IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 321 of 2012.

BETWEEN: **STAR PRINTERY LIMITED** a company incorporated in Fiji and having its registered office at Carpenter Street, Raiwai, Suva

PLAINTIFF

AND: **UB FREIGHT (FIJI) LIMITED** a company incorporated in Fiji and having its registered office at the office of Jay Lal & Co, Chartered Accountants, 21 Tui Street, Marine Drive, P O Box 343, Lautoka.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Parshotam S.** for the Plaintiff
Ms. Whippy K. M. for the Defendant

Date of Hearing : **14th March, 2013**
Date of Decision : **30th May, 2013**

DECISION

Catch Words

Without prejudice communication- Use of threats of litigation in negotiations done without prejudice- does the threats of litigation form part negotiations done without prejudice- indemnity costs.

A. INTRODUCTION

1. The Plaintiff filed this action seeking injunctive relief against the Defendant restraining it from proceeding with a winding up action. The endorsement of claims seeks to prevent the Defendant from either the filing of the winding up

petition and if it had already been filed, to restrain the Defendant from advertising the winding up notice. The Defendant had done neither of the acts that the Plaintiff sought to restrain, but had served the Defendant with a notice of winding up in terms of Section 221 of the Companies Act and for that a detailed reply was promptly made and sought a withdrawal of the notice of winding up, but this did not eventuate and the notice of winding up was hanging like Damocle's sword, despite that both parties proceeded to negotiate on 'without prejudice' basis. Finally, the Plaintiff filed the present action to prevent the Defendant from proceeding with Winding Up by the Defendant. On the first date of hearing of the injunction the Defendant assured to the court that they would not proceed with the winding up and the Plaintiff indicated to the court that they would not seek to proceed further regarding the application for injunction based on the assurance of the Defendant's solicitors, but sought indemnity costs for the said application stating their numerous previous requests for such an assurance were not heeded and also stated that adequate warning to the Defendant to seek indemnity costs, in the event it had to seek an injunctive relief from court to restrain the winding up against the Plaintiff. In the affidavit in reply the Defendant admitted that Plaintiff had notified them of seeking indemnity costs, in the event they do not withdraw the winding up notice. The parities were given opportunity to file affidavits regarding the hearing of the issue of indemnity costs.

2. One of the issues that needed determination is the admissibility of the 'without prejudice' communications since both parties relied on such communications. Even without referring to without prejudice communications it is obvious the apprehension of the Plaintiff and the reason for the action seeking injunctive relief. The negotiations of the parties proceeded on without prejudice basis and the solicitors of the Plaintiff admittedly informed to the Defendant that unless they withdraw the winding up the Plaintiffs would seek the intervention of the court seeking injunctive relief and would also seek indemnity costs in such a situation. Despite the said warning the Defendant neither withdrew the winding up notice nor gave any assurance to the Plaintiff regarding not to proceed with the winding up even during the without prejudice negotiations till this action was filed and the inter partes notice of injunction was served. On the first day of the hearing of the injunction the Defendant assured that winding up action

will not be resorted to recover the alleged debt and the issue is the request for indemnity costs for the said interim application seeking injunctive relief.

B. ANALYSIS

3. The Plaintiff filed this action with an endorsement of claim seeking injunctive relief restraining the Defendant from proceeding with the winding up action against the Plaintiff. On 27th September, 2012 the Defendant served the Plaintiff with a demand notice in terms of section 221 of the Companies Act claiming a sum of $37,823.93. For this notice the Plaintiff had replied on 16th October, 2012 through its solicitors and stated inter alia:

> 'Our client disputes the claim in the Winding up Notice and indeed has a substantive counter-claim against your clients. Our client had set its position out in its letter of 31 May 2012 to your client. We do not know whether your client brought that to your attention or not but in any event we enclose a further copy of that letter. We will be writing substantively to you over the next few days setting out our client's opposition to the Winding up Notice in more detail.
>
> Meanwhile, we ask that no further steps be taken under the Winding up Notice by your client.'

