CA on appeal from Ch.Div (Mr Justice Park) before Otton LJ, Aldous LJ. 15th March 1999.

JUDGMENT LORD JUSTICE OTTON:
I will ask Lord Justice Aldous to give the first judgment.

LORD JUSTICE ALDOUS:

1. This is an appeal against the order of Park J of 3 March 1999 which struck out certain affidavit evidence of Mr Stephen Forsyth, and certain parts of other evidence, upon the ground that the evidence was inadmissible because it referred to without prejudice discussions.

2. In this action the plaintiff, Mr Dora, seeks relief against the defendants, arising out of an action to recover money due under a judgment in the action CH 1995 D 13. That was an action by the plaintiff against the third defendant, Acraman (PML) Limited, which was then called Playsafe Monitoring Limited. Mr Peter Simper, the first defendant, was the chairman of that company and Mr Stenning, the second defendant, was the secretary. In that action Mr Dora claimed commission in respect of black boxes used to regulate gaming machines that Acraman had sold in Hungary. Judgment on liability was given for Mr Dora with costs. His costs were taxed at just over £103,000 on 11 November 1998. On 6 April 1998 a payment of £300,000 was ordered by way of interim order.

3. On 26 February 1998 Acraman was placed in administrative receivership at the request of its directors. On 27 February it changed to its present name and about the same time the fourth defendant, a shelf company, changed its name to Playsafe Monitoring Limited. The first and second defendants are the shareholders and directors of that company. Also on that day the fourth defendant purchased the assets of Acraman for approximately £59,000. The final event was the order made on 20 May 1998 winding up Acraman. The Official Receiver was appointed the liquidator. In summary, Acraman, having lost the action, could not pay its debts. The first and second defendants resolved to transfer its assets to another company controlled and run by them. The result was that Acraman went into liquidation.

4. In these proceedings, started by writ on 19 December 1998, Mr Dora seeks to recover from the directors of the fourth defendant (Mr Simper and Mr Stenning) and the new company, the fourth defendant. He alleges that the sale of assets by Acraman to the fourth defendant was at an undervalue in breach of section 216 of the Insolvency Act and rule 4.228 of the Insolvency Rules 1986. He also claims damages for an alleged conspiracy between the first and second defendants, and the fourth defendants, and unjust enrichment.

5. On 21 December 1998 Jacob J granted a Mareva injunction. By motion dated 10 February 1999 issued by the defendants, they sought to strike out the proceedings because of the alleged failure to obtain leave of the court to start the proceedings as required by sections 424 and 130 of the Insolvency Act; alternatively, because the pleadings disclosed no reasonable cause of action. They also sought to set aside the Mareva injunction. That motion is due to be heard on 22 March, 1999.

6. As a preliminary to the hearing of the motion, the defendants sought to strike out the affidavit evidence of Mr Forsyth and the evidence that resulted from it as it described without prejudice events. Park J agreed with the defendants and struck that evidence out. This appeal, with leave of the judge, is against that order. We are only concerned with the question of whether Mr Forsyth's evidence is admissible. Nothing I have said, or will say, is intended to reflect upon the actions of the parties or their credibility, which are issues for the judge who ultimately hears the motion.

7. The relevant evidence relates to what was said by Mr Simper and Mr Stenning at a meeting arranged by Mr Forsyth, who agreed to act as an intermediary in the dispute in the first action. That meeting took place on 25 April 1995. It is accepted that the meeting itself was a without prejudice meeting arranged to resolve the issues that had been raised in the first action. Therefore what was said would not, in the normal course of events, have been admissible in evidence in the action.

8. The relevant evidence is that contained in paragraphs 9 and 10 of Mr Forsyth's first affidavit. He says that he recalls the meeting very clearly and records a conversation which he says took place between him, Mr Simper and Mr Stenning. As stated in the affidavit he says that Mr Stenning stated: *"....that if*

he succeeded in obtaining judgment against them, they would have no hesitation in transferring the business of Playsafe to a new company, so as to render any judgment obtained by him effectively unenforceable. It was made very clear by both of these gentlemen that they were determined that John Dora should not be in a position to enforce any judgment which he obtained, as the debtor company would by then have no assets. They were both very open about their intentions in this respect."

