege might be if the identity of the "client" is conceptualised restrictively.

(c) The significance of legal professional privilege: the traditional view

9. Although legal professional privilege is rooted in confidentiality, it should not be forgotten that it has a more powerful effect than other rights arising out of confidentiality. Details of confidential relationships in other contexts are given appropriate respect by Courts, but mere confidentiality will, where disclosure is in issue, usually be "trumped" by the countervailing interest in the proper administration of justice. Even the recognised human right (under article 8(1) of the European Convention and now the Human Rights Act 1998) to a private and family life can, subject to proportionality, be defeated by an appeal to certain countervailing legitimate aims (listed in article 8(2)). Not so with legal professional privilege under English law, once it applies. The books contain various examples of claims to privilege being upheld, even where they involved a departure from what might be thought of as the "just" result in the individual case. Privilege can be waived by the client, or overridden by express statutory provision, but it is otherwise absolute.

10. Legal professional privilege is therefore more than a mere rule of evidence. It is a "fundamental condition upon which the administration of justice as a whole rests".[7]

11. The justification for upholding privilege in this way has been said to be that a person "must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent".[8]

[7] R v Derbyshire Magistrates Court ex parte B [1996] 1 AC 487 per Lord Taylor at p 507
[8] Ibid.

RECENT DEVELOPMENTS

(a) The context

12. Although many practitioners have welcomed the House of Lords' recent judgment in *Three Rivers District Council v Bank of England* [2004] UKHL 44 ("*Three Rivers (No 6*)"), it is important to remember just how much of the law on legal professional privilege has been called into question during the Three Rivers litigation. In the good old days before the various privilege decisions in that litigation, it was assumed by many lawyers that (1) legal professional privilege was a recognised fundamental right at common law, (2) that it was absolute, (3) that there were coherent policy justifications for upholding it which, almost without exception, should defeat the temptations of "pulling back the veil" in any individual case, and (4) that, in order for its rationale to be effective, and for clients to be able to appreciate in advance of instructing their lawyers that conversations with those lawyers would not later be revealed, the rule had to be very generously construed and rigorously applied. It was unrealistic, for example, for a solicitor to think that his professional discussions had to begin with a conversation along the following lines: "Whether or not what you and I discuss in due course will be confidential in future or could be admissible in court will depend on (1) whether you are to be regarded in law as "the client" and (2) the precise content of each communication between us. For example, if we discuss the weather, that will not be privileged. If we discuss the merits of your defence to a breach of contract claim brought by your suppliers, that will be privileged. But if we discuss how best I can present your response to a letter from the Financial Services Authority, I do not know whether the discussion will be privileged or not."

(b) *Three Rivers*

13. The litigation in *Three Rivers* has seen the Courts grappling, more or less explicitly, with the following questions:

    13.1. who is "the client" for the purposes of legal advice privilege?

13.2. what does "legal advice" mean? How much of what solicitors and barristers actually assist their clients with professionally falls within its scope?

13.3. have the public policy arguments in favour of privilege been overstated in the past?

(c) the client

14. In *Three Rivers (No 5)*,[9] the Court of Appeal ruled that communications between lawyer and client, and client *only*, could attract legal advice privilege. Although companies could only act through employees, it did not follow that all employees of a company were to be regarded as the client. Indeed, an employee might stand in no different a position from that of a third party, who (in respect of legal advice) does not count.

15. The facts, which are well known, were as follows. An Inquiry, conducted by Bingham LJ (as he then was), had been set up into the collapse of BCCI, which the Bank of England had been under a statutory duty to supervise. The communications at issue had all come into existence in the context of requests for advice and guidance from Freshfields (the Bank's lawyers), and from Counsel, about how best to present evidence to the Bingham Inquiry. There had been a small unit at the Bank of England devoted to dealing with communications with the Inquiry (the "Bingham Inquiry Unit"). In 1993, after the publication of the Bingham Inquiry's Report, proceedings were launched against the Bank, alleging bad faith in the way it had carried out its statutory obligations in supervising BCCI. These proceedings, as is well known, are massive and complex. After several years of litigation, there remained various requests for discovery of documents. And as Lord Scott noted, because the Banking Act 1987 had set the Claimants' evidential hurdle at the high level of bad faith (so that negligence would not be enough) it was not surprising that the Claimants sought the widest possible discovery from the Bank in order to assist their efforts to jump that hurdle.