4. The said communication of 31st May, 2012, mentioned in the above reply to the notice in terms of section 221 of Companies Act, is annexed to the affidavit in support marked as 'B' and this letter indicate a dispute as to the payments to the Defendant and parties were negotiating directly without the intervention of solicitors, on the issues even prior to the winding up notice.

5. Having replied to the winding up notice on 16th October, 2012 the Plaintiff as indicated in the said letter made a detailed reply to the winding up notice on the following day. The said communication of 17th October, 2012 is annexed to the affidavit in support marked as 'C2'. The said letter describes the claim of the Plaintiff and had also indicated its sentiments to settle the issues between the

parties without the intervention of the courts, perhaps to save costs and also not to damage the commercial relationship between the parties. Since the initiation of winding up process by serving a notice, the parties were represented by the solicitors but the initial communications were not made without prejudice and can be easily relied upon to prove the apprehension of the Plaintiff to justify the application seeking costs.

6. At the end of the detailed reply to the winding up notice dated 17th October, 2012, stated as follows

> '**Please let us know if your client will withdraw the winding up Notice or not. If it is not going to withdraw the Winding up Notice then we-request, as a matter of deference, that we be notified of this straight away so that we may make an application to the High Court of Fiji for an injunction restraining your client to take out further winding up proceedings. We must be given a reasonable opportunity to address this**.
>
> Having said that, we and the principles of our client are quitted happy to meet up with you and your client's representatives to sort out issues and see if some settlement can be reached without the necessity of court proceedings.' (emphasis is mine)

7. The letters dated 16th and 17th of October, 2012 were not marked as without prejudice and in the latter communication as I have highlighted, in the penultimate paragraph, indicated to the Defendant that unless they withdraw the winding up notice the Plaintiff will seek injunctive relief from court in order to stay the winding up proceedings initiated by the Defendant. There was no withdrawal of the said winding up notice or any assurance by the Defendant till the institution of the present action seeking injunctive relief.

8. In the affidavit in response regarding the issue of the costs, at paragraph 10 the Defendant admitted that Plaintiff's solicitors had realized the issue of claiming indemnity costs should the Defendant proceeded with the winding up

proceedings. So, from the time the notice to winding up was delivered to the Plaintiff, the Plaintiff was under a reasonable apprehension of winding up of it. By admission in the paragraph 10 of the affidavit in response on behalf of the Defendant, it received a notice from the solicitors of the Plaintiff that they would seek indemnity costs, if they sought to restrain the winding up action. This notice was presumably, given while the negotiations were going on and a reasonable request was made to the Defendant to withdraw the winding up notice, but the Defendants did not withdraw the winding up notice and did not give any assurance as to the intending winding up proceedings. It seems that the Defendants used the winding up notice and the threat of winding up as a tool in negotiations to insert pressure on the Plaintiff to settle. I can assume this even without considering any of the 'without prejudice' communications based on the admissions contained in paragraphs 10 , 14 and 16 of the affidavit in response in respect of costs filed by the Defendant and also considering winding up notice and the replies to it dated 16th and 17th October, 2012.

9. In the circumstances the threat of the winding up was real and despite requests from the Plaintiff, no assurance was given by the Defendant to refrain from proceeding with winding up even during the time of the negotiations were conducted on without prejudice basis. The Defendant had utilized the threat of winding up to compel and or to expedite the negotiations between the parties that commenced even prior to the service of the winding up, apparently without the assistance of the lawyers.

10. In such a situation where the threat is being utilized for negotiations the party who is threatened may see the threat as real and may either agree to a settlement or may try to alleviate the threat depending on the circumstances of the case. If that happens the Plaintiff may seek costs and considering circumstances an award of cost should be made in favour of Plaintiff. The next issue is what is the basis of the award of the costs and whether the Plaintiff can be awarded the cost on indemnity basis as claimed by them. Before that I would consider the issue of the usage of without prejudice communication since it involves issues pertaining to circumstances of the case which both parties relied in their affidavits.