9. Paragraph 10 continues: *"Both David Stenning and Peter Simper also made it clear that if John Dora was to take legal proceedings against them personally then, again, they would transfer their assets so as to avoid the effect of any judgment."*

10. I should at this stage make it absolutely clear that the affidavit evidence of Mr Simper and Mr Stenning is to the effect that no such statement what was made. In those circumstances, I proceed upon the basis that the statements were made but note that it may turn out that Mr Forsyth will not be believed.

11. Mr Coney, who appeared on behalf of Mr Dora, put forward three propositions. First, the general rule was that all evidence was admissible if relevant; second, that the "without prejudice" rule was an exception to that rule; and, third, there were exceptions to the exception. I accept the first two propositions in their entirety. The third is, I believe, correct in spirit but is too shortly stated to be acceptable as a pure proposition of law. It is the third to which I must now turn.

12. The basic rule was stated in the speech of Lord Griffiths in **Rush & Tompkins v Greater London Council [**1989] 1 AC 1280 at page 1299: *"The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is no more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head** [1984] Ch 290 at 306:*

> *'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. 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 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, as it was expressed Clauson J in Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151 at 157, 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.'*

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and 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 the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

*Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal, but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley LJ was making in **Walker v Wilsher** (1889) 23 QBD 335 at 337 and which was*

*applied in **Tomlin v Standard Telephones and Cables Ltd** [1969] 3 All ER 201, [1969] 1 WLR 1378. The court will not permit the phrase to be used to exclude an act of bankruptcy (see **Re Daintrey, ex p Holt** [1893] 2 QB 116, [1891-4] All ER Rep 209), or to suppress a threat if an offer is not accepted (see **Kitcat v Sharp** (1882) 48 LT64). In certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given: see **Cutts v Head** [1984] 1 All ER 597, [1984] Ch 290. There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the case is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in **Waldridge v Kennison** (1794) 1 ESP 143, 170 ER 306. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."*

13. Mr Coney made two basic submissions. First, that the statements referred to in Mr Forsyth's affidavit was not admissions in the first action. There were statements not relevant to the first action and therefore they did not fall within the policy consideration, referred to by Lord Griffiths, to protect litigants from being embarrassed from any admission made in an attempt to achieve a settlement. It followed that the evidence was admissible and not within this exception to the general rule. Second, he submitted that the statements were at least capable of being understood as a threat of impropriety in that it was a threat to put the assets of the company and the two directors beyond the reach of a court's judgment by improper means. It followed that the cloak of privilege could not exclude the evidence as the statements related to an exception to the exception.

14. I turn to consider the latter submission first. In **Forster v Friedland** (Court of Appeal 10 November 1992) the Court of Appeal had to consider a case in which it was alleged that during negotiations a party threatened to advance a case of impropriety. Hoffmann LJ said: *"In a respondent's notice Mr Wingate-Saul advanced two other grounds for upholding the judge's ruling. The first was that the conversation showed that Friedland was threatening to advance what he knew to be a sham defence, namely, that there had been no agreement whether legally binding or not.*

*I accept that a party, whether plaintiff or defendant, cannot use the without prejudice rule as a cloak for blackmail. Mr Wingate-Saul cited two cases which illustrate this proposition. The first was the British Colombia case of **Greenwood v Fitt** [1961] 29 DLRI at page 260, in which the blackmailer was the defendant. He told the plaintiffs in the course of without prejudice negotiations that unless they withdrew their claim for fraudulent misrepresentation he would give perjured evidence and bribe other witnesses to perjure themselves, and, if the plaintiffs nevertheless succeeded, he would leave Canada rather than pay damages. The Judge of Appeal said the without prejudice rule 'was never intended to give protection to this sort of thing'.*

15. In **Hawick Jersey International Limited v Caplan ,** which is reported in The Times Newspaper of 11th March 1988, or which there is also a Lexis transcript, the blackmailer was the plaintiff. He admitted during the negotiations that his claim for money lent was bogus and intended to put pressure on the defendant to negotiate over another matter. When the defendant said *'You are not going to force my hand by blackmailing me, the plaintiff replied, with disarming candour: 'But I have got to. What would you do if you had been me?'*

These are clear cases of improper threats, but 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. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."

