CA on appeal from Chancery (His Honour Judge Roger Cooke) sitting as a judge of the High Court before Balcombe LJ; Simon Brown LJ; Mr Justice Peter Gibson. 25th February 1993

LORD JUSTICE BALCOMBE: I will ask Lord Justice Simon Brown to give the first judgment.

J U D G M E N T : LORD JUSTICE SIMON BROWN:

1. This is an interlocutory appeal by the first defendant, Dr Nikbin acting in person with the leave of the judge below against an order dated 29th January 1993 made by His Honour Judge Cooke sitting as a judge of the High Court, whereby he adjudged inadmissible at the forthcoming trial of these actions transcripts of three particular tape recorded conversations, and made a number of orders ancillary to that decision. In so deciding, the judge was allowing the plaintiff's appeal from part of an order of Master Munrow dated 26th October 1992.

2. Three questions were in issue before the court below. First, were these tape recorded conversations properly to be regarded as without prejudice? Second, if so, did they nevertheless fall into an exception to the general rule that without prejudice communications are inadmissible in evidence? In particular, were they to be regarded as admissible on the ground that they disclose fraud or other such impropriety on the plaintiff's part? Third, were those questions properly to be decided by the judge hearing the interlocutory application or should they rather have been left, as the Master's order had left them, for decision by the trial judge? Questions one and two remain at issue before us. Dr Nikbin has not, however, to my mind wisely, sought to re-open the third question. It must surely be in the interests of both sides to know where they stand in relation to this disputed evidence before the substantive hearing starts.

3. Before turning to issues one and two, it is appropriate to say something of the facts of the case although it is unnecessary, as I believe, to delve too deeply into the very many complexities which appear to lurk around almost every corner of it. The principal protagonists are the plaintiff and the first defendant - old friends who alas have fallen out; the plaintiff, a radiologist; the first defendant, a research fellow at Imperial College; both Iranians whose mother tongue is Farsi.

4. There are two actions, each brought by the plaintiff against the first defendant and against, in each case, other members of his family too. The first main action, put very shortly, concerns a house in Hammersmith, purchased by the first defendant in December 1982 and subsequently refurbished by him and converted into three flats, funds for all this having, in the first instance at least, been supplied by the plaintiff. Between September 1989, when this first action began, until the statement of claim came to be re-amended in April 1992, the central issues raised by the pleadings were as to whether the property was acquired, as the plaintiff contended, solely for his benefit, that being denied by the first defendant on the footing that he had reimbursed the plaintiff in full for all these moneys by payments in Iran; whether, therefore, the subsequent dispositions in and between September 1988 and September 1989, successively from the first defendant to his wife and so on down the chain of defendants, were in breach of trust; and - this a closely related issue - whether, as the plaintiff said, there was an enforceable written agreement dated 10th August 1988 essentially reflecting his contended for absolute interest in the property or, as the first defendant maintained, whether that August 1988 agreement was invalid for undue influence and instead, in about September or October 1989, there was a quite different agreement reached between the parties, this one reflecting the first defendant's contention that he was the beneficial as well as the legal owner of the property, whereunder the plaintiff was to buy one of the three flats for £40,000 and pursuant to which he actually paid £10,000 in cash to the first defendant in part payment.

5. That, complicated as it may seem, is in fact a very considerable over-simplification of the situation and issues initially raised in the proceedings. Mercifully, however, it is unnecessary to go deeper into that part of the history.

6. So far as the second action is concerned, all I need say about that is that it involves a claim on a cheque for £150,000 drawn in favour of the plaintiff by the first defendant on his mother's account, she being a defendant in both actions. The plaintiff contends that that cheque represented security for a loan by him to the first defendant's mother. The defendants for their part deny that any loan was made. That

issue is discrete from any of the issues arising under the first action. The second action is nevertheless to be tried immediately following the first action and by the same judge, and evidence in the first action has been ordered to be receivable in the second. The combined trial of both actions, one may note, is due to start on 15th March, that is next month.