Use of Without Prejudice Communication as evidence

11. Both parties had submitted without prejudice communications. The Plaintiff, in its affidavit in support of the injunction annexed a without prejudice communication, but in this letter the main negotiated sum including the said sentence, was blackened so that the said negotiated sum was not brought to the notice of the court. The Defendant had annexed the entire without prejudice communications annexed as 'A' , 'B', and 'C' and out of that both 'C' and "B" were letters of the Defendant's and letter 'C' is what had already been submitted by the Plaintiff (sans the sentence relating to negotiated sum) as C6 in the affidavit in support of the injunction.

12. The Plaintiff relied mainly on the letter dated 21st November, 2012 annexed as 'C3' and state as follows

> 'Our client will allow a period of seven (7) days for your client to accept and execute payment of the aforementioned settlement sum. Failure to do so will result in proceeding for winding up against your client.'

13. The said communication was marked 'Without Prejudice' and the Defendant vehemently objected to the use of the said letter, but in the affidavit in response to the issue regarding indemnity costs it had annexed without prejudice communications including the said communication annexed by the Plaintiff in its affidavit in support of the injunction.

14. The Plaintiff had completely shaded the sentence relating to the proposed settlement sum and produced the document and contended that whole document cannot be considered as 'without prejudice' and stated that the privilege relates only to the settlement sum and anything other than that contained in the said letter do not fall in to the category of 'without prejudice'. The Plaintiff relied on the decision in Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others - [2010] 4 All ER 1011 for the said contention.

15. In Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others (supra) the court allowed the 'without prejudice' communication between the parties in order to interpret an agreement that resulted in said communications done without prejudice and at p 10117-10118 held as follows

> **"[13]** The issue between the parties is whether TMT are entitled to rely upon representations or alleged representations (iii) and (iv) as an aid to interpretation of the agreement. Oceanbulk seeks to exclude the evidence relating to them on the ground that they were made in the course of without prejudice negotiations. The construction of cl 5 will of course be a matter for the trial judge. At para [35] of his judgment the judge expressed the view that the evidence was 'potentially of significant probative value and might possibly be crucial upon an issue of construction that is central to these proceedings'. By contrast, in the Court of Appeal, Longmore LJ said at [22] that it was 'not entirely easy' to see how the facts relied upon by TMT assisted the construction of cl 5 ([2010] EWCA Civ 79, [2010] 3 All ER 282). It is not for this court to express a view on that question in this appeal. For present purposes it is sufficient to note that, at any rate at this interlocutory stage, Oceanbulk does not seek to exclude the evidence simply on the ground that it does not form part of the admissible factual matrix. **It follows that it must be assumed for the purpose of this appeal that, subject to the question whether it is excluded by the without prejudice rule, the evidence will be admissible at the trial on the issue of construction of the agreement**. Indeed, given the conclusion reached by the judge, it must be assumed that (in the judge's phrase already quoted) the evidence is 'potentially of significant probative value and might possibly be crucial upon an issue of construction that is central to these proceedings'.

> **[14]** The judge held that the evidence was admissible notwithstanding the without prejudice rule. The majority of the Court of Appeal (Longmore and Stanley Burnton LJJ) allowed Oceanbulk's appeal, holding that the evidence was not admissible. Ward LJ agreed with the judge and thus dissented. This appeal is brought with the permission of this court.

16. Further at p 10118-10119, 1020, 101121 elaborated the principles regarding the usage of without prejudice communications and ,held
‘Without prejudice--the legal principles

> [19] The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is usually called, the without prejudice rule, initially focused on the case where the negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. **The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations.** The underlying rationale of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.
>
> [20] Thus in Walker v Wilsher (1889) 23 QBD 335 at 337 Lindley LJ asked what was the meaning of the words 'with-out prejudice' in a letter written 'without prejudice' and answered the question in this way:
>
> 'I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not

accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.'