[9] Three Rivers District Council v Bank of England (No 5) [2003] QB 1556

16. The Bingham Inquiry was conceded not to be adversarial, with the consequence that litigation privilege could not apply to the documents requested. But did not legal advice privilege apply? The Court of Appeal held that *only* communications between the Bank of England's Bingham Inquiry Unit ("BIU") and Freshfields could in principle attract legal advice privilege, since only the BIU was the "client" in that context. Communications between *other* employees of the Bank ("however eminent he or she may be") and Freshfields could not, said the Court of Appeal, attract privilege.

(d) "legal advice", and *Three Rivers (No 6)*

17. Giving a second reason for its decision in *Three Rivers (No 5),* the Court of Appeal contrasted presentational advice with legal advice and said that the dominant purpose of the communications at issue (advice as to how best to present the evidence to the inquiry) was not such as fell within the scope of legal advice. That led to further applications and appeals. Many lawyers, it might be suggested, would view the distinction contained in the Court of Appeal's reasoning as a false one. Lawyers routinely advise on matters of presentation. A good part of the art of solicitor, and of the advocate, is about how to persuade, and how to present the facts in the most coherent and attractive way.

18. The Court of Appeal, it can be argued, appears to have fallen into the trap of assuming that, the "purer" the (academically) *legal* content of a communication is (e.g. the more it is about "legal rights and obligations"), the more likely the communication deserves to be protected from disclosure. But, apart from anything else, that is surely to forget the very *purpose* of privilege in the classic case, which is to protect what the *client* wants to tell his solicitor. Where a client, impliedly or otherwise, says to his lawyer: "[a] These things have happened to me – [b] please tell me what the law is and - [c] please tell me what I should do next", privilege (in order to work sensibly) must surely apply with full force to communications falling into categories [a], [b] and [c], not just those in category [b]. The client hardly cares whether the purely legal answer to a purely legal question is protected or not. The *public interest* in confidentiality is, perhaps paradoxically, but according to its public

policy justification, at its *highest* where the content of the communication is factual, not legal (as long as the communication also ultimately also has some legal context).

19. The Court of Appeal's restrictive approach to "legal advice" has now been corrected by the House of Lords: see *Three Rivers (No 6)*. This became necessary after the Claimants in *Three Rivers*, emboldened by their success in the Court of Appeal, sought disclosure of further documents between the *BIU* (i.e. the client) and Freshfields (they had specifically refrained from asking for such documents the first time around, suggesting perhaps that they too had assumed them to be unarguably privileged). The Court of Appeal, for the second time, confirmed and expanded upon its previously expressed view that "legal advice" must be advice as to legal rights or liabilities, holding that the documents at issue had to be disclosed. It is that decision that has now been reversed by the House of Lords.

20. In effect one can see the dispute about the meaning of "legal advice" as having come full circle: a sensible and long-standing approach had long ago been set out in the case of Balabel[10], and it has now been effectively (although perhaps not fully) endorsed by the House of Lords. The test there was, in essence, whether the communication is made in a "relevant legal context". Doubtless there is room for some argument about how far a "legal context" might extend – but it appears to amount to a more generous test than "advice about rights and liabilities", and as the law lords said, it could hardly be disputed that there was such a "legal context" to the Bingham Inquiry. By way of example, the outcome of that inquiry could easily have been judicially reviewed, and the persons whose actions were being

[10] Balabel v Air India [1988] Ch 317 at 330 per Taylor LJ: "Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and the client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

investigated could easily have been the object of considerable public criticism, which could itself have had significant legal consequences.

(e) Areas of concern

21. But it would be wrong to think that the House of Lords decision in *Three Rivers (No 6)* has resolved all of the difficulties in this area of the law or has "reasserted" legal professional privilege unambiguously. This is for two principal reasons.