7. Thus far I have outlined the issues raised in the first action only in so far as pleaded up to month, both the statement of claim and re-amended so as to introduce into the and on its face determinative, issue - as between the plaintiff and the first relation to the other defendants also - namely, the terms and April 1992. During that the defence were litigation a brand new, determinative certainly defendant if not in consequences of a settlement agreement dated 8th July 1990. I repeat: as from April 1992, both sides assert and rely upon that settlement agreement as the foundation of their continuing claims in the proceedings, certainly as between themselves and certainly so far as concerns their respective rights and liabilities regarding the Hammersmith property. What now divides the parties, however, and divides them most deeply, is the question as to what was actually provided for by that July 1990 settlement agreement. What in short were its terms and scope? In a sentence the first defendant contends that the document as now put forward by the plaintiff has been forged, that is to say altered in certain highly material respects from the form in which he, the first defendant, originally signed and accepted it in July 1990.

8. It is perhaps convenient to identify these alterations and this is best done by first reading out the agreement in the shorter form in which the first defendant says he signed it. It is in these terms: *"This agreement is made this 8th day of July 1990 between [the plaintiff] and the [first defendant].*

(a) The [plaintiff] agrees to pay 27 1/2% of the commission that he has received from AGFA GEVAERT from 1/12/1980 until 28/4/1988, according to the first schedule.

(b) The [first defendant] undertakes to procure the freehold title deeds of [the Hammersmith] property case unto the [plaintiff] or make payment of a sum of not less than the rack market price of the same to the [plaintiff].

(c) The [first defendant] also agrees to obtain a covenant from both his parents to the effect that they have no claim against the [plaintiff]. And he further undertakes to indemnify the [plaintiff] against such claims.

(d) This agreement is in final settlement of both parties' claims against each other."

9. The second page of the agreement contains the first schedule, (that referred to in clause (a)) in these terms: *"The total sum of commission shall be determined by Mr.Shokouhi and Mr.Zamir on presentation of both parties' applicable documents."*

10. All of that part of the agreement is by common consent in the first defendant's own handwriting. The alterations are these: first, the commission percentage stipulated in clause (a) has been reduced from 27 and a half per cent to 17 and a half per cent; second, there has been added in Farsi at the conclusion of the document, this by way of exposition or elaboration of the first schedule - and I simply read out what I understand to be the agreed translation of the Farsi addition: *"the documents will be:*

(1) The study of amounts withdrawn for the purchase and renovation of the property.

(2) *The study of the transfer of money to his mother's account and the cheque dated 11th August 1988 which was a loan."* **I interpolate that I understand this to refer to the £150,000, the subject of the second action.**

"(3) The agreed commissions on total received amounts will be deducted from the aforesaid sums due.

(4) Allocation of a commission is for peace-making purposes only. And there are no commercial, business or corporate agreements, neither in writing nor oral, amongst parties involved in the dispute."

11. The first defendant's case on that document is, I repeat, that since he signed and agreed it, the plaintiff dishonestly changed the percentage figure and added in the four numbered paragraphs to the first schedule. The plaintiff for his part contends that those alterations were made on the very day the agreement was drawn up and that they were duly attested to by the defendant's signature alongside the altered percentage figure and beneath the Farsi addition to the schedule. There now are, we may note, in the court's papers experts' reports obtained by both sides. We have not however been prepared to consider these in the context of the present dispute; they are plainly immaterial to its resolution.

