CA on appeal from QBD Commercial Court, David Steel J. Before Peter Gibson LJ, Tuckey LJ, Mr Justice Nelson. 22nd May 2003.

Peter Gibson L.J. (giving the judgment of the court):

1. The 7th Defendant, Mohammad Ghadimi-Gheshlaghi ("Mr. Ghadimi"), applies for permission to appeal from the order of David Steel J. on 16 April 2003. Thereby the judge gave permission to the Claimants, Berry Trade Ltd. ("BTL") and Vitol Energy (Bermuda) Ltd. ("VEB"), to adduce in evidence certain statements alleged by them to have been made by Mr. Ghadimi at three without prejudice meetings in July and August 2002 between representatives of the Claimants and Mr. Ghadimi, accompanied at one meeting by his solicitor, and in a telephone conversation between an executive of the Claimants, Keith Wagner, and Mr. Ghadimi in the summer of 2002. The Claimants made plain their intention to use the statements at a hearing the day after the hearing in this court. That hearing was to be in the Commercial Court when the Claimants were seeking summary judgment against Mr. Ghadimi on his counterclaim against the Claimants. The judge refused permission to appeal. Mr. Ghadimi applied to this court for permission and the application was put before Peter Gibson L.J. on 28 April on paper. He directed that the application be adjourned to a with notice hearing with the appeal to follow if permission were granted. At the end of the hearing we announced our decision that permission be granted, the appeal be allowed, the order of the judge be set aside and the Claimants' application to adduce the statements be dismissed for reasons which we would give in writing later. This judgment contains our reasons for that decision.

Background

2. The Claimants are members of the Vitol Group, a group of companies several of which are engaged in trading on a worldwide basis in crude oil and petroleum products. BTL was incorporated in 1993 in Bermuda as the vehicle for a joint venture between VEB and the First Defendant Kaveh Moussavi. The joint venture was to import crude oil and refined oil, produced in the Caspian region, through the northern ports of Iran and then transport that oil overland to ports in southern Iran for export, or for sale to third parties. Mr. Moussavi is an Iranian resident in England, who claimed to have powerful contacts in Iran able to facilitate the transit of the oil.

3. In July 2001 proceedings were commenced by the Claimants against Mr. Moussavi and five other Defendants associated with him. The Claimants alleged that from May 1996 onwards several cargoes of oil belonging to BTL were misappropriated and sold by Mr. Moussavi. They also alleged that the misappropriation by Mr. Moussavi was made in conjunction with Mr. Ghadimi, and that Mr. Moussavi and Mr. Ghadimi conspired to injure the Claimants by unlawful means. However, Mr. Ghadimi, who is also an Iranian, was not then joined as a Defendant. He had been imprisoned in Iran for four years for what were said to be foreign exchange offences. Mr. Ghadimi says that his detention was unlawful and that an Iranian Parliamentary Commission has carried out an investigation and found him innocent. He was released from prison in 2001 and came to England at the end of May 2002.

4. A worldwide freezing order, a search order and various ancillary orders were made against Mr. Moussavi when proceedings were brought against him. He failed to comply with several orders and in May 2002 he was committed to prison for 12 months for contempt. He has been declared bankrupt on his own petition. The Claimants have obtained default judgments against or settled with all the other original Defendants, but no recovery has been made.

5. On 10 July 2002 the Claimants obtained without notice a worldwide freezing order against Mr. Ghadimi and joined him as the 7th Defendant. By their Amended Particulars of Claim served on 7 August they claimed against him damages (including aggravated damages) for deceit and conspiracy and equitable compensation.

6. The Claimants decided to approach Mr. Ghadimi to establish whether a settlement might be possible before legal costs began to mount. He agreed to attend a meeting even before he had instructed solicitors. Five meetings were then held, on 16 and 25 July and on 21 August (those being the three meetings at which Mr. Ghadimi is alleged to have made statements on which the Claimants wish to rely) as well as on 19 and 24 September 2002. Mr. Ghadimi attended those meetings alone save on 25 July and

19 September when he was accompanied by the solicitor then instructed by him, Grant Rechnic. For the Claimants one or more of their solicitors and executives attended. We are told that the meetings lasted in total about 20 hours. It was expressly agreed that the meetings were without prejudice. A telephone conversation also took place between Mr. Ghadimi and Mr. Wagner. Mr. Wagner's original evidence was that this occurred shortly after the first meeting. Mr. Ghadimi's evidence is that it took place after, and arising out of, the third meeting. Mr. Wagner now accepts that this may be correct and Mr. Philip Marshall Q.C. for the Claimants told us that it was probably correct. We will return shortly to what each side states was said by Mr. Ghadimi at the first three meetings and in the telephone conversation.

7. By his Defence and Counterclaim dated 14 November 2002 Mr. Ghadimi denied acting in conjunction with Mr. Moussavi to misappropriate any assets of either of the Claimants. Mr. Ghadimi pleaded that he was first introduced to Mr. Moussavi in early April 1995. He said that in May 1995 he negotiated an oral agreement for the transportation through, and storage of BTL's oil in, Iran. He pleaded in para. 16 the terms of what was called the May 1995 Agreement. They included:
"(3) Mr. Ghadimi agreed to supervise the entire project and to arrange for the transportation of BTL's oil from the north to the south of Iran for a price comprising: (a) the amount of Mr. Ghadimi's actual costs relating to the successful implementation of the transportation …. and (b) a fee of US$9 per metric tonne of cargo".