[21] **It is now well settled that the rule is not limited to such a case.** This can be seen from a series of decisions in recent years, including most clearly from Cutts v Head [1984] 1 All ER 597, [1984] Ch 290, Rush & Tompkins Ltd v Greater London Council [1988] 3 All ER 737, [1989] AC 1280, Muller v Linsley & Mortimer (a firm) [1996] PNLR 74, Unilever plc v Procter & Gamble Co [2001] 1 All ER 783, [2000] 1 WLR 2436 and most recently Ofulue v Bossert [2009] UKHL 16, [2009] 3 All ER 93, [2009] AC 990.

[22] In particular, in the Unilever case Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed) set out the general position with great clarity ([2001] 1 All ER 783 at 789-791 and 796-797, [2000] 1 WLR 2436 at 2441-2444 and 2448-2449). He first quoted from Lord Griffiths's speech in Rush & Tompkins Ltd v Greater London Council, with which the other members of the appellate committee agreed. Rush & Tompkins Ltd v Greater London Council is important because it shows that the without prejudice rule is not limited to two-party situations or to cases where the negotiations do not produce a settlement agreement. It was held that in general the rule makes inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party.

[23] The passage quoted by Robert Walker LJ is as follows ([1988] 3 All ER 737 at 739-740, [1989] AC 1280 at 1299):
'The "without prejudice rule" is a rule governing the admissibility of evidence and **is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.** It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] 1 All ER 597 at 605-606, [1984] Ch 290 at 306:

"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 (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.'

[24] Robert Walker LJ observed ([2001] 1 All ER 783 at 789-790, [2000] 1 WLR 2436 at 2442) that, **while in that well known passage the rule was recognised as being based**

at least in part on public policy, its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite their negotiations, a contested hearing ensues. Robert Walker LJ further noted that these two justifications for the rule are referred to in some detail by Hoffmann LJ in Muller v Linsley & Mortimer (a firm). He quoted two substantial passages ([2001] 1 All ER 783 at 790-791, [2000] 1 WLR 2436 at 2442-2443) from the judgment of Hoffmann LJ in that case which it is not necessary to repeat here because in this appeal the issue is not so much about the scope of the rule as about the extent of the exceptions to it.

[25] It is therefore sufficient to quote two paragraphs from the judgment of Robert Walker LJ which show that the **rule is not limited to admissions but now extends much more widely to the content of discussions such as occurred in this case**. He said this ([2001] 1 All ER 783 at 791, [2000] 1 WLR 2436 at 2443-2444):

'Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" (Hoghton v Hoghton (1852) 15 Beav 278 at 321, 51 ER 545 at 561), has a wide and compelling effect. That is particularly true where the "without prejudice" communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.

At a meeting of that sort the discussions between the parties' representatives may contain a mixture of

admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and **statements (which might be characterized as threats, or as thinking aloud) about future plans and possibilities**. As Simon Brown LJ put it in the course of argument, a **threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution.** Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in Muller's case, a concept as implausible as the curate's egg (which was good in parts).'

[26] Finally, Robert Walker LJ expressed his conclusions on the cases as follows ([2001] 1 All ER 783 at 796, [2000] 1 WLR 2436 at 2448-2449):

'they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. **They show that the protection of admissions against interest is the most important practical effect of the rule. 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 & Tompkins Ltd v Greater London Council [1988] 3 All ER 737 at 740, [1989] AC 1280 at 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.**'

[27] **The without prejudice rule is thus now very much wider than it was historically. Moreover, its importance has been judicially stressed on many occasions**, most recently perhaps in Ofulue's case [2009] 3 All ER 93, [2009] AC 990, where the House of Lords identified the two bases of the rule and held that **communications in the course of negotiations should not be admissible in evidence**. It held that the rule extended to negotiations concerning earlier proceedings involving an issue that was still not resolved and refused, on the ground of legal and practical certainty, to extend the exceptions to the rule so as to limit the protection to identifiable admissions.