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12. Finally, before coming to the disputed tape conversations - disputed, that is, as to their admissibility; their authenticity and content are, for present purposes at least and without prejudice to the position to be taken at trial, accepted by the plaintiff - it is necessary to chart something of the history of the settlement agreement between its coming into existence on 8th July 1990 and its eventual appearance in the re-amended pleadings in April 1992. Both parties' explanations for this long delay are, I have to say, certainly to my mind, somewhat bizarre. The plaintiff in an affidavit of 21st October 1992 says that it was originally agreed that the settlement agreement would be kept secret until the sums due in respect of commission etc. had been determined and the agreement could be finalised; in the meantime the proceedings would continue. With that in mind, Mr Shokouhi, who, like both parties, had signed the agreement, kept the original of the agreement with neither the plaintiff himself nor the first defendant being at that stage provided with copies. There was, and there is no doubt as to this, eventually on 5th October 1991.a meeting attended by the parties and one or two others including Mr Shokouhi at which the agreement was discussed. According to the plaintiff's affidavit, "It was then decided that the Agreement would be implemented and that Mr Shokouhi would provide both Mr Nikbin and me with copies for the first time". The plaintiff asserts that in fact at the end of the meeting both he and the first defendant were duly given copies of that agreement. That, however, is disputed by the first defendant and for present purposes we shall assume that the first defendant still remained without a copy even after that October meeting.

13. The first defendant for his part says that after the July 1990 agreement was arrived at, he felt unable to raise it in correspondence or even in discussion lest the plaintiff should disown it, and perhaps even destroy it. It was not until 1991 that he wrote to Mr Shokouhi, seeking a copy from him and not until later still that he mentioned it in correspondence with the plaintiff's solicitors.

14. In various discussions in December 1991 and January 1992, the first defendant says that the plaintiff first began to indicate, albeit in somewhat ambiguous terms, that the percentage stipulated for in clause (a) of the agreement was not, as the first defendant understood, 27 and a half per cent but rather 17 and a half per cent, and also that other conditions had been added. For this reason it appears that the first defendant took tape recording equipment to two of those meetings before even the meeting, to which I shall shortly refer in greater detail, on 18th January 1992. At those earlier meetings, however, the equipment apparently broke down so there is no record of them. These facts one gathers not, surprisingly, from any of Dr Nikbin's sworn affidavits in these proceedings, but rather from his written chronology of events.

15. That then is the background against which the first defendant seeks to have admitted in evidence three particular tape recorded conversations;, three conversations, I should note, out of what the plaintiff contends was a total of some 20 meetings held between the parties over the years in attempts to reach settlement of this long running dispute. Each of the three was, it goes almost without saying, covertly taped. The plaintiff had no notion whatever that the second defendant was arming himself with equipment and recording the conversations in this manner.

16. The first two of these taped conversations, said to have taken place respectively in May 1990 and October 1991, touched on the issues raised by the original pleadings as to whether or not the plaintiff had indeed paid the first defendant £10,000 in cash. Perhaps somewhat unusually, it is the first defendant who is asserting, and the plaintiff who is denying, the making of this payment. The third conversation, that of 18th January 1992, substantially the longest as transcribed and the most significant upon this appeal, touches instead on the crucial issue raised by the re-amended pleadings with regard to the scope of the settlement agreement.

17. As the judge below pointed out in relation to all three of the transcripts, the language spoken was Farsi and the translations, even with the corrections effected by the plaintiff, do not readily surrender up the true meaning of the exchanges. Many of the subtleties of conversation are inevitably missed by all but the most expert translators. Secondly, the judge observed that he was wholly unsurprised that the first defendant wanted the transcripts to be before the court. On any view they contained material that, as the judge put it, could well afford a field day for an able cross-examiner, and certainly they appeared capable of bearing the suggestion that the plaintiff had been less than forthright and had

perhaps changed his position on various important matters, there being what at best were to be regarded as some very odd exchanges, in particular regarding the forgery issue.

18. The legal principles governing this appeal are not in doubt. So far as the without prejudice rule generally is

19. concerned, the House of Lords in **Rush & Tompkins Ltd. v. Greater London Council** [1989] 1 A.C. 1280 decided the proper approach to the root question, whether or not communications are properly to be regarded as encompassed within the rule, subject always of course to certain exceptions. The relevant passages in Lord Griffiths's speech are to be found recited in the judgment under appeal. Perhaps, however, it is appropriate to read them into this judgment too. At page 1299 Lord Griffiths said this: *"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in **Cutts v. Head**...' That the rule rests, at least in part, upon 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 that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in **Scott Paper Co. v. Drayton Paper Works Ltd.** ... be encouraged fully and frankly to put their cards on the table... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability'."*

20. Then a little further on, the quotation continues: *"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."*

21. He continued by making it plain that the application of the rule does not of course depend on whether or not the phrase, "***without prejudice*"**, is actually used.