8. Para. 23 of the Defence and Counterclaim was in this form: *"In or about June or July 1995, Mr. Moussavi suggested a variation to the terms of the May 1995 Agreement, so that Mr. Ghadimi's fee of US$9 per metric tonne was substituted with a fee of US$2 per metric tonne plus an entitlement to 30% of BTL's net profits from all BTL's operations or business in Iran, payable at regular intervals. Mr. Ghadimi stated that he would be prepared in principle to agree to such variation provided he had first satisfied himself as to BTL's accounts. No such accounts were ever produced and accordingly no such variation to the May 1995 Agreement was effected."*

9. In the Counterclaim Mr. Ghadimi claimed that he was entitled to receive from BTL US$720,000 in respect of management fees under the May 1995 Agreement (after receiving US$1,429,095 for such fees and US$940,000 as reimbursement for his costs) and a further US$450,000 pursuant to two separate oral agreements. On 13 November 2002 Mr. Ghadimi signed a statement of truth in which he expressed his belief that the facts stated in the Defence and Counterclaim were true. He also referred in para. 4(e) of his third Affidavit to the sum for which he counterclaimed as being owed by BTL to him.

The Claimant's application of 28 February 2003

10. On 28 February 2003 the Claimants applied to the High Court to be allowed to adduce in evidence the statements which they allege were made by Mr. Ghadimi in the first three meetings with the Claimants. They did not formally include in that application the statements which they allege were made by Mr. Ghadimi in the telephone conversation now conceded to have taken place after the meeting on 21 August, but that conversation is dealt with in witness statements of Mr. Wagner and Mr. Ghadimi, and Mr. Zacaroli, appearing for Mr. Ghadimi, takes no point on the fact that the judge included in his order the statements alleged to have been made in that conversation. The Claimants say that certain admissions were made by Mr. Ghadimi which demonstrated that his Defence and Counterclaim are dishonest. They claim that the case falls within a well recognised exception to the privilege generally accorded to evidence of without prejudice communications, that exception applying where the privilege is being used as a cloak for dishonesty.

11. The evidence put before the judge by the Claimants consisted of a witness statement by Denys Hickey of the Claimants' solicitors Ince & Co., two witness statements by Mr. Wagner and a witness statement by another executive of the Claimants, Gerry Bouman.

12. Mr. Hickey attended the first two meetings. Mr. Ghadimi and he were alone present at the first meeting of 16 July 2002. He said in para. 15 of his Third Witness Statement dated 26 February 2003: *"I refer to my manuscript notes of this meeting …. which show that a large part of the meeting was occupied by Mr. Ghadimi giving an explanation of his role in the Claimants' oil transit operation. I would ask the court to note in particular that my note records …. that Mr. Ghadimi claimed that Mr. Moussavi had initially offered him $2 per metric tonne of oil transported and then later offered a profit sharing arrangement with "a minimum of $2."*

16. The overall position adopted by Mr. Ghadimi at the meeting was that he was owed more than he had retained. "

13. Mr. Hickey's note of the "offer" was:
"Transit
- Initially talked of $2 per ton + costs.
- Then said wanted to be more committed. Would have ½ of all profits made by the operation.
- He would give input/output figures.
- Said had to clear with partners (although he had authority).
- With a minimum of $2."

14. When the meeting ended they agreed to meet again. The second meeting on 25 July 2002 was attended by Mr. Ghadimi and his newly instructed solicitor Mr. Rechnic of SPR Avery Midgen. Mr. Hickey and Mr. Wagner attended for the Claimants. Mr. Hickey again made a manuscript note. He said in his Third Witness Statement of that meeting that Mr. Ghadimi presented a detailed explanation concerning the operation of the transit of oil of the Claimants through Iran. He continued: *"It can be seen from my manuscript note that he again agreed to a fee having been agreed;* ***"verbally agreed $2.'"***

In fact, as the judge noted, what Mr. Hickey recorded appears to have been followed by an arrow, which might suggest that what was verbally agreed was not simply $2. But Mr. Hickey has not commented on that. The manuscript note also records: *"Contract for transportation was Cost plus dated 9 July 1995. NB Says it is genuine"*. We must revert to that later.

15. Mr. Wagner gave evidence of that meeting in his Second Witness Statement dated 28 February 2003. He said that he had started making a note but was aware that Mr. Hickey was making notes and when it quickly became obvious to him that there were significant flaws in Mr. Ghadimi's version of events, he stopped taking any note at all. His own note records nothing material. He said that Mr. Ghadimi made various assertions about the initial agreements he had with Mr. Moussavi in the early stages of the Iranian transit operations and made allegations about how these arrangements had worked in practice through 1995 and 1996. He also said:
"12. I do recall that Mr. Ghadimi claimed that he had verbally agreed with Mr. Moussavi a commission or "management" fee of US$2 per metric tonne for handling the initial transit of oil between the north and south of Iran."

He said that he immediately challenged that and that he specifically made a point of drawing to Mr. Ghadimi's attention the fact that he could not recall having seen any mention of commission or management fees at anywhere near the level of $2 per metric tonne amongst all the evidence reviewed by him; but he said that Mr. Ghadimi continued to assert that a US$2 per tonne fee had been verbally agreed with Mr. Moussavi.

16. Mr. Wagner also gave evidence of the third meeting on 21 August when no lawyers were present. Mr. Ghadimi came alone. Mr. Wagner and Mr. Bouman represented the Claimants. Mr. Wagner said that Mr. Ghadimi again asserted that in May/June 1995 he had made an agreement with Mr. Moussavi for a transit commission or management fee of US$2 per metric tonne but that Mr. Ghadimi had gone on to suggest that he had also been promised a local currency handling fee of 500 Rials per tonne (which he says was equivalent to between 12 and 18 US cents). Mr. Wagner referred to a note made by Mr. Bouman of the meeting as being an accurate note of the main points covered.