16. Hoffmann LJ concluded that the material before the court did not establish unambiguous impropriety.

17. That judgment of Hoffmann LJ was applied in **Dr Fazl-Alizadeh v Nikbin and Ors** (Court of Appeal 19 March 1993). In that case it was emphasised that for the material to be admissible it had to be established that it concerned unambiguous impropriety.

18. In this case we are considering the matter at an early stage when we have not even reached the stage of witness statements. This is an application to strike out and/or to set aside a Mareva order. In my view the court should at this stage decide whether the statements would, if proved, form the basis for establishing unambiguous impropriety. It is for the judge who hears the matter to be decide whether they do. In my view, when paragraphs 9 and 10 are taken into account together with the evidence of Mr Simper and Mr Stenning, it is established that the evidence sought to be struck out should be understood as disclosing unambiguous impropriety. The evidence alleges that these gentlemen would make sure that the judgment, which might be obtained by Mr Dora, would not be satisfied due to the action they would take, resulting in the company's assets being transferred out of reach of the order of the court.

19. I also take into account the affidavits of Mr Stenning and Mr Simper which state that these statements were never made. They may turn out to be right, but they do not suggest that what is alleged to be said was not improper or that something like that alleged was said, but that it was taken out of context. For that reason, I believe that this case is an exception to the without prejudice rule.

20. I turn to the first of Mr Coney's submissions which is based on the judgment of Hoffmann LJ in **Muller and Another v Linsley & Mortimer (A firm)** reported in The Times on 8 December 1994. In that case the first plaintiff was a director and shareholder of a computer software company. He consulted the defendants (a firm of solicitors) as he was concerned that the board might dismiss him from his employment and thereby activate a provision of the Articles of Association under which the company would sell his shares to the other shareholders at a fair value. The solicitors advised that while he was still employed he should transfer the shares to his wife. Under the Articles of Association the board was obliged to register those shares if the transfer was duly stamped. As the solicitors had little time to have the transfer stamped before the board met, they presented the transfer with an undertaking to have it stamped. The board rejected the transfer, purported to dismiss the plaintiff and activate the provision for compulsory sale. The plaintiff alleged that the defendants were negligent in presenting the unstamped transfer and that he suffered damage of about £2 million.

21. The Court of Appeal had to decide whether negotiations between the solicitors were admissible in the proceedings by the plaintiff. The Court of Appeal held that they were admissible in evidence in the action by the plaintiff against the solicitors. In the report Hoffmann LJ said: *"In **Rush v Tompkins v Greater London council** ([1989] AC 1280) the privilege rested entirely on the ground of public policy. The public policy basis of the rule was to prevent anything said in without prejudice negotiations being relied on as an admission.*

The privilege operated as an exception to the general rule on admissions, which could itself be regarded as an exception to the rule against hearsay, that the statement or conduct of a party was always admissible against him to prove any fact which was thereby expressly or impliedly asserted or admitted.

In his Lordship's judgment, the public policy aspect of the rule was not concerned with the admissibility of statements which were relevant otherwise than as admission, that is, independently of the truth of the facts alleged to have been admitted.

The correspondence in the present case fell outside the scope of the rule. The statement of claim raised the issue whether the plaintiffs' conduct in settling their claim against the company was reasonable mitigation of damages.

The conduct consisted in the prosecution and settlement of the earlier action. The without prejudice correspondence formed part of that conduct and its relevance lay in the light it might throw on whether the plaintiffs acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it might contain."

22. Mr Coney also drew to our attention, in support of that judgment of Hoffmann LJ, to two passages in the speech of Lord Griffiths in **Rush v Tompkins .** The first one is at page 1300c: *"It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement."* Secondly a passage at 1300f: *"I regard this as an exceptional*

case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

23. Mr Coney submitted that the statements sought to be excluded were not being relied on as admissions made in negotiations. They supported the plaintiff's case of misconduct in the second action. They were therefore admissible. The first action has been concluded save for the issues of compensation and the evidence of Mr Forsyth does not relate to that issue. In the present case the issues are whether the assets were sold at an undervalue, whether there was conspiracy, whether the action was properly brought and unjust enrichment. What was said would appear to have little bearing on whether the assets of the third defendant were sold at an undervalue, but they could have relevance on the insolvency issue arising under section 130. However, their importance relates to the alleged conspiracy in that they could throw light on whether the first and second defendants had an intention to carry out a wrongful act which, if carried out, would amount to conspiracy.

