

JUDGMENT : MR JUSTICE NEUBERGER: : Chancery Division. 8th November 2000.

1. Mr Anthony McMann and Mr Philip Wallace are the joint provisional liquidators of Anglo American Insurance Company Limited (Anglo), a company incorporated under the Companies Act 1985. On 11th July 2000 they issued two applications. The first was against Mr David Brian, Mr Michael Hamer and Mr Tom Gleeson, all of whom resided in Bermuda. The second was against Eileen Sweeney Stephen Glugstone and Stephen Jowie, all of whom resided in New York. The applications were in relation to each of those individuals ("the applicant") under the inherent jurisdiction of the court, seeking a request, to the Supreme Court of Bermuda, and to the United States' Bankruptcy Court for the southern district of New York, to act in aid of this Court for the purpose of examining those individuals and getting them to produce documents.
2. These two applications by the provisional liquidator were supported by a confidential statement signed by one of the liquidators, Mr McMann. The confidential statement was lodged with the court, and exhibited substantial "without prejudice" negotiations which had taken place between the provisional liquidators and/or their solicitors, on the one hand, and the applicants or some of them, and/or their solicitors on the other hand.
3. What is before me today is not the two applications by the provisional liquidators for letters of request, but an application by the six individuals (hereafter the applicants). They first seek a direction that, in effect, the court determine that the "without prejudice" negotiations or evidence of those negotiations is not admissible in relation to the provisional liquidator's applications for letters of request; secondly, they ask for a direction that the applicants and a accompany called Centre Solutions Bermuda Limited (CSL) be entitled to inspect the confidential report.
4. The detailed circumstances in which the provisional liquidators contend that they are entitled to the letters of request so that the applicants can be examined, are not of concern at the present stage. The applicants were concerned with the management and running generally of CSL for a substantial period. CSL claims to be a creditor for a substantial amount against Anglo and, while it concedes that it may be a contingent debtor of Anglo, it does not accept that the size of any debt that it has to Anglo would exceed Anglo's debt to it.
5. Section 23& of the Insolvency Act 1986 empowers the court on the application of an office holder, such as the provisional liquidators of Anglo, to summon certain categories of individual to appear before it for the purpose of being examined by or on behalf of the office holder and on to produce document. It provides for sanction, in the event of the individual not complying. It follows section 235, which imposes a duty on such office holders to comply with the reasonable requirements of the office holder with regard to answering questions, giving information and producing documents.
6. The procedure pursuant to which an application under section 236 is to be made is set out in Part 9 of to Insolvency Rules 1986. Rule 9.2.1 states: *"The application shall be in writing and be accompanied by a brief statement of the grounds on which it is made."*
Rule 9.5 provides that the written record of the examination and affidavits in connection therewith *"shall not be open to inspection without an order of the court by any person other than the applicant and an order under the applicable section or any person who could have applied for such an order"*.
Rule 9_5.3 extends the ambit of rule 9.5.2: *"To so much of the court file as shows the grounds of the application for an order under the applicable section."*
In the present case the application is not made under section 236 because all the applicants are outside the jurisdiction. For this reason it is made by way of an application for letters of request.
7. The first question I have to determine is whether the rules in Part 9 of the Insolvency Rules are in some way to be applied to an application such as this. Mr Mabb, who appears on behalf of the applicants, says that Part 9 is inappropriate primarily it does not apply to a case where the inherent jurisdiction of the court is being invoked, rather than where the court's powers under section 236 (or its equivalent in relation to bankruptcy section 336) are being invoked. Further, he says, that there is no reason to imply the application of Part 9, because there is a provision which fills the gap, namely rule 7.31(5). Rule 7.31 is concerned with the general right to inspect the file, and sub-rule (5) says: *"The*

right of inspection conferred by this rule is not exercisable in the case of documents or parts of documents as to which the court directs either generally or specially that they are not to be made open to inspection without the court's leave."