22. The first point - a somewhat obvious but very important one - is that the "client" issue as addressed by the Court of Appeal in *Three Rivers (No 5)* remains unresolved. The House of Lords originally refused permission to appeal from that decision of the Court of Appeal. In *Three Rivers (No 6)*, it seemed possible that the House of Lords might address the issue again. It even gave leave to the Attorney General, to the Law Society and to the Bar Council to intervene and make submissions on the point. In the event, it declined to address the point, in effect because it was too late to do so (see, e.g., the reasoning of Lord Scott at paragraph 47 of the House of Lords' decision). Lord Carswell said that he was "… not to be taken to have approved of the decision in *Three Rivers (No 5)*, and I would reserve my position on its correctness" – but this is as far as any of their Lordships was prepared to go on this occasion.

23. It is understandable that the House of Lords chose not to address an issue that was not strictly part of the case before them (and as to which a recent panel had refused permission), but the state of the law remains therefore somewhat unclear and unsatisfactory. This is after all, as Lord Brown recognised in *Three Rivers (No 6)*, "an area of the law in which clarity and certainty are at a premium". And as Lord Millett had observed in a recent Privy Council case, "a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent."[11] At present many lawyers will no doubt feel that they are unable, responsibly, to give such an assurance to their clients.

[11] B v Auckland District Law Society [2003] 2 AC 736, at p 757

24. The second point about *Three Rivers* is perhaps a less obvious one. But it should be noted that the House of Lords' judgment in *Three Rivers (No 6)* does not reveal an unhesitating thumbs-up for legal professional privilege, when compared to some comparable decisions of the past:[12]

    24.1. Lord Scott (paragraph 29) appears to question the justification for litigation privilege where it applies to communications between litigants with third parties, and to think that a new look at the justification for litigation privilege is required;

    24.2. Lord Scott also said (paragraph 38) that there could be no getting away from the "difficulty" in a marginal case, where it needs to be determined whether there is a "relevant legal context" in which the lawyer's advice is being requested or given, and that in such a case the question for the Judge will be twofold: (i) whether the advice relates to the rights, liabilities or remedies of the client and (ii) whether (and apparently *even if the answer to the first question is yes*), whether the communication falls within the policy underlying the justification for legal advice privilege in our law. If that becomes the test, it appears to be significantly less generous than that set out in *Balabel,* and is not an easy test to apply in practice;

    24.3. Baroness Hale said (paragraph 61) that she sympathised with the Court of Appeal's anxiety to set "boundaries" to the scope of legal advice privilege. She also said that legal advice privilege is "too well established in the common law for its existence to be doubted now". This, it may be suggested, is a somewhat reluctant endorsement of the privilege.

25. On the other hand, it is perhaps wrong to be unduly pessimistic. The problem in *Three Rivers (No 5)* arose in a context in which it had been *conceded* that litigation privilege could not apply (because the Bingham Inquiry was not "adversarial"), and in which, perhaps unusually, the "client" was said to be a "unit" within a very large

[12] C.f. R v Derbyshire Magistrates Court ex parte B [1996] 1 AC 487; and R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563.

organisation. It is possible that – even in a purely legal advice privilege context - a future panel of the Court of Appeal might feel able to distinguish the decision in some way or other.

(f) A recent illustration of the new scepticism

26. As a postscript, I would like to draw attention to the recent *Philip Morris* case.[13] The government of the United States of America sued the major tobacco companies for damages of hundreds of billions of dollars under the RICO legislation, alleging a long-term fraud carried out by the companies against the American public in deliberately concealing the health risks of smoking. By a letter of request the USA asked the High Court of Justice in London to compel an English witness to attend there to give evidence for the impending trial in Washington. The Court granted that request. That would not have been a surprising result, were it not for the fact that the witness was a partner at a City law firm who had been the senior solicitor of one of the Defendant tobacco companies for many years and who had unquestionably been *retained* in order to give advice about the company's rights and obligations. The Court of Appeal dismissed the company's appeal against the Judge's Order.