17. Mr. Bouman exhibited the note to his Witness Statement dated 27 February 2003 and said that during the course of the meeting Mr. Ghadimi stated that Mr. Moussavi had agreed on behalf of BTL to pay him a commission of US$2 plus 500 Rials per metric tonne on oil transported through Iran. Mr. Bouman's note records:
"G says to have agreed $2 p/mt
comm..
+ Rials 500
JV??!!
profit only
G & KM had a j/v covering the transportation and other efforts for BT – Berm
that also included profit made by Berry
He expect to make a lot of money because KM did the j/v and G would get 30% of the overall profit."

18. Mr. Wagner in his Second Witness Statement also gave evidence of the telephone conversation with Mr. Ghadimi which he dated shortly after the meeting on 25 July 2002. He said that during the conversation Mr. Ghadimi asserted that he had agreed with Mr. Moussavi to retain US$940,000 of the proceeds of oil sales calculated on the basis that he was due US$340,000 for general costs and overheads and US$600,000 as a fee for the transit within Iran of a total of 300,000 metric tonnes of oil representing US$2 per metric tonne. He exhibited a manuscript note of the telephone conversation. This cryptically records the figures of "$940K", "$600" (connected by a line with "$2/MT)", and "$340".

19. Mr. Ghadimi in his Fourth Witness Statement responded to the Claimants' evidence. He said that when he met Mr. Hickey at the first meeting he tried to explain that he had nothing to do with Mr. Moussavi's apparent wrongdoings. He challenged Mr. Hickey's account of what he, Mr. Ghadimi, had said about Mr. Moussavi initially offering $2 per metric tonne and later offering a profit sharing arrangement with a minimum of $2. Mr. Ghadimi said (in para. 8*): "This is not what I told him. Indeed such an account would have been nonsensical. I distinctly recall that I informed Mr. Hickey that Mr. Moussavi had initially offered me a fixed management fee plus transit costs and thereafter had said that he wanted both sides to be more committed and had therefore proposed a management fee of US$2 per m/t plus a percentage (which Mr. Moussavi initially proposed to be 50% but, very shortly thereafter, to be 30%) of all the profits made by BTL's operations in Iran. I told Mr. Hickey that Mr. Moussavi had promised to provide to me figures showing BTL's entire throughput of oil in Iran and to provide proper accounts in order that I could ascertain BTL's genuine profits from its Iranian operations. I did not inform Mr. Hickey that the initial agreement was a management fee of only US$2 per m/t."*

20. Of the second meeting Mr. Ghadimi said (in para. 12): *"I clearly recall that I told those present at the meeting that the agreement was US$2 per metric tonne plus 50% of the operational profits from all of BTL's operations in Iran , which profit-sharing figure had very shortly afterwards been reduced to 30%."*

That, he said, was supported by a note made by Mr. Rechnic. That meeting he recalled lasting for about 3 hours.

21. He described the third meeting as lasting for 7 or more hours. He recalled explaining the basis of his verbal agreement with Mr. Moussavi as to the transit operation and that his agreed management fee was US$2 per metric tonne plus 30% of the operational profits made by BTL in Iran. He explained that the reference to 500 Rials per tonne came up because Mr. Wagner stated that the Claimants had evidence that that was Mr. Ghadimi's only remuneration for his involvement in the transit project. Mr. Ghadimi said that he had given that false information to the Iranian security services under interrogation in 1997 because he feared that, had he told them the truth, they would have extorted money from him.

22. He said of the telephone conversation that he clearly recalled it, having instigated it after the meeting on 21 August. He explained that Mr. Bouman had said at that meeting that the Claimants would be prepared to settle the claim quickly for US$1 million. Mr. Ghadimi had indicated that he would pay that sum because, among other reasons, Mr. Rechnic's views were pessimistic. However, after the meeting he began to have doubts and telephoned Mr. Wagner to try to persuade him to accept $600,000. He said that he had only retained $940,000 from the proceeds of sale of BTL's oil and that $340,000 represented direct freight costs. He could not recall whether he or Mr. Wagner had stated that $600,000 equated to a US$2 per metric tonne commission on 300,000 metric tonnes. He further explained that the purpose of the conversation was to negotiate a lower settlement figure and not to rehearse the issues.

23. Mr. Ghadimi accepted that he did not refer in the meetings and conversation to the $9 per metric tonne figure pleaded in the Defence and Counterclaim and gave an explanation for this. In short it is that although the $9 agreement was reached with Mr. Moussavi, he was content to replace it with US$2 per metric tonne plus 30% of profits because he expected that profit share agreement would give him a higher reward than the fixed fee arrangement, and so did not refer to the $9 arrangement when talking to the Claimants. Only when he discussed his case with his new solicitors, Watson Farley & Williams, in the context of preparing his Defence and Counterclaim did those solicitors advise him that there was no benefit to be gained by counterclaiming on the $2 plus 30% arrangement.

24. Mr. Buss of Watson, Farley and Williams in his Witness Statement confirmed that in the course of preparing the Defence and Counterclaim, he advised Mr. Ghadimi, on the basis of his instructions, about

the factual circumstances in which Mr. Ghadimi agreed his management fee. His advice was that the production of accounts was a condition precedent to the $2 plus 30% arrangement becoming binding and that, no such accounts having been provided, he was entitled to claim for management fees at the rate of $9 per metric tonne. Mr. Buss also produced Mr. Rechnic's note of the second meeting in which reference is made to:

"Cost +
9 July 1995
and then
2USD, 30% and 50%."
A little later, in the context of payments, Mr. Rechnic recorded:
"UAB [a bank] – 120K – 130K USD – 2 USD – commission."