8. Mr Mabb contends that, if rule 7.31(5) applies as opposed to Part 9, first, the applicants do not have to get over a threshold of establishing some bona fide interest or justification for looking at the confidential report, and secondly, that the onus is on the office holder under rule 7.31 (5) and not on the applicant.
9. I agree with Mr Oliver QC, who appears for the provisional liquidator with Mr Gillyon, on this issue. He contends, that Part 9 does no more than reflect how the court would have previously exercised its inherent jurisdiction under section 236, in relation to an application under section 236. In my judgment that is supported by a brief observation by Nourse LJ in the **British and Common Wealth Holdings Plc** [1992] Chancery 342, at 353C.
10. In the case of an application under section 236, what was the inherent jurisdiction is now enshrined in Part 9 of the rules; however, where the application is made (because the relevant individual is outside the jurisdiction) for letters of request, then the inherent jurisdiction survives.
11. I also agree with Mr Oliver that another way of reaching the same result, if I am wrong, in that rule 7.31(5) applies and it would be illogical if it did not apply in precisely the same way to an application such as this, as Part 9 applies where the application is under section 236.
12. I turn to the question of the applicant's contention that the "without prejudice" negotiations should not be before the court. To some extent, the way in which the application is framed can be fairly he said to be circular or uncontroversial because it effectively seeks a determination that the negotiations cannot be referred to, save to the extent that as a matter law they can be. The difficulty in which the draftsman of the application found himself arises from the fact that the ground upon which the provisional liquidators sought to justify putting before the court the "without prejudice" material was not clear.
13. The law relating to the circumstances in which "*without prejudice*" material can be put before the court has been most recently considered by the Court of Appeal in Unilever Plc v the Proctor and Gamble Company [2000] Fleet Street Reports 344. In an authoritative judgment Robert Walker LJ, with whom Simon Brown LJ, in a short judgment, and Wilson J agreed, set out the general principles applicable to the admissibility of "*without prejudice*" correspondence at 352 and 357 (bottom) to 359 (top). He then set out on 353 to 354 eight of the most important instances where "without prejudice" correspondence can be referred to or even looked at. The general rule however is clear: where negotiations are entered into between parties on a "*without prejudice*" basis, then, while it may be permissible to refer to the existence of the negotiations, it is not permissible to refer to the contents of those negotiations.
14. In the present case, the basis upon which it is sought to justify putting "*without prejudice*" material before the court is summarised in the skeleton argument prepared on behalf of the provisional liquidators. Essentially, it comprises three grounds. The first ground is that the provisional liquidator's application is essentially an ex parte application and the provisional liquidators are obliged, under normal principles, to give full disclosure.
15. I am doubtful whether it would be fair to characterise the present application as an ex parte application because it was made on notice (very sensibly) to the applicants, and it was made in circumstances where it was pretty predictable that it would be opposed. However, I do not think that that matters, bearing in mind that the proposed liquidators are officers of the court, and bearing in mind that they have good reason to expect that their report or at least part of it will remain confidential. A liquidator is under a duty to give the court a full picture, in the same sort of way as a person applying for an ex parte application is bound to give full disclosure. However, it does not seem to me that, save in quite exceptional circumstances at any rate, an obligation to give full and frank disclosure in relation to an application made against a number of individuals, one has to, or even can, disclose "without prejudice" negotiations which have taken place between the applicant and those individuals and their respective legal advisors. Because of the exceptions which were identified

Robert Walker LJ in Unilever, it would be quite wrong for me to say that in every conceivable case it would be inappropriate to exhibit, or to refer to the contents of, "*without prejudice*" negotiations, but as a general proposition, that must be right.