27. The company argued that, on a proper application of the Balabel test, the real test is whether a solicitor has been retained to give legal advice (i.e. about rights and obligations) and whether the communication falls into the continuum aimed at receiving that advice. The Court of Appeal replied that the dominant purpose of the retainer was not the issue. The point was that the witness must have at least some information not protected by privilege, and the examination should therefore go ahead. The solicitor was duly forced to give evidence (in front of a High Court Judge rather than a Master), making privilege objections where they arose on a question-by-question basis. The difficulty of that exercise should be noted. In answer to each question, the issue for the witness (who of course owed strict duties of confidentiality to his client as well as obvious duties to the Court) to resolve in his own mind, before he could answer, was: "Would my proposed answer to that

[13] United States of America v Philip Morris and others [2004] EWCA Civ 330

question, gained from knowledge of the client's affairs several years ago, impermissibly reveal communications between myself and my clients which occurred in a relevant legal context sufficient to attract legal professional privilege?"

28. The strict ratio of the *Philip Morris* decision is narrow: for litigation privilege to apply, specific litigation must objectively be reasonably in prospect. There mere possibility that a client might be sued at some point is not sufficient to bring litigation privilege into play. Whether the analysis of "legal advice" is still correct in the light of *Three Rivers (No 6)* is unclear. But perhaps *Philip Morris* also has a wider significance: it is a striking indication of what can now happen - a solicitor is called to court to answer questions about his own client, put to him by his client's enemy – and it is thus a timely (and, many would say, stark) warning to all practitioners about the heavily context-dependent (and sometimes weak) protection that is afforded by legal professional privilege.

(g) Concluding remarks

29. So, in conclusion, where are we? It may be suggested that the present practical reality is that whether something is or is not legally privileged is frequently likely to be legally controversial. It is reasonable to expect that litigants will be tempted or encouraged in this atmosphere to question the assertion of privilege made by the other side more sceptically than in the past. An increase in satellite litigation is a distinct possibility. But the Courts have not, so far, fully explored the practical difficulties in resolving such disputes. How far can a litigant be permitted to go in probing the assertion of privilege made by the other side over a document or a series of communications, without impermissibly becoming privy to the very confidential material sought to be protected?

30. It is perhaps unwise to seek to provide summaries the law in this difficult area. But the following can be said with reasonable certainty:

    30.1. legal professional privilege, where it applies, is a fundamental rule of evidence, and also a substantive and fundamental right, overriding the competing public interest in having all relevant material placed before a court;

30.2. the Court of Appeal's scepticism about the rationale of retaining legal advice privilege (as opposed to litigation privilege) has been confirmed to have been misplaced by the House of Lords;

30.3. the test for legal advice privilege is to be found in *Balabel* and *Three Rivers (No 6)*, but is still not precisely clear. Care needs to be taken to ensure that the communication is taking place within a specifically legal context;

30.4. the Court of Appeal's distinction between advice about rights and obligations, and advice about presentation, was not the correct way of separating legal advice from non-legal advice. "Legal advice" can include the effective presentation of a case – especially if the consequences of failing to present the relevant evidence is public criticism or private or public lititation;

30.5. whether the employees of a large company seeking advice from a lawyer are to be regarded as a client, or as the client's agents, and therefore eligible for legal advice privilege (and if so which of them), is an unresolved legal question. It is likely that the point will be reconsidered soon.

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"WITHOUT PREJUDICE" PRIVILEGE
AFTER BNP PARIBAS V MEZZOTERO

1. The recent EAT decision in *BNP Paribas v Mezzotero* [2004] IRLR 508 has changed the way we think about without prejudice privilege in the employment law context. This paper examines the foundations of the "without prejudice" rule and then considers the meaning and possible effect of the *Mezzotero* decision.