[28] The speeches of the majority contain a number of references to the importance of the rule which are relied upon on behalf of Oceanbulk. I take some examples. Lord Hope said at [12]:

'... The essence of [the rule] lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. **Far from being mechanistic, the rule is generous in its application.** It recognizes that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection.'

In para [2] Lord Hope had said that where a letter is written without prejudice during negotiations conducted with a view to a compromise, **the protection that these words**

claim will be given to it unless the other party can show that there is a good reason for not doing so.

[29] In para [43] Lord Rodger recognized the breadth of the without prejudice rule and rejected the proposed exception. So too did Lord Walker. **He said at [57] that he would not restrict the without prejudice rule unless justice clearly demands it**. This seems to me to be entirely consistent with the approach of Lord Griffiths in Rush & Tompkins Ltd v Greater London Council [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300, **where he said that the rule is not absolute and that resort may be had to the without prejudice material for a variety of reasons where the justice of the case requires it**. See also per Lord Neuberger at [89], endorsing the passage from the judgment of Robert Walker LJ in the Unilever case [2001] 1 All ER 783 at 796, [2000] 1 WLR 2436 at 2448-2449 (referred to above)."(emphasis added)

17. In paragraph 25 of the Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others - [2010] 4 All ER 1011 it was quoted with authority the judgment of Robert Walker LJ [2001] 1 All ER 783 at 791 that cited the judgment of Simmon Brown LJ where his lordship held that threat of litigation (and in that case an infringement proceedings), may be imbedded in the negotiations for a compromised solution and in such a situation a partial disclosure of minutes of such a meeting was impossible.

18. The application of the said rationale and the Plaintiff's revelation of the threat of winding up contained in a without prejudice communication cannot be separated from the main negotiation, hence the production of the without prejudice communication annexed in the affidavit in support of the injunction, which was relied by the Plaintiff in the determination of the issue of costs, cannot be considered as evidence since it also forms part of the negotiation and threats and fears are used in commercial negotiations and the public policy that encourages settlements of disputes outside courts have not excludes such

methods in negotiations done on without prejudice basis. Game Theory (or prisoner' dilemma) is used in the decision making process in negotiations, in Commercial dealings.

19. The Plaintiff sought to separate the threat of litigation from the compromised negotiated sum, and stated that without prejudice principle would only apply to the latter and since it had not brought to notice the negotiated sum, the said communication relating to threat of litigation can be produced to the court as evidence. I do not agree with that kind of artificial separation of the issues contained in that letter. This will be against the accepted public policy of encouraging negotiations outside court, where the parities themselves initiated the negotiations, apparently without the assistance of solicitors but could not reach a settlement and Defendant had engaged a solicitor firm and after that a winding up notice was served to the Plaintiff but the negotiations continued despite the threat of winding up. Both parties admittedly committed for a negotiated settlement, but since the settlement could not be reached and the threat remained for too long and the nature of the threat resulted this action seeking injunction. The Defendant did not object to the injunction and readily made the assurance to court not to proceed with the winding up on the first day of the inter partes hearing of the injunction without filing objections to the motion. The Defendant did not abuse the process, and readily gave the assurance.

20. Looking at the materials before me (without considering without prejudice communications) it is evident that Defendant neither desired to withdraw winding up notice as requested by the Plaintiff in its letters dated 16th and 17th October, 2012 nor had given any assurance even during the negotiations that it will not proceed with the winding up of the Plaintiff. Even without considering any of the without prejudice communications it can be safely deduced that the Defendant had used the threat of winding up as a tool in negotiations , and the artificial separation suggested by the counsel for the Plaintiff is not warranted. The threat of winding up and the negotiations done on without prejudice basis are embedded as a one event and the artificial separation suggested by the counsel for the Plaintiff is not only 'implausible as the curate's egg', but also the

behaviour of the Defendant also does not substantiate such an artificial separation of the issue of winding up and the alleged settlement.