16. In the case of an office holder making an application under section 236 or, as in the present case, an application akin thereto, I can well see it may be appropriate to refer to the existence of "*without prejudice negotiations*". But, to my mind, the mere fact that he is obliged to give the court a complete picture does not justify exhibiting, or referring to the contents, of "*without prejudice*" negotiations. The fact that an application under section 236 is, according to rule 9.21 to be accompanied by a brief statement, seems to me to provide a little direct support for that conclusion, albeit that it is certainly not necessary for the view I have formed.
17. The second reason put forward for exhibiting the "*without prejudice*" correspondence is because there has been what Mr Oliver refers to as a suggestion of criticism by the applicant of delay on the part of the provisional liquidators. He compares this argument an argument for dismissing a claim for want of prosecution, Mr Oliver contends that just as one can put in evidence of negotiations to explain an apparently unjustifiable delay, in an application to dismiss for want of prosecution, so it is permissible in a case such as this to put in evidence of negotiations to meet an anticipated criticism of delay.
18. The principle upon which Mr Oliver relies is well summarised, if I may say so, in paragraph 5, on page 353, of Robert Walker LJ's judgment in Unilever: "Evidence of negotiations may be given for instance on an application to strike out proceedings for want of prosecution in order to explain delay or apparent acquiescence.
19. Lord Justice Lindley in Walker v Wiltshire 1889 23 QB division 335 at 338 noted this exception but regarded it has limited to '*the fact that such letters have been written and the date of which they were written.*' But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay."
20. In my judgment, the extent to which it is permissible to refer to "*without prejudice*" correspondence for the purpose of meeting an anticipated possible contention that letters of request should not be issued because of delay, cannot be any more generous to a person seeking to refer to without prejudice correspondence, than in the context of an application to dismiss the prosecution.
21. On what I have seen and heard, there was no reason why the provisional liquidators could not simply have informed the court that there were "*without prejudice*" negotiations between the parties, identifying the period over which these negotiations took place, and explaining that this is referred to purely for the purpose of meeting any criticism of delay. I cannot at the moment see, particularly in the light of the enjoinder that that the statement of the grounds be brief, why the statement need have gone any further, let alone exhibited all the correspondence.
22. The third ground identified in Mr Oliver's argument is that it was suggested in correspondence by the applicants, that it was inappropriate to seek relief under section 236 or its equivalent, on the grounds that the provisional liquidators had already decided to sue the applicants. The decision in **Clover Bay Limited v Bank of Credit and Commerce International SA** [1991] Chancery 90 indicates that, once an office holder has determined that he will bring such proceedings, it is inappropriate to invoke section 236 against the person against whom the contemplated proceedings contemplated would be brought.
23. What is said by Mr Oliver is "*without prejudice material is a relevant and admissible to show why the claim was intimated*" ie in response to the applicants' suggestion that there should be a global settlement. It seems to me that to put in all the "*without prejudice*" negotiations at this stage to meet that possible point was inappropriate. All that needed to be done was to mention that if that point was raised, then (a) the provisional liquidators had not determined, and had at no time in the past determined, to bring proceedings against any of the applicants (a point already made by Mr McMann), and (b) that if there was a dispute, then the liquidators may wish to refer to some of the correspondence to explain why the contrary may be raised.
24. There are two further points to be made. First, it would be the applicants, not the liquidator who would be seeking to rely upon the "*without prejudice*" correspondence to seek to show that the

liquidators had determined on making a claim. It would therefore not be the liquidators, but the applicants also would seek to rely on that correspondence, because there is no suggestion in any open correspondence of such an intention or determination by the liquidators. Secondly, there is nothing in the evidence of the provisional liquidators to indicate this thought was actually in their mind at the time that they prepared their confidential report.

25. In those circumstances, I reach the conclusion, that while I can understand why the provisional liquidators decided to exhibit the without prejudice correspondence, and while I am quite satisfied from having read the confidential reports that it was not their intention to poison the court's mind or take advantage of any alleged admission or anything of that sort in the without prejudice correspondence, that correspondence should not have in fact been put before the court. The grounds on which it is now sought to be put before the court are not sustainable.
26. I turn to the second issue, which is the application by the applicants to see the confidential report.
27. To determine whether a person, against whom an application under section 236 is made, should see the confidential report, is not normally easy. It was perhaps most authoritatively considered in **Re: British and Common Wealth Holdings**, to which I have referred. Nourse LJ said this at 344E-D: *"In my opinion the correct approach to an application to inspect the confidential statement, lies somewhere between the two extremes of which counsel have respectively contended. The particular principle now recognised by rule 9.5 of the statements shall not be able to inspection without an order of the court immediately differentiates the case in one where the general principle [and I interpose to say that is the well established principle that in litigation anything shown to the court by one party must be seen by the other party] must prevail. Clearly the person against whom the order is sought must discharge some burden, being great or small, before a court can exercise its discretion in its favour.... The confidential statement although unsworn is the evidence on which the ex party order is made. Further evidence, usually from both sides is then found on the application to set it aside. In my judgment, inspection of the statement should prima facie be allowed where the court is of the opinion that it will or may be enabled fairly and properly to dispose of the application if part of the evidence is withheld from a person against whom the order is sought. It will then be for the office holder to satisfy the court that confidentiality whole or in part is nevertheless appropriate."*