THE "WITHOUT PREJUDICE" RULE

2. The "without prejudice" rule is a rule governing the admissibility of evidence. The rule provides that written and oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. The underlying policy was described by Oliver LJ in *Cutts v Head* [1984] Ch 290 at 306 as follows:

> *"It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table. … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*

THE JURIDICAL BASIS OF THE RULE

3. The juridical basis of the without prejudice rule is partly based on public policy and partly on contract i.e. an express or implied agreement between the parties to the effect that what is said in settlement negotiations will not subsequently be relied on in court. But the rule cannot be wholly explained on this basis. The first letter passing between the parties marked "without prejudice", or the 'opening shot' in

negotiations will be protected by the rule even though it was unsolicited and was not agreed by the parties.[14] Likewise, the three party situation, where without prejudice correspondence between A and B may be inadmissible in proceedings between A and C, has nothing to do with contract.[15]

4. The without prejudice rule must also be explained by reference to the public policy of encouraging litigants to settle their differences, and which, for that reason, is directed to admissions against interest. Lord Hoffmann in *Muller v Linsley & Mortimer* [1996] PNLR 74 pointed out that the privilege operates as an exception to the general rule on admissions that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. In *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436 at 2448, Robert Walker LJ stated that the protection of admissions against interest is the most important practical effect of the rule.

WHAT COMMUNICATIONS ATTRACT WITHOUT PREJUDICE PRIVILEGE?

5. The rule applies to exclude all negotiations genuinely aimed at settlement of a dispute, whether oral or in writing, from being given in evidence. The application of the rule is not dependent on the use of the phrase "without prejudice". If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at trial and cannot be used to establish an admission.[16] Unlike other forms of privilege, the consent of both parties is required to waive without prejudice privilege.

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[14] See Schering Corporation v Cipla Limited [2004] EWHC 2587, Laddie J.
[15] See Rush & Tompkins Ltd v Greater London Council & Anr [1989] AC 1280; Hollander "Documentary Evidence" (8th edition, Sweet & Maxwell) para 15-02.
[16] Rush & Tompkins Ltd at 1299-1300 per Lord Griffiths.

EXCEPTIONS TO THE RULE

6. There are a number of circumstances in which without prejudice communications will be admitted in evidence, the principal of which are as follows:

   6.1. when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible;[17]

   6.2. evidence of without prejudice negotiations may be given in order to explain delay or apparent acquiescence. The fact of without prejudice negotiations may be relevant, for example, on an application to strike out for want of prosecution;[18]

   6.3. when the words "without prejudice save as to costs" are used, the correspondence may be admitted on questions of costs;[19]

   6.4. one party may be allowed to give evidence of what the other party 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" (the expression used by Hoffmann LJ in *Forster v Friedland* 10 November 1992, unreported).

UNAMBIGUOUS IMPROPRIETY

7. If, for example, a defendant threatens in negotiations that he will give perjured evidence and will bribe other witnesses to perjure themselves unless the claimants withdraw their claim, then this is an unambiguous example of an improper threat which will be admitted in evidence. [20]

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[17] Tomlin v Standard Telephones and Cables Ltd [1969] 1 WLR 1378.
[18] Walker v Wilsher [1889] 23 ChD 335 at 338.
[19] Cutts v Head.
[20] Greenwood v Fitt [1961] 29 DLR 1, 260 (British Columbia).

8. However, the Court of Appeal has made clear in a number of recent cases that this exception should be applied only in the "clearest cases of abuse of a privileged occasion": *Unilever plc v Proctor & Gamble Co* at 2444 per Robert Walker LJ. In *Fazil-Alizadeh v Nikbin* 25 February 1993, unreported, Simon Brown LJ warned that "unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded". The Court of Appeal has stated that the exception does not apply to a mere inconsistency in a pleaded case or position. In *WH Smith Ltd v Colman* [2001] FSR 91, Robert Walker LJ stated:

> *"It is not to be set on one side simply because a party making a "without prejudice" communication appears to be putting forward an implausible or inconsistent case or to be facing an uphill struggle if the litigation continues".*

9. Thus in *Unilever plc v Proctor & Gamble Co*, the Court of Appeal refused to permit the plaintiff to rely on statements made by the defendant at a without prejudice meeting which threatened the plaintiff with proceedings for infringement of a patent. In *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715, the Court of Appeal allowed an appeal against a decision to permit the claimants to adduce in evidence statements made at without prejudice meetings in which the Defendant admitted misappropriating assets, contrary to his pleaded case. The Court in that case expressly rejected the judge's use to a test of whether there is a "serious and substantial risk of perjury" as weakening significantly the requirement of unambiguous impropriety.