But that comment is not explained.

25. Finally, the judge saw a further witness statement dated 7 April 2003 from Mr. Wagner. In it he confirmed that, although his earlier account of the second meeting made no reference to Mr. Ghadimi mentioning a "cost plus" basis for being paid or to a profit-sharing agreement, both had been mentioned. Mr. Wagner gave his understanding of what Mr. Ghadimi meant thereby. He emphasised that at no time did Mr. Ghadimi state that the profit share or joint venture was to be in addition to the $2 payment. Similarly, he said of the second meeting that Mr. Ghadimi mentioned the joint venture but did not say that he was expecting to receive a profit share on top of it or in addition to a base fee of $2. On the telephone conversation with Mr. Ghadimi, he accepted that Mr. Ghadimi might be correct about its date, but said that the figures Mr. Ghadimi gave confirmed his earlier assertion that he received only $2 per tonne.

26. The judge in his judgment, after considering a number of authorities on the relevant exception to the without prejudice rule, noted that the issue of admissibility was being determined at an interlocutory stage, observed that it would be inappropriate to seek to resolve factual disputes at this stage, and said that by its very nature the issue could not properly be determined by the trial judge. He recognised that the very need to call witnesses in order to determine differences of recollection as to what was said during the negotiations would undermine the existence of a clear case. He said that it was for the applicant to make good a sufficiently clear case of abuse and that the standard of proof might vary according to the purposes for which the veil over the negotiations needed to be lifted. He directed himself in this way (in para. 24 of the judgment*): "For present purposes the standard of proof, in my judgment, must be such as to establish a serious and substantial risk of perjury, which only the content of the negotiations would readily reveal."*

27. The judge then referred to the evidence and concluded:

"31. As I understand it, there is no documentary support, contemporary or otherwise, for a proposal by Mr. Moussavi of $9 per metric tonne at any time, let alone an agreement to that effect. The meetings and telephone conversations during the summer of 2002 were arranged for the purposes of negotiation. Mr. Ghadimi accepts that he used, in particular, the second and third meetings to explain his case in great detail. Indeed, they lasted three hours and seven hours respectively. Yet equally unambiguously the position adopted by Mr. Ghadimi throughout was that the only agreed fee as regards tonnage delivered was $2 per tonne. Furthermore, the only discussion on the sums payable to Mr. Ghadimi under the agreement was by reference to a rate of $2 per tonne.

32. Moreover, it is common ground, one, that there was no mention by Mr. Ghadimi of an agreement or even a proposal for a fee of $9; two, there was no suggestion by Mr. Ghadimi that the rate of $2, whether with or without a profit share agreement, was in substitution for any other rate; and three, there was no suggestion that a rate of $2, whether with or without a profit share agreement, was proposed by Mr. Moussavi but not, in fact, accepted.

33. It may be that in due course during the trial a different account of the content or context of the negotiations may emerge. I recognise that it would not be appropriate to lift the privilege of the negotiations simply because, as I have said, of inconsistency or implausibility as compared with the pleaded case. On the material available, the position seems to me to be clear: one, the agreed rate per tonne is a central but uncomplicated issue in the case;

two, the disparity between the defendants' pleaded case and the account put forward in the negotiations on this central issue is both clear and unchallenged; three, only the content of the negotiations would readily reveal that the pleaded case must be false.

34. Bearing in mind the need to restrict applications of this kind to the clearest cases of abuse, I am satisfied that there is a serious and substantial risk that the exclusion of the evidence of this part of the negotiations would act as a cloak for perjury, and accordingly I accede to the application."

The application and appeal to the Court of Appeal

28. On this application and appeal Mr. Zacaroli challenges the correctness of the test formulated by the judge which he submits is inconsistent with authority. He further submits that even if that test were correct in law, the judge failed properly to apply that test to the facts of the case, having regard to the existence of a substantial dispute as to whether the statements relied on by the Claimants were in fact made by Mr. Ghadimi. He says that at its highest this is a case of an inconsistency between what is pleaded in the Defence and Counterclaim and what was said by Mr. Ghadimi to the Claimants in the without prejudice discussions, and that it falls far short of being an impropriety that would justify the lifting of the privilege.

29. Mr. Marshall supports the decision of the judge for the reasons he gave. Further by a Respondent's Notice Mr. Marshall seeks to argue that the decision should be upheld on further grounds. He submits that evidence regarding what was said during the without prejudice discussions could be adduced, even where it was contested by Mr. Ghadimi, if such evidence was prima facie true and, if proved, would show perjury, dishonesty or other unambiguous impropriety on Mr. Ghadimi's part. He also argues that the question whether or not the statements were made could thereafter properly be determined by a judge at a suitable preliminary hearing or at trial as considered appropriate in accordance with the court's case management powers. He also asks permission to adduce a Fifth Witness Statement of Mr. Wagner to show that Mr. Ghadimi is attempting to mislead the court and to use the without prejudice privilege as a cloak for dishonesty. What gave rise to this further evidence is the Third Witness Statement dated 28 April 2003 which Mr. Ghadimi made in connection with the Claimants' application for summary judgment against him. In it Mr. Ghadimi referred to an agreement, dated 9 July 1995, which Mr. Moussavi had provided at Mr. Ghadimi's request and which stated that Mr. Ghadimi's fees were one per cent of costs (or about 20 US cents per metric tonne), that document having been sought to protect him against any unwelcome approach by "the racketeers in the security services". Mr. Wagner said in the Fifth Witness Statement that that wholly contradicted what Mr. Ghadimi said at the second meeting on 25 July 2002 when, according to Mr. Wagner, Mr. Ghadimi insisted that the agreement of 9 July 1995 was genuine, although he did not produce a copy of the contract. Mr. Wagner referred to Mr. Hickey's manuscript note, Mr. Hickey having recorded *"NB Says it is genuine"*.