At 367B Ralph Gibson LJ said that: *"I agree with the test formulated by Nourse LJ namely that there will be good reason for disclosure if it appears to the court that, without access to the statement, the applicant for disclosure will or may be unfairly prejudiced, in the conduct of his application to have the order set aside."*

He went on immediately thereafter to say: *"In my judgment the mere fact that the statement was before the court when the order was made and has not been seen by the applicant does not by itself constitute good reason."*

Woolf LJ took much the same view. At 3873 he said: *"I entirely agree with Nourse LJ's formulation of the channel operation that the court should adopt, that it is inspection should prima facie be allowed where the court is of the opinion that it will or may be unable, fairly and properly to dispose of the application if part of the evidence is withheld from the person against whom the order is sought. It is then for the office holder to justify any nondisclosure."*

28. The same view was taken by Lightman J in relation to an application under section 366 of the 1986 Act (see **Re: Ajani (A Bankrupt)** [1996] 1 Butterworth Company Law Cases 272), where he pointed out that an application by an office holder was not the sort of application where there was an automatic right for the other party to see any document. This was for two reasons: (a) because it was not adversarial litigation, and (b) because there was a specific statutory (or in this case, strictly speaking, extra-statutory, in a statutory instrument), provision to the contrary (see at 283 F-H).
29. It seems to me that there are two bases upon which the court may be satisfied that a respondent to a section 236 application crosses the hurdle identified in the judgment. The first is on the basis of argument put forward by the respondent to the section 236 application. Secondly, I think it important to bear in mind that the office holder and those representing him have, as Mr Oliver accepts, a duty to draw the attention of the court to the statements in the confidential report, or documents exhibited thereto, which, by definition, will be unknown to the respondent, but which may result in him being potentially prejudiced as contemplated by Nourse LJ.

30. If there are passages or documents which, in respect of which the officer holder wishes to retain confidentiality, he will have to raise the issue with the court in the absence of the respondents, rather like a **Beddos** application.
31. I have had a brief opportunity to look at the confidential report and Mr Oliver has read it. At the moment I am concerned purely with the grounds raised by Mr Mabb as to why he should be entitled to see the report.
32. Although there is a degree of overlap between them, he relies on the following matters. First, there is an issue as to whether the gathering of information from the applicant by the provisional liquidators should begin with a questionnaire. Secondly, he says that there is an issue as to whether the objection which the provisional liquidators have to the applicants being represented by their current solicitors is a good one. The basis for the objection is that it is inappropriate that they be represented in connection with the present application (and in any subsequent examination) by the solicitor who act for CSL, because that solicitor will be able to pass on information to CSL, against whom the principal liquidators may have a claim. Thirdly, there is the question of what effect the orders sought by the provisional liquidators would have in Bermuda and New York. Fourthly, there is the possibility of there being errors in Mr McMann's confidential report which could be corrected. Fifthly, there is removal of "without prejudice" material. Sixthly, there is the need for an opportunity to respond to the points made by Mr McMann.
33. I believe it important to bear in mind in this connection, that, if the applicants wish to raise any points, they can do so in a witness statement a affidavit, as indeed, to some extent, they have already done. It will then be open to the provisional liquidators to reply to those points. It may well be appropriate, at that juncture, either in the provisional liquidator's reply or in a covering letter from their solicitors, to indicate to the applicants that there is further material in the confidential report upon which the liquidators will rely and which they wish to remain confidential. It will then be possible to identify whether or not there is relevant material in the report and better it ought to remain confidential.
34. At this stage I have to ask myself whether any of these six matters are sufficient to persuade me that the applicants get over the hurdle identified in the three judgments British and Commonwealth.
35. When considering that issue, I think there is some force in the argument that I should bear in mind Article 6(1) of the European Convention on Human Rights which (and Mr Mabb in my view rightly puts it no higher) under scores the care which has to be exercised before the court prevents a party, such as the applicants, looking at a document put before it by the other party, the provisional liquidators.
36. So far as the question of whether there should be a questionnaire is concerned, I find it very difficult indeed to see how the applicants' case can be assisted by seeing the confidential statement. The areas upon which the applicants are to be questioned are clear, although they have been expanded, as Mr Mabb points out. I do not see why it would help them to see the confidential grounds upon which the provisional liquidators seek to raise to justify to the court the application for the letters of request.
37. Secondly, is there a sufficient basis because of the objections to the solicitors, who appear who represent CSL, representing the individual applicants? I think this point contains its own suicide pill. If confidential reports contains information which the provisional liquidators are concerned should not get back to CSL, then for the liquidators to have to reveal that information to the applicants at a time when they are represented by solicitors who also represent CSL would be plainly unjust. on the other hand, if there is nothing in the confidential report which the liquidators are concerned about getting back to CSL, then there will be nothing useful revealed. However, I think that the applicants are entitled to a statement from the provisional liquidators as to whether there is anything in the report which they do object to the applicants seeing, solely because of their concern that the applicants' solicitors act for CSL. I do not see that the point it goes further than that.
38. As to the third ground, I am quite unpersuaded that the effect in Bermuda and New York of the orders sought by the provisional liquidators would be something upon which the report would be relevant.

