

BANG OUT OF ORDER!

Why lawyers need to avoid
'unambiguous impropriety'

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Introduction

- Seminar prompted by EAT decision in **Swiss Re Corporate Solutions Ltd v Sommer** [2022] EAT 78
- In this seminar we consider the:
 - Underlying policy
 - Historic case law on the test
 - Facts and findings in **Sommer**
 - Consequences of the **Sommer** judgment

Without prejudice privilege – why do we have it?

■ **Cutts v Head** [1984] Ch 290:

- Encouragement to settle disputes without litigation
- Enabling full & frank discussion without worrying about impact on litigation if settlement fails

■ **Ofulue v Bossert** [2009] 2 WLR 749:

- Removes inhibition

Does w/p privilege apply in the ET?

■ **Yes!!!** See:

■ **BNP Paribas v Mezzotero** [2004] IRLR 508

■ **Woodward v Santander UK plc** [2010] (UKEAT/0250/09)

Introducing the unambiguous impropriety exception

- **Forster v Friedland** [1992] Lexis Citation 2387 – Hoffmann LJ christens the term
- **Unilever plc v The Procter & Gamble Company** [1999] EWCA Civ 3027 – Robert Walker LJ cements the term

A truly exceptional exception

- **Unilever** – *‘only in the clearest cases’*
- **Fazl-Alizadeh v Nikbin** [1993] Lexis Citation 3615 – *‘scrupulously and jealously protected’*
- **Motorola Solutions Inc v Hytera Communications Corporation Ltd** [2021] 2 WLR 679 – the courts have *‘jealously guarded any incursion into or erosion of the w/p rule’* *‘truly exceptional cases’*

How unambiguous is unambiguous?

- **Motorola** – requires *'no ambiguity'* at all. Possible or probable interpretations do not suffice. Chinese company stating an intention to move its business outside of enforceable jurisdictions could have been for reasonable commercial reasons.
- **Nikbin** – conversation could be interpreted as admission of forgery of settlement agreement, but not necessarily, thus test not met.

Process of assessing whether the test is met

■ **Nikbin; Motorola:**

- *‘Evidence which is asserted to satisfy this test must be rigorously scrutinised’*

■ **Woodward** – Acceptance negotiations not always calm & dispassionate.

■ **Boreh v Republic of Djibouti** [2015] EWHC 769 (Comm) – look at whether actions unambiguously exceed *‘what is permissible in settlement of hard-fought commercial litigation’*

A realistic approach to settlement negotiations

- Discouraging picking out a sentence here and there: **Forster; Unilever; Berry Trade Ltd v Moussavi (No. 2)** [2003] EWCA Civ 715;
- Consider whether the privilege has, in fact, been abused: **Unilever; Savings & Investment Bank Ltd v Fincken** [2004] 1 WLR 667;

Examples of the test being met (1)

- **Greenwood v Fitts** (1961) 29 DLR (2d) 260 – party saying if a claim was brought, he would perjure himself, bribe witnesses to perjure themselves, leave Canada to defeat a judgment for damages.
- **Hawick Jersey International Ltd v Caplan** (The Times, 11.03.1988) – bringing a false claim in order to persuade a party to reach fair settlement on other matters

Examples of the test being met (2)

- **Boreh** – seeking to extradite on a false basis on trumped up charges & to start money laundering investigations to persuade settlement of commercial claims
- **Ferster v Ferster** [2016] EWCA Civ 717 – Using the threat of committal proceedings in claim 1 as a lever to extract an inflated share price in claim 2.

Is there a special rule for discrimination?

- **Mezzotero** – at first glance, obiter suggestion that alleged discrimination will suffice to lift the cloak.
- **Woodward** – narrow reading of **Mezzotero** consistent with the wider case law. Cloak could be lifted by a blatantly discriminatory course of action, including cynical abuse of w/p privilege to act in a way which is plainly discriminatory.

Swiss Re Corporate Solutions Ltd v Mrs H Sommer [2022] EAT 78

- Swiss Re is a UK service company and part of a global insurance/reinsurance giant
- Mrs Sommer was a political risk underwriter earning £75k plus bonus in an otherwise white, male team
- On return from maternity leave in Oct 2020 she was told she was at risk of redundancy

Grievance

- Mrs Sommer raised a grievance about the redundancy process
- She openly forwarded to her personal email address a number of work emails, some containing information about colleagues
- She 'BCC'd' one to her husband, who did not work for Swiss Re
- Swiss Re launched an investigation into her grievance
- During this, although Mrs Sommer had denied sending emails to a third party, the email to her husband was discovered

Mrs Sommer's claims

- First ET1 submitted on 22 January 2021, raising numerous complaints of discrimination and victimisation, and equal pay
- Mrs Sommer was made redundant on 16 April 2021
- Second ET1 submitted on 28 April 2021 adding claims including unfair dismissal and harassment/victimisation in respect of the letter from Swiss Re's solicitors

Swiss Re's letter of 22 January 2021 (1)

- Headed 'Without Prejudice and Subject to Contract'
- Alleged there were serious breaches of her 'ongoing obligations to the company' and that she 'had caused a deliberate data breach'
- Noted she sent three emails to herself and one to her husband
- Claimed she had breached confidentiality obligations in both her contract, and in the Respondent's Code of Conduct

Swiss Re's letter of 22 January 2021 (2)

- Reminded Mrs Sommer she was subject to regulatory obligations such as the duty to 'act with integrity' under FCA rules
- Claimed she had committed a criminal offence by breaching the Data Protection Act 2018 and that this carried an unlimited fine upon conviction in the crown court
- Threatened disciplinary action up to and including dismissal for gross misconduct
- But she could avoid this by accepting their £37k termination offer

The tribunal judgment, PH, Dec 2021

- Found there was an existing dispute between the parties, hence Without Prejudice privilege could be engaged
- Set out the law correctly, noting that only in truly exceptional cases will the ‘unambiguous impropriety’ exception apply
- Noted a ‘striking disparity’ between what was known about the alleged misconduct and what was said about it in the letter
- Crucially, held ‘no basis at all’ for Swiss Re’s allegations – so letter not covered by privilege and was admissible at trial

Grounds of appeal

- the EJ a) misunderstood or b) misapplied the law in relation to the ‘unambiguous impropriety’ exception to the without prejudice rule; and
- the EJ’s finding that there was “no basis at all” for assertions made in the WP letter was unsupported by or inconsistent with the evidence and/or was perverse

The appeal – Bourne J

- The first ground of appeal did not succeed as Bourne J found that EJ Grewal had not misdirected herself on the law
- The second ground did succeed. Crucially, the Judge's reference to the allegations having 'no basis at all' in fact was an error, given that, whilst they may have been put forcefully, the allegations were based on undisputed facts

Legal conclusions

- The 'unambiguous impropriety' exception to the W/P rule is a high test and hard to overcome
- Conduct must have been seriously improper – eg perjury, blackmail or something very close to that
- There must be no ambiguity about the behaviour complained of
- Evidence must be rigorously scrutinised

Practical conclusions

- When drafting a W/P letter, do not stray from established facts, even if putting them at their highest
- Otherwise there is a risk of a preliminary hearing to consider whether the communication is unambiguously improper
- Claimants should avoid 'evidence banking'! This is disapproved of in for example *Brandeaux Advisers (UK) Limited & ors v Chadwick* [2010] EWHC 3241 (QB)

Any questions?

- And most importantly, can anyone think of an easier way to refer to 'unambiguous impropriety'?!
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