30. That application for further evidence was opposed by Mr. Zacaroli, but he said that if we allowed it, we should also allow a further witness statement by Mr. Ghadimi expanding on the explanation given by him in his Third Witness Statement dated 28 April 2003. In it Mr. Ghadimi explained that, contrary to Mr. Wagner's evidence, at the meeting on 25 July he had produced a copy of the agreement of 9 July 1995 on which Mr. Hickey had written that he had been given it during that second meeting. Mr. Moussavi had signed the agreement, so that to that extent it was genuine, Mr. Ghadimi maintained, but it did not reflect Mr. Ghadimi's actual agreement and was designed to protect him in Iran.

31. We decided to admit both the late witness statements; we will comment on them further later in this judgment.

The law

32. It is well established 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 (**Phipson on Evidence**, 15th ed. (2000), para. 21-10). The underlying policy was described by Oliver L.J. in **Cutts v Head** [1984] Ch 290 at p. 306C in this way*: "It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations …. may be used to their prejudice in the course of the proceedings. They should …. be encouraged fully and frankly to put their cards on the table …. the public policy justification, in*

truth, essentially rests with 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."

33. The juridical basis of the without prejudice rule is partly based on public policy and partly on contract, viz. an implied agreement between the parties to the effect that what is said in settlement negotiations will not subsequently be relied on in court. In **Muller v Linsley & Mortimer** [1996] PNLR 74 Hoffmann L.J. pointed out that the public policy rationale is directed solely to admissions. He said at p. 79: *"If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) 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. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, ie independently of the truth of the facts alleged to have been admitted."*

34. In **Unilever plc v Procter & Gamble Co. [**2000] 1 WLR 2436 Robert Walker L.J. (with whom Simon Brown L.J. and Wilson J. agreed) said that the modern cases show that the protection of admissions against interest is the most important practical effect of the rule. He continued (at p. 2448H*): "But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties (in the words of Lord Griffiths in [**Rush & Tomkins Ltd. v Greater London Council** [1989] AC 1280,] 1300) "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." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."*

35. It is also well established that there are exceptions to the rule. The relevant exception for consideration in this case is "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"" (see **Unilever** at p.2444F). The term "unambiguous impropriety" was used by Hoffmann L.J. in **Forster v Friedland** 10 November 1992 (unreported). That Lord Justice, with whom Neill and Butler-Sloss L.JJ. agreed, referred to two cases, **Greenwood v Fitt** [1961] 29 DLR1 and **Hawick Jersey International Ltd. v Caplan**, The Times, 11 March 1998, which were cases of threats, the impropriety of which was unambiguously admitted in without prejudice negotiations. Thus the British Columbia case of **Greenwood v Fitt** involved the defendant threatening in those negotiations that he would give perjured evidence and bribe other witnesses to perjure themselves unless the claimants withdrew their claim. Hoffmann L.J. said: *"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."*

36. The narrowness of this exception has often been emphasised. In **Fazil-Alizadeh v Nikbin**, 25 February 1993 (unreported) Simon Brown L.J. (with whom Balcombe and Peter Gibson L.JJ. agreed) said: *"There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded."*

In **Unilever** (at p. 2444 G) it was said that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

37. This court in **Fazil-Aziladeh_**said that the taped without prejudice conversation might be taken to contain an admission by the claimant of the payment of £10,000 although he continued in his pleadings to deny such payment, but that did not come within the exception to the rule. The exception does not apply to a mere inconsistency (see **Kristjansson v R Verney & Co. Ltd.,** 18 June 1998, and **WH Smith Ltd. v Colman,** 20 March 2000, both unreported decisions of this court). In the latter case Robert Walker L.J. said of the without prejudice rule (in para. 13): *"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. Those are questions to be decided at trial or, if the claimant's case is strong enough, on an application for summary judgment. Either the claimant's case for summary judgment is strong enough or it is not, and it should not be bolstered up by denying to the defendant the benefit of the doubt in relation to a "without prejudice" communication."

38. None of the cases to which we have referred offers any encouragement to the Claimants in this case. However, there are three further cases on which Mr. Marshall places reliance.

39. The first is **Dora v Semper,** 15 March 1999 (unreported). In that case the claimant had in an earlier action obtained judgment against a company, Acraman, which was then placed in administrative receivership and sold its assets to another company, Playsafe. In a second action the claimant sought to recover from Playsafe and its directors on the basis that the sale by Acraman was at an undervalue. In the second action a freezing order was obtained by the claimants against Playsafe and its directors. They applied to strike out the second action and to set aside the freezing order. They also sought to strike out part of the affidavit evidence of a Mr. Forsyth for the claimant on the grounds that it described without prejudice conversations in the first action. In those conversations, it was alleged, the Playsafe directors had threatened to transfer assets so that no judgment could be enforced. Park J. struck out the evidence. On the claimant's appeal this court allowed the appeal.