39. It appears to me that the opportunity to object to the reference to "*without prejudice*" material goes because I have held that it should disappear (apart from possibly being replaced by the reference to the existence of such without prejudice discussions and if appropriate the period over which the negotiations took place).
40. The other two grounds do not seem to me to take matters any further. The opportunity to correct errors and to respond to points made are matters which could be raised by a respondent in any section 236 application. The only special feature here, it is fair to say, that it is clear that Mr McMann's first statement did contain at least one error because he has corrected it in a second confidential place.
41. It is also fair to say that there have been one or two errors made from time to time by the provisional liquidators, solicitors. That is not a point that persuades me that there is any real risk of there being any serious errors, so as to take this case out of the normal run of cases. In those circumstances, I do not think it right to order disclosure of the report.
42. I should make two final points. First, I am not in a position to decide whether or not the applicants have complied with what would be their obligations under section 235 if they were in the jurisdiction. Mr Mabb has taken me to correspondence, which does undoubtedly provide some support for his contention that they have been prepared to help and give information, and that it may be the imposition of an unreasonable condition by the provisional liquidators which has prevented this happening. On the other hand there may be a complete answer to this, and it may be that the applicants (or some of them) would have been breach of section 235 if they were in the jurisdiction.
43. Secondly, the question of whether or not the solicitors who act for the applicants should continue to act for them and CSL is not something which I can or should decide at the moment. It seems clear that this Court has jurisdiction to require the solicitors to act for the applicants or CSL but not for both, or to order them not to provide any documents or information to CSL if that information or the documents have been provided to the applicants by the provisional liquidator in connection with the present application (see **Re: London Morton Bank Limited Haddock's Case** [1902] 2 Chancery 73, per Collins MR at 81 and Lord Justice Sterling at 82 and 83.)
44. However, the costs and inconvenience involved in the applicants having to instruct fresh solicitors may be such that, even if there is a case for saying that the solicitor should not continue to act for both parties, the balance of unfairness comes down in favour of permitting them to continue to do so. That is not a point I can determine (or have been invited to determine) today. It is the point on which the offer of the applicants to provide information and documents voluntarily to the provisional liquidators, appears to have broken down, at least judging from the correspondence to which Mr Mabb has taken me. As I say, it is not something which I can or should deal at the moment.
45. In the event, therefore, it appears to me that the applicants substantially succeeds on the first, "*without prejudice*", issue, and the provisional liquidators succeed on the second, disclosure, issue.

MR D MASS appeared on behalf of the Claimants

MR D OLIVER QC & MR P GILLYON appeared on behalf of the Respondents