24. The statements could not support an admission on liability in the first proceedings. If made, they amounted to a statement ancillary to the negotiations. In my judgment they are similar to the statements made in **Muller.** They are not such as would amount to admissions in the first action. Further, I believe that to interpret the without prejudice rule so as to make these statements admissible and thus an exception to that rule, would in no way derogate from the basic public policy consideration of encouraging persons to negotiate freely so as to reach a settlement. The statements were not concerned with the rights or wrongs of the first proceedings. They would not have been relevant to the first proceedings as they were neither an admission nor a denial, nor did they form part of a true negotiation. For this reason also they constitute an exception to the normal without prejudice rule and are potentially admissible. I would allow this appeal.

LORD JUSTICE OTTON:

25. I agree. The meeting was undoubtedly agreed for the purpose of resolving the dispute between the parties. It is not difficult to envisage that this was a full and frank discussion in the absence of solicitors and that extravagant statements may have well have been made that each was later to regret. Any oral statement made at such a meeting is admissible if it is relevant to any issue in the litigation, unless it is agreed that discussions are to be on a without prejudice basis. In general the without prejudice rule makes inadmissible in any subsequent litigation the proof of any admissions made with the genuine intention to reach a settlement. Like my Lord, I am not persuaded that the words complained of amounted to an admission in an earlier action. Equally, I am not persuaded that they were made with a genuine intention to reach a settlement.

26. The passage in paragraph 9 of the affidavit of Stephen Forsyth is to my mind critical: *"At the meeting, it was made very clear by both Peter Simper and David Stenning that they had no intention of abiding by the original contract which had been agreed with John Dora, namely that he would be paid £25 per device supplied to Hungary. They made it clear they no longer needed him for the purposes of Playsafe's business in Hungary. When I pointed out that John Dora had in turn made it clear that he was prepared to continue with the proceedings, both Peter Simper and David Stenning stated that if he succeeded in obtaining judgment against them, they would have no hesitation in transferring the business of Playsafe to a new company, so as to render any judgment obtained by him effectively unenforceable. It was made very clear by both of these gentlemen that they were determined that John Dora should not be in a position to enforce any judgment which he obtained, as the debtor company would by then have no assets. They were both very open about their intentions in this respect.*

10. Both David Stenning and peter Simper also made it clear that if John Dora was to take legal proceedings against them personally then, again, they would transfer their assets so as to avoid the effect of any judgment."

27. The words complained of were, in my judgment, directed to a collateral matter. The words were capable of bearing the meaning that if the plaintiff was to pursue what he perceived to be his legal

rights and remedies, then some of the defendants would ensure that the first and second defendants would so conduct the affairs of the third defendant as to ensure that there would be nothing left and that the plaintiff would be left with an empty judgment. The question is whether what was allegedly said disclosed an unambiguous impropriety. As Hoffmann LJ said in **Forster v Friedland**: *"These are clear cases of improper threats, but 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. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."*

28. That statement of principle seems to me to be apt in this case and that the circumstances of this case do not fall within it. The judge undoubtedly considered and applied the correct principle, but I am reluctant to say that I cannot share the judge's view that the defendants did not display an unambiguous impropriety. The words allegedly used, given their ordinary and proper meaning, amount to an unequivocal implication that the assets of the company would be placed outside the reach of the court by improper means. The words can only have been uttered with the intention or in an attempt to deter the plaintiff from pursuing his rights. Moreover, the word complained of were in themselves capable of amounting to an overt act in furtherance of a conspiracy between the first and second defendants to deter the plaintiff from pursuing his action through the court process and to deprive him of his just desserts should he persist and win. They went well beyond the colourful or exaggerated language test.

29. Consequently, I cannot see any justification for protecting the exchange by privilege and public policy does not require it to be so protected.

30. I, too, would allow this appeal.

Order: Appeal allowed with costs here and below but limited to paragraphs 1 and 2 of the Order made by Park J but remaining costs be costs in the substantive motion.

MR C CONEY (Instructed by Messrs Judge Sykes Frixou, London, WC2B 6YF) appeared on behalf of the Appellant.
MR R FLOWERDEW (A solicitor) (Instructed by Messrs Lawrence Tucketts, Bristol, BS99 7J2) appeared on behalf of the Respondents.