10. In *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2004] 1 WLR 667, the Court of Appeal overturned a decision permitting the claimant to amend its statement of claim to include an admission made by the defendant at a WP meeting as to his ownership of shares, which was inconsistent with his affidavit of means. According to Rix LJ, the fact that the admitted ownership of shares was unchallenged by the defendant was not the same thing as an unequivocal or unambiguous impropriety. The real question is whether the privilege itself has been abused. Rix LJ stated at page 684 that:

"it is the fact that the privilege is itself abused that [loses the admitting party the protection of the privilege]. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case."

THE WITHOUT PREJUDICE RULE IN EMPLOYMENT TRIBUNALS

11. There is no question that "without prejudice" privilege applies as much to Employment Tribunal proceedings as to High Court proceedings. This was established in the EAT case of *Independent Research Services Ltd v Catterall* [1993] ICR 1, in which Knox J noted at pages 2-3, that although employment tribunals are not bound to apply the strict rules of evidence, the "without prejudice" privilege applies just as much, if not more, to proceedings in employment tribunals as it does to proceedings in court. In that case, the EAT upheld a tribunal decision not to admit in evidence a letter from the Applicant headed "without prejudice" in which he put forward an offer to remain in employment, which was inconsistent with his assertion that his trust and confidence in his employers had been destroyed.

BNP Paribas v Mezzotero

12. The EAT's decision in *BNP Paribas v Mezzotero* [2004] IRLR 508 will potentially have wide-ranging effects on the ability of employers to enter into without prejudice negotiations with employees to reach compromise agreements.

(a) The facts

13. Ms Mezzotero worked for BNP Paribas in its debt capital markets department from 1996. She was absent on maternity leave for a period in 2000 and had a second period of maternity leave between March and November 2002. Shortly after her return to work in November 2002, she raised a grievance concerning her treatment prior to and on return from maternity leave. Prior to the resolution of the grievance, she was invited to a meeting which was expressed by her employers to be "without

prejudice". There was a dispute about what was said at the meeting. According to Ms Mezzotero, her employers suggested during the meeting that she terminate her employment with the bank. The bank refused to put their proposal in writing because, they said, the meeting was without prejudice.

14. Ms Mezzotero subsequently brought a Tribunal claim for sex discrimination and victimisation. In particular, she alleged that the without prejudice proposal to terminate her employment amounted to an act of sex discrimination or victimisation. The bank objected that the matter was subject to legal privilege, and it did not consent to waiving that privilege.

15. The Chairman of the Tribunal ruled that Ms Mezzotero was entitled to give evidence about the meeting because, at the time, there was no extant dispute between the parties about the termination of her employment, and therefore the negotiations were not genuinely aimed at settlement of the applicant's discrimination claim. In any event, he concluded that it would be an abuse of the without prejudice rule to exclude the evidence.

(b) **The EAT's reasoning**

16. Cox J (sitting alone) dismissed the interlocutory appeal by the bank, holding that the without prejudice rule did not apply to prevent the statements made at the meeting being admissible in evidence before the tribunal. The EAT found that for the without prejudice rule to apply, there must be a dispute between the parties and the communications to which the privilege is said to attach must be made for the purposes of a genuine attempt to compromise it. Cox J considered that the grievance did not relate to termination of her employment, but rather, to the continuing employment relationship between the parties. Therefore, there was no extant dispute between the parties as to termination, which the respondents' remarks were a genuine attempt to compromise. Further, Cox J stated at paragraph 28 that:

"I do not consider that the act of raising a grievance by itself means that parties to an employment relationship are necessarily in dispute. Grievance procedures are well recognised and well used in the workplace. They provide a mechanism where any employee who is aggrieved about a particular matter can raise it through appropriate internal channels. It may be upheld, or alternatively dismissed, for reasons which the employee finds acceptable, so that the parties never reach the stage where they could properly be said to be 'in dispute'."

17. Moreover, it was unrealistic to refer to the parties "agreeing" to speak without prejudice, given the unequal relationship between them and the vulnerability of the applicant: see paragraph 30.