40. Aldous L.J. noted that the directors denied the statements sought to be relied on but said that he proceeded on the basis that the statements were made and noted that it might turn out that Mr. Forsyth would not be believed. He pointed to the fact that the case was at an early stage and said that at that stage the court should decide whether the statements, if proved, would form the basis for establishing unambiguous impropriety, adding that it was for the judge who heard the matter to decide whether they did. Aldous L.J. then expressed the view that when the evidence of Mr. Forsyth as to the making of the statements was taken into account together with the evidence of the directors unambiguous impropriety was established. It is surprising that the evidence of the directors was said to go to establishing the impropriety, given that they denied making the statements. But Aldous L.J. said that the directors did not suggest that what was alleged by Mr. Forsyth to have been said was not improper or that if it was said it was taken out of context. He therefore found the case to be an exception to the without prejudice rule. With respect, that reasoning seems to us to be of doubtful cogency: it is hard to see why significance can be attached to the fact that the directors did not make the suggestions referred to by Aldous L.J. Why should they, when they had denied making the statements at all? All that could be said was that Mr. Forsyth's evidence, if correct, established unambiguous impropriety. Aldous L.J. went on to point out that the statements were not such as to amount to admissions in the first action and did not form part of a true negotiation, that the public policy justification for the without prejudice rule had no application to such statements and that they were admissible.

41. Otton L.J. agreed, saying that he was not persuaded that the statements amounted to an admission, nor were they made with a genuine intention to reach a settlement. He went on to say that the words complained of were an unambiguous impropriety. He did not address the fact that the statements were denied by the alleged makers of them.

42. In our judgment that case is distinguishable on its facts. The alleged statements involved no admissions of fact relevant to the first action and formed no part of a genuine negotiation to settle the first action and so to receive the statements in evidence in the second action would not derogate from the public policy justification for the without prejudice rule. Their relevance lay only in the fact (if fact it was) that they had been made. This court did not address the difficulty of how evidence which was disputed could establish unambiguous impropriety, save in the passage of Aldous L.J.'s judgment where he refers to what the directors did not say, the cogency of which point we have respectfully doubted. This court seems to have adopted the approach of admitting the disputed evidence on the footing that the judge who heard the second action would decide whether the statements were made. In the circumstances of that case for that judge to determine that point would not have caused any difficulty because his ability to decide the substantive issues before him would not have been hindered by hearing evidence of statements made without prejudice to the issues in the first action. In the present case the alleged admissions are relied on for the truth of their content and not for the fact that they were made, and, if

made, they were indisputably made in the course of genuine negotiations to settle the action; further, as David Steel J. himself said, their admissibility could not properly be determined by the trial judge. This last point was disputed by Mr. Marshall, who referred to a number of cases where the trial judge has determined, or it has been held that the trial judge should determine, whether evidence was to be excluded by the application of the without prejudice rule. None of those cases, however, was concerned with disputed oral admissions in the course of lengthy negotiations where the unambiguous impropriety exception was in point, and it seems plain to us that it would be undesirable for the trial judge in this case to be left to decide whether the statements were made. We would not therefore accept that the approach in **Dora v Semper** is one to be applied in the present case.

43. The second case relied on by Mr. Marshall is the decision of His Honour Judge Raymond Jack Q.C. sitting as a High Court judge in **Merrill Lynch, Pierce Fenner & Smith Inc. v Raffa** [2001] 1 LPr 31. In that case, the judge ruled on whether the claimant could rely on admissions alleged to have been made by the defendant at without prejudice meetings on an application then about to be heard for summary judgment. The judge said:

"40 In the discussions there was a plain acceptance of Mr Raffa's involvement in the fraud though he raised the question of collaborators. If it is true that Mr Raffa did admit at least his involvement, it means that any defence which denies that involvement will be a dishonest defence and if he supports it with his word it will involve perjury. This does not relate to some peripheral matter but is the heart of the litigation.

….

43 In his summary of the law in Unilever Robert Walker L.J. expressly refers [to] the situation where the exclusion of the evidence would be a cloak for perjury. That situation will arise here if Mr Raffa made the admissions and seeks to defend the case on the basis that he was not involved in the fraud. I would hold the admissions admissible on that basis. It would be a very clear case.

….

45 I therefore hold that Merrill Lynch are entitled to rely such part of the evidence relating to admissions made by or on behalf of Mr Raffa in the discussions that he was concerned in the fraud in order to rebut any defence advanced by Mr Raffa which denies his involvement in the fraud. I point out that Dr El-Said [Mr. Raffa's lawyer] was present on two of the three occasions and can speak to what occurred."

44. In that case, the judge does not refer to any evidence by or for Mr. Raffa who was in prison in Egypt and had not put in a defence. Thus it appears that the judge decided the question of admissibility purely on the then unchallenged evidence of the claimant.

45. The third case relied on by Mr. Marshall is **Savings & Investment Bank Ltd. v Fincken** [2003] EWHC 719 (Ch). In that case the claimant applied to re-re-amend the statement of claim to plead a statement made by the defendant at a meeting with a liquidator of the claimant company. That statement was an alleged admission that the defendant owned certain shares, the ownership of which he had not previously admitted, despite having sworn an affidavit which purported to disclose all his assets and in which he had not mentioned those shares and despite entering into a deed of settlement in which he warranted that he had made full disclosure. The defendant objected to the amendment on the basis that the meeting at which the statement was made was without prejudice. Patten J. dismissed that objection on the basis that the case fell within the unambiguous impropriety exception. He did not refer to any evidence by or for the defendant denying that the statement was made, but referred instead to the fact that there was evidence before the court that at the meeting the defendant made the admission which was sought to be pleaded. The judge fastened on the words of Robert Walker L.J. in **Unilever** at p. 2444 (to which we have referred in para. 35 above), *"if the exclusion of the evidence would act as a cloak for perjury"*, and said:

"40. It seems to me that the exception identified by Robert Walker LJ can extend, in appropriate cases, not only to instances where the without prejudice occasion is abused by the making of threats but also cases where there is an unambiguous admission of facts which is intended to be followed by an equally unambiguous denial of those facts by the same party. Circumstances of that kind amount to an abuse and the exclusion of such evidence by virtue of the rule would act as a cloak for perjury.