22. Accordingly, the basic issue is to be determined essentially by asking the single question: were these discussions genuinely aimed at compromising the action? "***Genuinely***" here means of course no more than that the discussions were indeed attempting to resolve the parties' differences; it connotes nothing in the way of good faith generally. In the present context too the question must be, posed essentially in relation to the plaintiff's intentions; the without prejudice rule clearly cannot be destroyed simply by someone like the first defendant here wiring himself up and attending a discussion not, for his part, with a view to negotiating a settlement but rather to acquiring useful evidence against his adversary for the purpose of continuing the proceedings in being.

23. Having considered these three transcribed conversations at length, not merely by reference to their own language but also in the light of the evidence generally before us regarding their surrounding circumstances, I for my part have no doubt whatever that the plaintiff here was upon each of these three occasions genuinely seeking to negotiate a resolution of the parties' differences. The first defendant himself, be it noted, accepts in one of his several affidavits that the final meeting *"could possibly be termed an unsuccessful attempt to re-negotiate and compromise the final agreement";* and indeed at page 6 of his ably presented and helpful skeleton argument he says of it: *"The meeting was tense and the plaintiff was extremely wary of leaving evidence, on the other hand he was desperate that the meeting should produce results there and then before the summons of 24/1/92 forced him to give discovery of the 'agreement'."*

24. I should perhaps mention that the first defendant had indeed issued a discovery summons returnable on 24th January and on his case it was only on 20th January, in anticipation of that hearing and, of course, after the crucial tape recorded meeting on 18th January, that he was first given a copy of the disputed settlement agreement.

25. At one point I had wondered whether it might be open to the first defendant to contend, in regard to that third conversation, that it was concerned not so much with an attempt to negotiate a solution of a dispute already in being, but rather with a fresh dispute as to the scope of the settlement agreement. If, for instance, this January 1992 conversation had been devoted specifically and exclusively to, so to

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speak, drawing up the battle lines regarding the form and terms of the still unpleaded settlement agreement, then I doubt whether it would have fallen within the protection of the without prejudice rule. But in reality it was no such thing. On the contrary, although for his own tactical reasons the first defendant was trying to concentrate the discussion upon the terms of the settlement agreement, the plaintiff for his part was clearly anxious to deflect the first defendant's interest away from that document and instead to persuade him to some overall solution to the underlying conflict between them. To my mind there can therefore be no doubt whatever but that all three conversations fall squarely within the without prejudice principle.

26. I turn therefore to the crucial question whether these particular conversations ought nevertheless to lose the protection of the rule because they disclose misconduct of a kind sufficient to displace it. The approach to this issue too is now plain, having recently been clarified by this court's decision in **Forster and others v. Friedland and Another**, transcript 10th November 1992. In the leading judgment, Lord Justice Hoffmann, after referring to various cases such as **Hawick Jersey International Ltd v Caplan** involving threats, said this: *"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."*

27. As the judge below pointed out, the critical expression there is "*unambiguous impropriety*".

28. Do any of the transcripts before us disclose such unambiguous impropriety? Frankly, my own first response to that question is-that precious little within this entire dispute is unambiguous. Certainly innumerable questions are raised at every turn and many matters cry out for clarification. It is difficult indeed to escape the conclusion that, on occasions at least, both parties have been guilty of some deviousness.

29. So far as the first two tapes are concerned, it seems to me unnecessary to detail them at all. Even putting them at their very highest - and I believe this would be putting them higher than the facts justify - they could not possibly be said to amount to anything more than an admission by the plaintiff that he had indeed paid £10,000, a fact which he nevertheless continues to dispute within the litigation. But I remind myself of this further passage from Lord Griffiths's speech in **Rush & Tomkins v. G.L.C.**, and I take up the quotation after reference to an 18th century case about the admissibility of admissions of an independent fact unconnected with the merits of the case: "*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.*

30. Accordingly, even if during those first two recorded conversations the plaintiff is properly to be regarded as having admitted making payment of £10,000, then, the attempt to compromise having failed, that admission cannot be held against him and received in evidence, despite his continued denial of such payment in the pleadings. In so far as the first defendant seeks in the alternative to argue that there has been here a concluded settlement of the issue regarding payment of the £10,000, this argument, in so far as I follow it, is to my mind wholly misconceived.

31. I turn therefore to the last tape - that on which most of the argument before us has centred - which, let me acknowledge at once, has caused me greater pause for thought. During this third conversation - and again I regard it as quite unnecessary to recite passages from it or indeed indicate its course in any detail - the plaintiff, certainly on a number of occasions, acknowledged that alterations had indeed been made to the original form of the settlement agreement, and clearly indicated that he was anxious to conclude a fresh final compromise on all issues without the first defendant having an opportunity to see a copy of that agreement in its final form. That anxiety too was manifest from time to time during the course of the conversation and the plaintiff suggested on several occasions that the first

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defendant would, he believed, be upset and angry were he to see the agreement. All this, contends Dr Nikbin, leads to the inescapable inference that the admitted changes to the agreement must have been made not, as the plaintiff says and indeed has said on oath in answer to interrogatories, on 8th July 1990, when the first defendant would of course have known full well about them, but rather at some later date and, accordingly, behind the first defendant's back. In addition, Dr Nikbin draws our attention to a particular passage in the discussion at page 5 of the transcript when in answer to the question, "*But how is it possible to change it?",* the plaintiff answered, "*You threatened and he changed it"* ["**he**" there referring to Mr Shokouhi]. That, suggests the first defendant, must inevitably be referable to a threat made, not at the meeting itself, which could hardly have caused the agreement to be altered as it was, but rather to one made on some later occasion.

32. Speaking for myself, I readily see the force of these points. But it is one thing to suggest, as I for my part would be prepared to recognise, that that is certainly one possible interpretation of the tape, one inference well capable of being drawn from the actual words exchanged - indeed, particularly if one looks at this through Dr Nikbin's eyes, this might even be thought the more probable explanation of the plaintiff's comments - it is quite another thing to contend that this is the unambiguous conclusion to be drawn from this conversation. That contention I certainly cannot accept, least of all against the curious background to this case, to which I have already alluded - the circumstances in which months passed before even this agreement began to surface in correspondence, and indeed the circumstances in which the first defendant says that his suspicions aroused by earlier discussions, he went taped up to the January 1992 meeting. And, be it noted, despite all the first defendant's efforts to trap the plaintiff into admitting altering this document behind his back and at some date subsequent to 8th July 1990, the plaintiff never in fact throughout the whole course of the conversation actually made any admission to that effect. Even accepting that the test of unambiguous impropriety involves a less stringent approach than that adopted by the criminal courts when dealing with allegations such as forgery, I would still not regard the test as having been satisfied on the facts of this case.

33. I say nothing as to the likely strength of the first defendant's case at trial upon this critical issue of forgery. With expert evidence at his disposal he may indeed persuade the court that it is significantly more probable that these alterations, disadvantageous to him, were made after, rather than at, the initial settlement meeting. But that is nothing to the point regarding the appeal before this court today. All that I do say is that the first defendant should not be aided in his task by what I am satisfied must ultimately be regarded as intrinsically ambiguous comments made by the plaintiff during the course of these discussions.

34. I add only this. 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. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likely to have participated in discussions with half a mind at least to their litigious rather than their settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitably it must, against the prospects of successful settlement.

35. For these reasons, in my judgment, this appeal fails and should be dismissed.

MR JUSTICE PETER GIBSON: I agree.

LORD JUSTICE BALCOMBE: I too agree.

Order: Appeal dismissed with costs.

THE APPELLANT appeared in person.
MR DANIEL GERRANS, instructed by Messrs Brian Harris & Co. appeared for the Respondent (Plaintiff).

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