21. The Defendant readily agreed to an assurance when the matter was called for hearing of the injunction, indicating the threat of winding up was mainly utilized to coarse the negotiations which were done without prejudice prior to the action being instituted in court and threat was also a part of said negotiation. Upon the available evidence it is safe to assume that the threat of winding up was never withdrawn during the negotiations, but at the same time did not take any action since the service of the notice of the winding up, in order to use the treat as a part of negotiations to reach an expedited negotiation. The risk of such a method of negotiation is that depending on the mind of the other party, they might rush to court without fully utilization of negotiations and this is more likely depending on the nature of the threat and its implications on the other side and the duration of the threat. The threat of winding up can have serious consequence to a company depending on its reputation and also on its nature of business.

22. The ratio of the said decision in Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others - [2010] 4 All ER 1011 is that generally any communication in the course of negotiations done without prejudice should be excluded, and this is done with two underlying policies. They are the paramount considerations of the party autonomy in the negotiations and protection given to the parties to freely negotiate in case of the negotiations and if failed, such communications are precluded from being produced. In the light of the said public policy that encourage alternate dispute resolutions one cannot exclude the ingenuity of the parties where both carrots and sticks are being used. A party may use a threat of litigation either to expedite the process or otherwise depending the instructions from their client. I do not have any evidence to support such separation of the threat of winding up from the negotiation in this case and the burden is with the Plaintiff who sought such dissection of without prejudice communication.

23. In **Cutts v Head and another**[1984] 1 All ER 597 at 603 held as follows,

"What counsel for the defendant particularly relies on, however, is the decision of this court in *Walker v Wilsher* (1889) 23 QBD 335. That was an appeal from Huddleston B, who had, on the question of costs, after trial looked at some without prejudice correspondence and made his order accordingly. That was attacked in the Court of Appeal, Lord Esher MR saying (at 336–337):

'The letters and the interview were without prejudice, and the question is whether under such circumstances they could be considered in order to determine whether there was good cause or not for depriving the plaintiff of costs. It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. I am, therefore, of opinion that the learned judge should not have taken these matters into consideration ... '

Lindley LJ was equally uncompromising. He said (at 337):

'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given. Supposing that a letter is written without prejudice then, according both to authority and to good sense, the answer also must be treated as made without prejudice.'

A little later he said (at 338):

'No doubt there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have adverted would not be infringed. The facts may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with—the material matters, that is to say, of the letters—must not be looked at without consent.'

Bowen LJ was equally adamant. He said (at 339):

'The precise question now before us, as to the admissibility of such evidence for the purpose of deciding as to the costs of an action could not have arisen before the Common Law Procedure Act, 1852. Up to then costs at common law always followed the event, and it naturally follows that there is no authority before that time on the point. Then comes the case before Kindersley, V.C., who did precisely what Huddleston, B., has done here [see *Williams v Thomas* (1862) 2 Drew & Sm 29, 62 ER 532]. I think there was a confusion of thought and reasoning in the judgment of the Vice-Chancellor which we ought not to hesitate to point out. The use that the defendant sought in that case to make of the offer which had been made without prejudice was to attract the attention of the Court to the conduct of the plaintiff upon receiving it. In my opinion it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them without prejudice, to be given in evidence against them or to be used as material for depriving them of costs. **It is most important that the door should not be shut against compromises, as would certainly be the case if letters written without prejudice and suggesting**

methods of compromise were liable to be read when a question of costs arose. The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity."(emphasis is added)