18. The EAT found in the alternative that the employer's conduct fell within the "unambiguous impropriety" exception to the without prejudice rule. In reaching this conclusion, Cox J referred to the purpose of the discrimination legislation in eradicating the "very great evil" of discrimination, the fact-sensitive nature of discrimination cases, and the need for discrimination allegations to be properly determined by employment tribunals after full consideration of all the facts: see paragraphs 35-36. Her Honour reasoned that an employer would not be permitted by the without prejudice rule to prevent a tribunal considering an overtly racist remark, and that it would be impermissible to attach "different levels of impropriety to fact-sensitive allegations of discrimination": see paragraphs 37-38.

(c) **The Court of Appeal**

19. Pill LJ rejected the bank's application for permission to appeal, noting that if there had been a genuine attempt at a without prejudice discussion with a view to settling the case, the employers would not have refused to put their proposal in writing (and indeed, that their case would have been stronger if a properly worded letter had been sent to her under the heading "without prejudice").

(d) **Analysis of the EAT decision**

20. The ratio and the rationale of the decision are arguably correct. Employers should not be entitled to hide behind the cloak of without prejudice privilege in order to terminate the employment of difficult or underperforming employees, and should not be able to manufacture disputes as to termination when no such disputes exist. The practice of employers calling unsuspecting employees into meetings, and presenting them with a choice between immediate termination and a pay off, or drawn out redundancy or disciplinary procedures arguably amounts to a repudiatory breach of the contract of employment. Until the moment the employer proposes the termination of employment, there is no litigation in contemplation and no real dispute between the parties. The effect of *Mezzotero* is to prevent these employers from relying on without prejudice privilege to avoid the scrutiny of the courts or tribunals.

21. The danger of *Mezzotero* lies in Cox J's alternative reasoning. The effect of the case is to extend the unambiguous impropriety exception, particularly in the discrimination context. The prohibition on "attaching different levels of impropriety to fact-sensitive allegations of discrimination" means that alleged acts of discrimination (such as offering to terminate an employee's employment where that employee has brought a claim of sex discrimination) are likely to be treated as unambiguous improprieties. As a result, as Michael Rubinstein points out in the IRLR Highlights of July 2004, where the employee is attempting to adduce evidence in support of a claim of unlawful discrimination, it is now questionable whether that evidence can attract legal privilege at all. This could have a stifling effect on the ability of parties to resolve discrimination claims in advance of Tribunal hearings.

22. Moreover, the extension of the unambiguous impropriety exception is arguably unnecessary to protect employees from unscrupulous employers. Although there is a real risk of employees being placed under improper pressure by employers to

resolve disputes, this is ameliorated by section 203(3) of the Employment Rights Act 1996 which ensures that compromise agreements are not effective unless they are in writing and the employee has received independent legal advice.

23. Equally troubling is the fact that the EAT's decision makes the employee's vulnerability and unequal status a basis for removing without prejudice protection from the employer. As indicated above, without prejudice privilege is not based on the parties' consent. An employee does not need to agree that the discussions are "without prejudice" in order for the privilege to apply.

24. In addition, it may be unrealistic, in light of the new statutory dispute resolution procedures, to hold that the act of raising a grievance does not necessarily mean the parties are in dispute. As employees are now required to complete internal grievance procedures before they can bring an admissible complaint in a Tribunal, it is arguable that many grievances may well indicate that the parties are in dispute.

(e) **<u>What effect on High Court cases?</u>**

25. As yet, there are no reported High Court employment cases which have considered without prejudice privilege in light of *BNP Paribas v Mezzotero*. However, some Tribunals have already had to consider the decision, and have followed it in the context of considering redundancy dismissals.

26. *Mezzotero* is likely to impact on High Court breach of contract cases, particularly in cases involving long notice periods or large bonus payments, where employers have an incentive to compromise disputes under the cloak of without prejudice privilege. Provided that the parties are genuinely attempting to resolve outstanding disputes, and discrimination is not alleged, the High Court should hold that the discussions are protected by privilege. However, employers would be well advised to document their without prejudice discussions, confirm the outcome on a letter headed "without prejudice", obtain the employee's agreement in advance that the

discussions are without prejudice, and encourage the employee to have independent legal representation.

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