41. I am also satisfied, for what it is worth, that circumstances of that kind constitute unambiguous impropriety of the kind envisaged by Lord Justice Hoffmann. That is not to say, as I hope I have indicated, that every

admission, legal or factual, can be open to the court in subsequent proceedings regardless of the circumstances. The sort of cases that I have in mind are cases where in an uncomplicated situation and not for the purpose of establishing a negotiating position on a hypothetical basis the party has made a clear admission of relevant facts which he or she then subsequently chooses to deny."

46. We do not see that either the **Merrill Lynch** case or the **Savings & Investment Bank** case provides much assistance in the determination of the present case because of their different circumstances. In the **Merrill Lynch** case on the only evidence before the court the defendant admitted in the without prejudice negotiations his involvement in fraud. In the **Savings & Investment Bank** case again there appears to have been no challenge to the evidence that the relevant simple admission of fact was made by the defendant. Further, Patten J. had distinguished the circumstances of his case from those of other cases, by saying (in para. 39) that the concerns of Lord Griffiths in **Rush & Tomkins,** of Hoffmann L.J. in **Forster** and of Robert Walker L.J. in **Unilever** were: *"largely concerned with ensuring that what may be complicated without prejudice negotiations should not subsequently be scrutinised with a view to constructing admissions which when made, and particularly in the context in which they were made, were never intended to be and were not in truth unequivocal and unambiguous admissions of liability."*

47. We will come back shortly to the circumstances of the alleged admission in the present case. Mr. Zacaroli criticised the decisions in both cases as eroding the protection afforded to admissions made in without prejudice negotiations. It may be doubted whether Robert Walker L.J.'s reference to "a cloak for perjury" was intended to cover such admissions rather than the threatened perjury in a case like **Greenwood v Fitt.** However it is unnecessary for us to decide in this case the correctness of the decisions in **Merrill Lynch** and **Savings & Investment Bank** in view of their different circumstances.

Conclusions

48. We start with the judge's self-direction that the court, when considering whether statements made in without prejudice discussions may be admitted in evidence, applies the test of whether there is a serious and substantial risk of perjury. Mr. Marshall does not suggest that that test has been applied before and we can see nothing in the authorities to support it. On the contrary, it seems to us to weaken significantly the requirement of unambiguous impropriety and of the need for a very clear case of abuse of a privileged occasion. Although the judge in the final paragraph of his judgment says that he bears in mind the need to restrict applications to admit without prejudice statements to the clearest cases of abuse, he then applies the test of a serious and substantial risk of perjury. In our judgment that is too low a test and one which would seriously erode the without prejudice rule. The judge should have looked for nothing less than unambiguous impropriety.

49. Does the evidence establish such unambiguous impropriety? We shall consider that question first having regard to the Claimants' evidence, leaving aside the evidence of and for Mr. Ghadimi. The judge was impressed by two points on which heavy emphasis was laid in the Claimants' evidence.

50. One is the absence from what Mr. Ghadimi said in the without prejudice discussions of any reference to an agreement between Mr. Ghadimi and Mr. Moussavi based on the fixed commission of $9 per metric tonne which was later pleaded in the Defence and Counterclaim. There is a plain inconsistency between that omission from the discussions and the pleadings; but a mere inconsistency, as the cases show, is not sufficient to amount to unambiguous impropriety. What has to appear very clearly from the evidence is that Mr. Ghadimi was guilty of perjury in signing the statement of truth as to his belief in the truth of the pleaded facts and in deposing to the sum claimed in the counterclaim as owed to him. We do not see how it can be said that that is shown, still less if account is taken of the explanation by Mr. Ghadimi, supported as it is by Mr. Buss, to which we have referred in paras. 23 and 24 above.

51. The second point is what the judge said in para. 31 of his judgment was "unambiguously the position adopted by Mr. Ghadimi throughout", viz. "that the only agreed fee as regards tonnage delivered was $2 per tonne". We have to say that we respectfully disagree with the judge's assessment that this was the position unambiguously adopted by Mr. Ghadimi throughout. Take the first meeting on which the Claimants only have the evidence of Mr. Hickey. He indicates, in the passage from his Third Witness Statement to which we refer in para. 12, his reliance on his notes for what was said. But they are not transcripts but only brief notes and like all the other notes on which reliance is placed they need

interpreting in order to arrive at the sense contended for. The note does not even record Mr. Ghadimi saying that Mr. Moussavi made an offer, still less that there was an agreement, of $2 per metric tonne: merely that he "talked of" that sum. The note by Mr. Hickey of the second meeting, on which again Mr. Hickey plainly relies for his account of that meeting, does refer to a verbal agreement of $2, but there is the ambiguity of the arrow following $2, to which we have already drawn attention. Mr. Wagner does clearly state his recollection of Mr. Ghadimi speaking of a verbal agreement with Mr. Moussavi at $2 per metric tonne. But Mr. Wagner's powers of recollection have been shown to be suspect in three particulars already: it is conceded that he was probably wrong in his dating of the telephone conversation with Mr. Ghadimi; Mr. Wagner asserted that Mr. Ghadimi did not produce a copy of the contract of 9 July 1995 when it is clear from Mr. Hickey's writing on it that the contract was produced by Mr. Ghadimi; and his description of the meeting on 25 July 2002 in his Second Witness Statement omitted any mention that Mr. Ghadimi had referred to a cost plus basis for being paid or to a profit-sharing agreement, whereas in his Third Witness Statement he accepts that those matters were mentioned. As for what is alleged to have been said at the third meeting, Mr. Bouman's note and description of a very lengthy meeting are very short; and while the note mentions Mr. Ghadimi speaking of an agreement at $2 per metric tonne plus 500 Rials, it also records a profit-sharing agreement between Mr. Moussavi and Mr. Ghadimi. Mr. Wagner's description of that meeting is equally short. Finally, Mr. Wagner's evidence of the alleged statement in the telephone conversation does not explain the context in which the discussion was held and in which the figure of $600,000, representing 300,000 tonnes at $2 per tonne, was mentioned. When we bear in mind the absence of any transcript or detailed record of what was said, the fact that Mr. Ghadimi had no legal representation or advice at the time of the first meeting, the fact that at the second meeting Mr. Rechnic had only just been instructed, the fact that Mr. Ghadimi was on his own at the third meeting and at the time of the telephone conversation, and the fact that the evidence of the Claimants' witnesses who attended the meetings (as well as Mr. Rechnic by his notes of the second meeting) shows, as is Mr. Ghadimi's claim, that at each meeting he referred to an agreement as to a share of profits as well as referring to $2 a tonne, we are wholly unable to agree with the judge that it is unambiguously clear that Mr. Ghadimi throughout asserted an agreed commission of only $2 per tonne. Even if wrong on that and even if there were an inconsistency between the evidence and the pleading (albeit that the pleading refers to a conditional agreement of $2 plus a 30% profit share), that would not, in our view, show unambiguous impropriety. More is needed to demonstrate clearly to the court that by the statement of truth as to his belief and by the reference on oath to the sum claimed by the Counterclaim as owed to him Mr. Ghadimi was deliberately perjuring himself.

52. We are not able to derive any assistance from the further evidence given by Mr. Wagner in his Fifth Witness Statement and alleged to show that Mr. Ghadimi is using the without prejudice privilege as a cloak for dishonesty. It does not directly impact on the admissibility of the statements sought to be relied on, nor is the matter so clear as to demonstrate unambiguous impropriety, even if one leaves aside the explanation which Mr. Ghadimi has provided.

53. In our judgment this is simply not the sort of case where the court should be prepared to admit the evidence of without prejudice statements as falling within the exception from the without prejudice rule for unambiguous impropriety. The situation here is precisely what Robert Walker L.J. referred to in Unilever (at p. 2444A) when he talked of without prejudice communications which "consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours." It seems to us quite wrong to select from many hours of without prejudice discussions what are said to be an admission here and an admission there in order to mount a claim that by his subsequent statements on oath the alleged maker of the admissions committed perjury. These were not even discussions at which, through tape-recording or the keeping of a detailed note, what was said and the context in which it was said could not be doubted. If the without prejudice rule can be breached in this case, we do not see why it cannot be breached in any case where an admission, inconsistent with some pleading or sworn assertion, is alleged to have been made. No litigant could be advised to enter into without prejudice discussions without a lawyer at his elbow or a prepared script approved by his lawyer. To allow such admissions in evidence flies in the face of the public policy justification for the without prejudice rule.

54. We reach that conclusion without taking account of the denial by Mr. Ghadimi that he ever made a statement that his agreement with Mr. Moussavi was for a fee of $2 per metric tonne and nothing more. It is therefore unnecessary for us to decide whether the fact of that denial is itself destructive of the Claimants' submission of unambiguous impropriety, as Mr. Zacaroli submitted. However, we would add some comments on the submission by Mr. Marshall that a dispute of fact does not affect the question of admissibility which can be resolved later.

55. The judge, having stated that it would not be appropriate to resolve factual disputes at that interlocutory stage and that the very need to call witnesses to determine differences of recollection as to what was said during the negotiations would undermine the existence of a clear case, nevertheless proceeded to find the disputed evidence admissible. The judge does not explain how he envisaged the matter would then proceed. He knew that the evidence was required by the Claimants for use on the application for summary judgment, but he surely could not have envisaged that on that application evidence contested by the party against whom judgment was sought could be accepted as true. On such applications that party's case is taken to be true. Mr. Marshall told us that the Claimants intended that all the material would be available to the judge hearing the application, though he accepted that in so far as there was a conflict of evidence, that judge would not resolve disputes of fact. But given that Mr. Ghadimi does dispute making the statements that the agreement was for $2 per metric tonne only, we have difficulty in seeing what utility the judge's ruling on admissibility had for the summary judgment application.

56. The judge gave no directions for the trial of the factual dispute. Had he done so, that trial of that dispute should surely have been the occasion to rule on admissibility. But we would not suggest that, in a case like the present, directions for the trial of the issue whether the alleged statements were made should be given. Not only is there no unambiguous impropriety on the Claimants' evidence, at such trial it would be inevitable that the witnesses would have to give even more evidence to explain what occurred in the without prejudice discussions. Satellite litigation of this sort is bound to discourage settlement negotiations for fear of such consequences, and is in our opinion highly undesirable.

57. For these reasons we reached the clear conclusion that permission to appeal should be given and the appeal allowed.

Order:

1. Appeal allowed.
2. Order of Judge below to be set aside.
3. Claimant's application to adduce certain witness statements refused.
4. Claimant to pay 7th Defendant's costs here and below assessed in the sum of £8,500 in this court and £13,500 in the court below.
5. Permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)

Mr. Philip Marshall Q.C. (instructed by Ince & Co. of London) for the Claimants/Respondents

Mr. Antony Zacaroli (instructed by Messrs Watson Farley & Williams of London) for the Appellant Mohammad Ghadimi-Gheshlaghi, the Seventh Defendant