24. In my judgment after carefully considering the legal authorities and rationales laid down in numerous English authorities, the without prejudice communications that are produced in this case by both parties cannot be accepted as evidence for the determination of costs. The threat of winding up cannot be separated from the negotiations that were carried out without prejudice, as suggested by the counsel for the Plaintiff, and Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others - [2010] 4 All ER 1011 cannot be applied to lead without prejudice evidence against the public policy that encourage negotiations and communications under privileged condition. In the said decision court allowed the use of without prejudice communications to interpret an agreement reached in order to fill a lacuna in the said agreement reached between the parties. This is not to discourage without prejudice negotiations but to encourage them so that if some doubt or lacuna arises it can be cleared using such communications to consider the factual matrix to a contract. Hence all the correspondences that were done without prejudice and marked so cannot be considered as evidence in the present proceeding regarding the determination of the costs.

C. INDEMNITY COSTS

25. Despite the exclusion of all the without prejudice correspondence from the present determination, the admitted evidence between the parties are that despite the request of the Plaintiff to withdraw the winding up notice, the Defendant did not grant an assurance of not to proceed with the winding up action against the Plaintiff. Winding up action can have serious consequences depending on the reputation of the company and also due to the nature of the business and the business environment. So, a threat of winding up cannot be considered lightly and despite it being used as a mere threat to expedite negotiations or otherwise, the apprehension of the winding up can lead to

parties seeking injunctive relief against such threats to stall any prospective winding up action to save the company from unnecessary strain, provided that they are financially sound as evidenced from the facts of this case. The Plaintiff did not receive any confirmation as to their request to withdraw the winding up action, in their reply to the notice of winding up. The Defendant admitted in the affidavit in opposition to the issue of costs that they were warned of impending action to adjunct the winding up and also for request of indemnity costs in such a situation. The behaviour of the Plaintiff is not unreasonable considering the circumstances of the case.

26. In EMI Records Ltd v Ian Cameron Wallance Ltd [1983] 1 Ch 59 at 70 Megarry V.C Held

> 'In the result therefore, I reject Mr. Cook's clear and forceful contentions on this point, and hold that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than those contained in rule 28: and these include orders for costs on the solicitor and own client basis, on the solicitor and client basis, or on an indemnity basis. I do this, first on the footing of the Court of Appeal decision that I have mentioned. Second, the circumstances of litigation are so various that it is a matter of high importance that the judge should have wide discretion as to the basis of costs, and not be subjected to the Procrustean bed of rule 28. Even in party and party taxation or in common fund taxations it is important for the judge to be able to order that particular items which otherwise would be included should be excluded, and vice versa, so that the taxing master will not be confined to rigid application of formulae set out in the rule.'

27. Considering the evidence before me excluding all the without prejudice communications it is admitted that parties started negotiations and after some time the solicitors of the Defendant had thought to initiate the winding up proceedings against the Plaintiff. The Plaintiff replied to the said winding up

notice through its solicitors and sought a withdrawal of the winding up notice and no such withdrawal was ever made by the Defendant. In spite of the failure to grant any assurance of not to proceed with the winding up the parties negotiated for a settlement, but warned the Defendant that they would seek the intervention of the court to stall any further action to proceed with the winding up and to seek indemnity costs in such a event. Since there was no assurance from the Defendant not to proceed with the winding up the Plaintiff sought inter partes injunctive relief and the Defendant on the first day without filing any objections gave an undertaking that winding up would not be proceeded. As I have held earlier the threat of litigation continued as a part of negotiations and both parties continued with the negotiations while the threat was alive. The warning of the Plaintiff to the Defendant prior to this action did not grant any assurance from the Defendant not to proceed with the winding up. In the circumstance the costs should be awarded to the Plaintiff but considering the facts of the case I am not convinced that this is a case where indemnity costs should be granted. In the circumstance I grant a cost of $2,000 assessed summarily to be paid by the Defendant within 21 days.

D. FINAL ORDERS

a. The Plaintiff is granted a cost of $2,000 assessed summarily.
b. The Defendant should pay the cost within 21 days from today.

Dated at **Suva** this **30th day** of **May, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva