**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 90**

**CA67/23**

OPINION OF LORD RICHARDSON

In the cause

ROCHE DIAGNOSTICS LIMITED

Pursuer

against

GREATER GLASGOW HEALTH BOARD

First Defender

and

ABBOTT LABORATORIES LIMITED

Second Defender

**Pursuer: Lord Keen of Elie KC, Breen; Addleshaw Goddard**
**First Defender: Lindsay KC, Blair; NHS Central Legal Office**
**Second Defender: Lord Davidson of Glen Clova KC, McGinley; CMS Cameron McKenna LLP**

20 September 2024

**Introduction**

[1] This case involves a dispute about public procurement.

[2] This is the second opinion that I have issued in relation to this matter. On 5 June 2024, I issued an opinion ([2024] CSOH 55) having heard the parties at debate. I refer to paragraphs 1 to 10 of that opinion which set out the background to the parties' dispute and explain the present procedural position.

[3] As noted there, the pursuer is presently seeking to recover documents from each of the defenders pursuant to two specifications of documents which had previously been granted by the court. Following service of the specifications on them, each of the defenders lodged confidential envelopes with the court.

[4] Both of the defenders resisted the disclosure of the contents of these envelopes to the pursuer. The first defender did so on two grounds: first, the first defender asserted that a number of the documents were protected by legal professional privilege; and, second, disclosure was resisted on the grounds that the documents concerned had been issued on a "without prejudice" basis.

[5] The second defender also resisted disclosure to the pursuer of the contents of the confidential envelopes on the grounds that the documentation had been issued on a "without prejudice" basis. In addition, the second defender asserted that the documentation concerned was commercially confidential.

[6] Motions were granted to open up the confidential envelopes and have the contents considered by a commissioner. The commissioner considered the contents of each of the envelopes and received submissions from the parties. Thereafter, he prepared two reports to the court dated 20 November 2023 and 23 February 2024.

[7] It was apparent from those reports that there were a number of issues that required to be resolved by the court in order for progress to be made. Accordingly, I heard the parties on those issues.

[8] Whatever may have been the scope of the parties' disputes in respect of the documents at an earlier stage, having heard submissions, it became clear that the parties were in dispute in respect of two issues which were capable of immediate resolution. The first of these was that the pursuer claimed that, having disclosed two documents containing

summaries of the legal advice provided to it by the NHS Central Legal Office, the first defender had waived legal privilege. The second issue was that the parties disagreed both as to the underlying legal basis of and the correct approach to be taken to cases in which "without prejudice" privilege was asserted.

[9] Both the pursuer and the second defender were agreed that once these two issues had been resolved, questions would remain as to the second defender's assertion of commercial confidentiality. However, both parties also agreed that this third issue would require to be revisited in light of my decisions on the first two issues.

[10] Accordingly, I address these issues in turn.

**Waiver of legal privilege**

***The pursuer's submissions***

[11] The pursuer's position on this issue was straightforward. Amongst the documentation which had been provided voluntarily by the first defender to the pursuer in response to the two specifications were two papers: the first was entitled "Laboratories Managed Service Procurement" dated 6 July 2023; and the second "Laboratory Managed Service Procurement Briefing" dated 1 August 2023. The pursuer submitted that these documents each contained detailed summaries of legal advice provided to the first defender.

[12] In respect of the first paper, the pursuer founded on the following passages:

> "Executive Summary
> …
> On Monday 26th June, our appointed legal counsel advised that the prospects of defending the action and raising a motion to have the automatic suspension preventing the award of contract to Roche Diagnostics Limited had limited prospects of success. [sic]
> …
> 1. Introduction

NHS GGC have abandoned its Procurement of the recent Labs Managed Service Contract based on advice from legal counsel and the Central Legal Office (CLO) litigation team

This follows the action raised in the Court of Session by Abbott Laboratories Ltd on 23 May 2023 [the summons was actually signeted on 17 May 2023] which led to the imposition of an interim interdict preventing the award of the contract.

On 26 June 2023, our appointed legal counsel advised that the prospects of defending the action and raising a motion to have the automatic suspension preventing the award of contract to Roche Diagnostics Limited had limited prospects of success. [sic]
…
5. Court Summons
On 23 May 2023 a commercial action was raised by Abbott in the Court of Session [the summons was actually signeted on 17 May 2023] following NHS GGC's decision to award to [sic] the contract to Roche, challenging the decision on numerous bases under 10 headings, and a more general challenge alleging fundamental transparency failures. This also included an interim interdict which prevented NHS GGC from awarding the contract.

NHS GGC engaged legal counsel via the CLO Litigation Team, appointing Morag Ross KC to act for us. From this point there was a very intensive period where work began to prepare defences to the action which required a huge amount of information to be gathered and organised and affidavits prepared. During this period, NHS GGC had a series of consultations with legal counsel following which our prospects would be good or sometimes could worsen depending on emerging material being provided by NHS GGC.

At this point, the legal strategy was to prepare to raise a motion in court to lift the suspension preventing the award of contract. If this was successful, the action could potentially continue, but the remedy available to the court would be limited to award of damages in the event that the process was deficient and deficient to the extent that it would have overturned the result of the tender.
…
Up until this point, there had been no reason to believe that there were any issues with evaluator scores, however this now became of significant concern to legal counsel as it opened up the possibility that there could be deeper issues and unless a full review of all scoring could be conducted, would cast significant doubt over the robustness of the process.

In parallel to this, Abbott had filed a motion to the court seeking recovery of a large number of documents relating to the tender process which it set out in a 'specification'. Our legal advisors reviewed this specification and advised that some documents were commercially sensitive (to Roche) and should be opposed and that some would have to be disclosed.
…

6. Board-led Review into Evaluator Scoring and Moderation
…
The outcome of the review was shared with our legal counsel and unfortunately the conclusion was that given the amount of errors within the input scoring, some of the figures given in the fourth outcome letter were not reliable and in these circumstances, it would be legitimate for NHS GGC to conclude that its confidence in the process has been diminished to the extent that the best course was to abandon.

In addition to the advice that our prospects of our motion being successful were now badly diminished, NHS GGC also had to consider that the current contract was due to expire on the 12 September 2023 and in any view, it would not be possible to effect a transfer of services by 13 September 2023 and so also had to consider the interests of maintaining provision of essential laboratory services for our patients across primary and secondary care services.

7. Decision to abandon
NHS GGC considered that as the prospects of convincing the court to lift the suspension were now weak and in light of the impending end date of the current contract and risk of service failure, that it had no realistic option other but [sic] to abandon the procurement and seek to re-run the competition.

The decision to abandon is not without risk as it raises the prospects of being challenged by Roche however we are confident that our decision to abandon the procurement is based on the advice given to us by legal counsel and in the end, made only in the interest of the need to take action to ensure continuation of the Labs managed service and to protect patient care and with a commitment to re-run the competition

8. Interim contract with Abbott
Having made the decision to abandon the procurement, NHS GGC had to act quickly to enter into a negotiation with the incumbent provider to extend the current contract to allow sufficient time for a re-procurement and associated implementation of new equipment from the awarded supplier.

In doing so NHS GGC had to take into account:
…
6. The legal advice that the only viable mechanism open to us is Regulation 72 of the Public Contracts (Scotland) Regulations which allows for modifications of contracts during their term in particular circumstances as long as the modification represents no more than 50% of the original contract value (with indexation applied)".

[13] In respect of the second paper, the pursuer relied on the following passages:

"3. Court Summons from Abbott
…
NHSGGC engaged legal counsel via the CLO Litigation Team, appointing a KC to act for us on this specific issue and meetings followed to examine our prospects

> regarding this challenge. During this period the local team identified a few issues where prior knowledge had been used during the scoring process. Prior knowledge cannot be used in scoring a bid submission as it leads to unequal treatment of bidders in the process. Evaluators must score objectively only on the basis of the bidder submission and with reference to the specification of requirements set out within the Invitation to Tender.
>
> In parallel to this, Abbott had filed a motion to the court seeking recovery of a large number of documents relating to the tender process. Our legal advisors reviewed this specification and advised that some documents were commercially sensitive and should be opposed and that some would have to be disclosed. The additional concern of this would be that sharing of these documents may influence a future tender scenario which was recognised as being a potential outcome.
> …
> Taking detailed consideration of the facts, strong legal advice from CLO and Kings Counsel together with the current contractual position and the need to ensure that service provision was not compromised it was decided that a failed procurement would require to be concluded and that an extension with the existing supplier would be required, which can be actioned within current procurement frameworks.
> …
> 5. Next Steps
> As can be seen from the dates above, the position remains live and NHSGGC are currently working with CLO and KC to respond to the current action and provide a response to the court summons.
>
> In the interim period NHSGGC will require to progress an interim arrangement regarding the continuation of the current contract and this will be developed in the coming week. We are strongly advised that this can be legally actioned under procurement regulations, albeit it may result in a further action notice from Roche given correspondence to date.
> …."

In these circumstances, the pursuer submitted that the first defender had acted in a way which was inconsistent with the maintenance of confidentiality over that advice (*Scottish Lion Insurance Co Ltd* v *Goodrich Corp* 2011 SC 534 at paragraph 46). Accordingly, the pursuer submitted that the first defender ought to be deemed to have waived privilege over the advice.

***The first defender's submissions***

[14] Senior counsel for the first defender agreed that the correct approach to the issue of waiver was as set out by Lord Reed in giving the opinion of the court in *Scottish Lion*. He emphasised that the intention of the person entitled to assert privilege was immaterial, the question was to be approached objectively.

[15] As to the two documents upon which the pursuer founded, senior counsel submitted that these merely indicated that the first defender had taken legal advice. That was hardly surprising in the circumstances and of little import. Decisions taken in relation to procurement in the context of the Public Contracts (Scotland) Regulations 2015 inevitably involved a detailed consideration of the law. The fact that legal advice had been taken did not, in itself, amount to a waiver of the content of that advice: *Bullough* v *Royal Bank of Scotland* 2019 SLT 524 at paragraph 24. The passages relied upon by the pursuer set out, at best, conclusions, rather than the advice which vouches those conclusions.

[16] The first defender had not provided partial or unfair disclosure; it had not, in any meaningful sense, disclosed what the legal advice was: *Paragon Finance* v *Freshfields* [1999] 1 WLR 1183 at 1188. The documents had been produced by the first defender as they demonstrated the reasons for the decisions made by the first defender. Had the documents been expressed in such a way as to suggest that the first defender itself was concerned about, among other things, prospects of success, there could be no suggestion at all of waiver. The ordinary reader would not read those documents and conclude that their disclosure was inconsistent with maintenance of privilege in relation to the detailed legal advice provided by solicitors or counsel. It was submitted that no attempt has been made by the first defender to obtain any forensic advantage by unfairly selectively deploying legal advice. The first defender did not found on the existence of legal advice in its pleadings.

Accordingly, the court ought not to require disclosure of any aspect of the legal advice which was tendered to the first defender.

[17] As a fallback position, senior counsel submitted that, in the event that the court considered that the first defender had waived any legal advice privilege, any such waiver had been limited. It was restricted to the advice relied upon by the first defender at the two meetings for which the papers had been prepared. It was well recognised that privilege might be waived for a limited purpose without being waived generally (*Scottish Lion* at paragraph 47).

***Decision***

*The law*

[18] The parties were not in dispute in relation to the correct approach to be adopted in relation to determining whether legal professional privilege has been waived. Both parties relied on the summary of the law set out by Lord Reed in giving the opinion of the court in *Scottish Lion* (at paragraphs 44 to 48). In this regard, I note also that Lord Doherty helpfully drew together the relevant authorities in *Bullough* (at paragraph 17).

[19] On this basis, I consider that the following points are of significance for present purposes. First, there is no question of there having been an express waiver by the first defender. Accordingly, the question is whether a waiver is to be inferred from the circumstances. In this case, those circumstances are restricted to the disclosure by the first defender of the two papers founded upon by the pursuer (see [12] and [13] above). Second, more particularly, the question is whether it can be inferred from the first defender's production of the two papers that it has given up its right to resist further disclosure by acting in a way which is inconsistent with its retention of that right. Third, it is clear that the

circumstances must be assessed objectively: the first defender's subjective intention is irrelevant.

[20] Fourth, where, as in the present circumstances, the issue of waiver arises in the context of information being disclosed, in part, in the course of litigation, considerations of fairness may bear on whether a party's conduct has been inconsistent with the maintenance of confidentiality. That is because "While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result." (*Paragon* at 1188 per Lord Bingham of Cornhill CJ).

*Application*

[21] Against that background, the crucial question in the present case is whether the first defender's disclosure to the pursuer of the two papers founded upon is inconsistent with the first defender's assertion of privilege.

[22] In order to answer that question, it is first necessary to consider whether the two papers in fact contain legal advice to the first defender which could have been the subject of privilege. Senior counsel on behalf of the first defender resisted this. He argued that the content of the papers disclosed little more than that the first defender had taken legal advice or, at best for the pursuer, the conclusions drawn from that advice.

[23] Looking at the two papers in detail, I do not consider that the first defender's position is tenable. It is undeniable that they contain the detail of aspects of the advice tendered to the first defender. In this regard, I do not consider that it matters that the documents bear to have been prepared by the first defender itself rather than its legal advisers (*Dundee University* v *Chakraborty* 2023 SC 297 at paragraph 19.) The first paper, in

particular, discloses details of the legal advice which the first defender received in respect of the developing dispute with the second defender arising out of the procurement exercise. The paper sets out how that advice apparently altered as further issues with the procurement process were uncovered. Separately, the first paper sets out the advice which the first defender received that:

> "the only viable mechanism open to us is Regulation 72 of the Public Contracts (Scotland) Regulations which allows for modifications of contracts during their term in particular circumstances as long as the modification represents no more than 50% of the original contract value (with indexation applied)".

[24] The second paper also discloses that the first defender has been "strongly advised" that an interim arrangement regarding the second defender's current contract can be "legally actioned" under the procurement regulations.

[25] Accordingly, looking objectively at the content of the two papers, their disclosure is not consistent with the retention of the first defender's right to resist the production of material on the grounds of legal professional privilege. In other words, by disclosing the two papers to the pursuer, the first defender must be taken to have waived its right to resist the use of those papers on the grounds that they contain legal advice. In fairness to the first defender, it has never sought to resist the use of the two papers on this basis. As I have noted above, the first defender's position was, rather, that the papers did not contain legal advice.

[26] The next stage in the analysis is to consider the extent of the first defender's waiver. As Lord Reed made clear in *Scottish Lion,* waiver of privilege requires to be distinguished from loss of privilege (at paragraph 46). For present purposes, the particular question is whether the consequence of the first defender's actions in waiving privilege in relation to the

two papers founded upon by the pursuer is that the first defender has given up its right to resist disclosure of further documentation detailing the legal advice it received.

[27] Determining the extent of the first defender's waiver gives rise to considerations of fairness as it is necessary for the court to ensure that privilege is not waived in a partial way which would risk unfairness or misunderstanding (*Scottish Lion* at paragraph 48).

[28] On behalf of the first defender, it was submitted that the two papers were produced in order to set out the reasoning which underlay the decisions which the first defender had taken. It was stressed that the first defender was not seeking to obtain any forensic advantage in so doing by "cherry picking" the legal advice which was deployed. The first defender made no averments as to the legal advice which it had received and was not seeking to put it in issue.

[29] In all the circumstances, I am quite satisfied that the first defender must be taken to have waived its right to resist the disclosure of documentation disclosing the legal advice which it set out in those two papers. I do not consider that the first defender has established any basis for restricting its waiver to any greater extent.

[30] First, I do not consider that the first defender's subjective intention in disclosing the two papers to the pursuer is of particular relevance. As Lord Reed made clear in *Scottish Lion* (at paragraph 47), the court requires to approach the question of waiver objectively. Furthermore, it is also clear from the authorities that the court must have regard to the overarching fairness of the proceedings. The matter was, in my view, well encapsulated by Mr Justice Mustill (as he then was) in *Nea Karteria Maritime Co Ltd* v *Atlantic & Great Lakes Steamship Corp (No 2)* [1981] Com LR 138, 139:

> "…where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the

> whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

[31] Second, although it is true that the first defender has not directly put the content of the legal advice it received in issue in the pleadings, the nature of the legal advice it received has a bearing on matters which the first defender seeks to prove. The first defender avers that its decision to abandon the procurement process was one which a reasonable contracting authority could reach (Answer 40). Further, in Answer 52, the first defender avers that it had no other "realistic option" but to extend its existing contract with the second defender. In both cases, the first defender seeks to justify the decisions which it has taken in the course of the procurement process. That is, of course, precisely the intention of both of the papers founded upon by the pursuer and, in that context, both of the papers rely upon the legal advice which the first defender received.

[32] Accordingly, for these reasons, I conclude that the first defender must be taken to have waived its right to resist the disclosure of the legal advice the details of which are set out in the two papers founded upon by the pursuer. In particular, I consider that the first defender has waived its right in respect of (i) the advice it received in relation to the defence of the proceedings raised by the second defender on 17 May 2023 including the merits of its position; (ii) the advice it received in relation to its options following the abandonment of the procurement process; and, (iii) the advice it received in respect of the compatibility of the extension of the second defender's contract with procurement law.

[33] In light of my finding in respect of waiver, I am minded to remit matters back to the commissioner to review all the documentation which he has concluded is covered by the first defender's assertion of legal professional privilege and to exclude all documentation which is subject to the first defender's waiver. However, as I was not addressed by either

the pursuer or the first defender as to how this eventuality might be approached, I will put the case out by order so that I can be addressed on it.

**"Without prejudice" privilege**

***The pursuer's submissions***

[34] The pursuer's principal position was that Scots law did not recognise "without prejudice" as a bar to the production of documents in response to a specification of documents. Senior counsel submitted that consideration of the authorities made clear that Scottish courts had treated statements made between parties in the context of negotiation to achieve a compromise as being of limited probative value. Senior counsel highlighted that it was clear from early authorities that the approach to the recovery of documents in Scotland differed from that followed in England and Wales. In this regard, he referred to the opinion of Lord Justice Clerk Hope in *McCowan* v *Wright* (1852) 15D 229 at 231 to 232 in which his Lordship highlighted these differences. Senior counsel also referred to Lord Hunter's observations on what his Lordship perceived was a greater emphasis in Scotland on the importance of the public interest in the administration of justice when dealing with questions of document recovery in *Sante Fe International Corporation* v *Napier Shipping SA* 1985 SLT 430 at 432.

[35] Senior counsel relied upon the decision of the Inner House in *Millar* v *Small* (1856) 19D 142. That case concerned two actions which involved the same parties. The defender, Mr Small, alleged that the other litigation had been settled by collusive arrangement and these allegations were the basis of his defence. The court had not determined the relevancy of his averments but had concluded that they were a fit subject for inquiry. Mr Small sought to recover documents relating to that alleged arrangement from one of the parties to the

allegedly collusive settlement and the haver was convened to the case. The haver objected to producing the documents essentially on the grounds that they were privileged in that they involved private discussions in relation to, among other things, the action which had been settled. The Inner House held that Mr Small was entitled to recover excerpts from the documentation insofar as these related to the alleged collusive arrangements. Senior counsel submitted that this case was directly analogous to the present case and it had not been doubted or questioned in any subsequent case.

[36] Senior counsel noted that in England and Wales, there is clear recognition of a "without prejudice" rule governing the admissibility of evidence founded upon the public policy of encouraging litigants to settle their differences rather than litigate (see *Rush & Tompkins* v *Greater London Council* [1989] 1 AC 1280 (HL(E)) per Lord Griffiths at 1299). Furthermore, it is apparent that this rule extends to preventing the production of documents which are covered by this rule (*Rush & Tompkins* per Lord Griffiths at 1305).

[37] Senior counsel contrasted this with the position in Scotland. In *Daks Simpson Group* v *Kuiper* 1994 SLT 689, Lord Sutherland granted summary decree on the basis of an admission which had been made in a letter which concluded with the words "without prejudice". His Lordship set out his understanding of the legal position as follows:

> "… The general principle underlying the rule is that if offers, suggestions, concessions or whatever are made for the purposes of negotiating a settlement, these cannot be converted into admissions of fact. I do not read Oliver LJ's statement [in *Cutts* v *Head* [1984] Ch 290] as saying anything beyond that. The observations in Bell [v *Lothiansure* 1990 SLT 58] were made in the context of the averment being that solicitors for the insurers offered to settle the pursuers' claims and all other claims arising from the same cause for the sum of £250,000, but the letter proceeded on the narrative that the claims were against the first defenders and did not concern the insurers and expressing the view that any loss was not covered under the policies but nevertheless the insurers were prepared to make an ex gratia offer. Quite plainly, in my view, that could not be converted into some form of admission. "Without prejudice" in my view means, without prejudice to the whole rights and pleas of the person making the statement. If, however, someone makes a clear and unequivocal

> admission or statement of fact, it is difficult to see what rights or pleas could be attached to such a statement or admission other perhaps than to deny the truth of the admission which was made. I see no objection in principle to a clear admission being used in subsequent proceedings, even though the communication in which it appears is stated to be without prejudice. I would adopt what is said by Lord Wylie in Watson-Towers [v *McPhail* 1986 SLT 617] and the Canadian view expressed in *Kirschbaum* [v *"Our Voices" Publishing* [1971] 1 OR 737]." (at 692 B-D)

Lord Sutherland's articulation of the principles in *Daks* was approved by the Inner House in *Richardson* v *Quercus* 1999 SC 278 (at 283 to 284 per Lord Prosser) albeit that it was recognised that each case required to be judged on its own facts.

[38] Senior counsel emphasised that this distinctly Scottish approach was recognised in the English case heard before the House of Lords of *Bradford & Bingley* v *Rashid* [2006] 1 WLR 2066. Lord Hoffman had recognised that the Scottish approach, in contrast with the position in England, involved, as his Lordship put it, confining the without prejudice rule to admissions which could be construed as having been made hypothetically rather than without qualification. Lord Hoffman was not attracted by this approach which he did not consider was consistent with modern English authority (at paragraph 13). Lord Hope also recognised this difference in approach in his analysis of the Scottish case law (at paragraphs 25 to 30), as did Lord Brown and Lord Mance (at paragraphs 65 and 89 to 90 respectively). Senior counsel also drew my attention to Lord Rodger's observation, again in an English appeal, that the approach of the Scottish courts was inconsistent with the approach adopted in *Rush & Tompkins* (*Ofulue* v *Bossert* [2009] 1 AC 990 at paragraphs 38 and 39).

[39] Senior counsel submitted that, for present purposes, the important difference in approach in Scotland was, first, that the questions arising from "without prejudice" communications were dealt with at the stage of considering the admissibility of the evidence rather than at the stage of considering the recoverability of documents. Secondly,

determining admissibility involved consideration of those documents in the context of the surrounding circumstances (*Richardson* at 283 to 284 per Lord Prosser).

[40] On that basis, the question for the court was when to determine the question of admissibility of the evidence contained in the documents in respect of which the defenders were asserting the "without prejudice" privilege. Senior counsel submitted that determining this question after the pursuer had had an opportunity to consider the documents concerned was the preferable course.

[41] Senior counsel also advanced two alternative arguments which proceeded on the basis that the pursuer's principal submission was wrong and that "without prejudice" privilege, as developed in the English case law, also existed in Scots law. On this premise, the pursuer first submitted that without prejudice privilege did not extend to the agreement which resulted from the privileged negotiations (*BGC Brokers LP & Ors* v *Tradition (UK) Limited & Ors* [2019] EWCA Civ 1937 per Arnold LJ at paragraphs 14 to 18). The pursuer submitted that on this basis the agreement concluded between the defenders regarding the extension of the second defender's contract ought not to be covered by any privilege.

[42] The second alternative argument advanced by the pursuer was based on a further recognised exception to the English rule of without prejudice privilege namely "unambiguous impropriety". This exception had been recognised by Lord Justice Robert Walker in *Unilever plc* v *The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444. In distilling the case law in that case, his Lordship had identified an exception to the without prejudice rule where the exclusion of the evidence as to negotiations would "act as a cloak for perjury, blackmail or other "unambiguous impropriety". Senior counsel submitted that insofar as the defenders were able to rely on this privilege, the court should consider the possible applicability of this exception.

[43] In this regard, for completeness, senior counsel drew my attention to the Sheriff Court decision of *Lujo Properties Limited* v *Gruve Limited* 2023 SCLR 373. For present purposes, this case did not involve the recovery of documents but concerned whether particular communications were admissible. The learned Sheriff appeared to have been persuaded that the English rule of "without prejudice" privilege essentially applied in Scotland albeit it did not appear that the point had been fully argued before him (at paragraph 85). In any event, the pursuer's position was that, insofar as the rule did exist in that form, *Lujo* represented a recognition in Scotland that the "unambiguous impropriety" rule did apply (at paragraph 83).

***The defenders' submissions***

[44] Senior counsel for both of the defenders submitted that "without prejudice" privilege existed in Scots law and ought to be applied in the present case.

*The first defender's submissions*

[45] On behalf of the first defender, senior counsel submitted that the "general rule" that nothing written or said "without prejudice" in such circumstances should be looked at unless with the consent of both parties (which apparently originated from the English case of *Walker* v *Wilsher* (1889) 23 QBD 335) had been recognised by Lord McCluskey in *Bell* v *Lothiansure Limited* 1990 SLT 58. The first defender recognised that there had been comparatively little discussion of this principle in Scottish case law.

[46] However, senior counsel's position was that it was difficult to see any significant difference, as a matter of principle, which would justify a different outcome north and south of the border. The guiding principle which had been recognised in the English cases was:

> "that parties should be encouraged so far as possible to resolve their dispute without resort to litigation, and that they 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: *Cutts v Head* [1984] Ch 290, 306 per Oliver LJ." (*Bradford & Bingley* at paragraph 24 per Lord Hope)

The House of Lords had also recognised that without prejudice privilege could be asserted against a third party by other parties who had, between themselves, settled a dispute (*Rush & Tompkins*).

[47] Senior counsel accepted that, notwithstanding without prejudice privilege, unequivocal admissions made in that context might be admissible. Accordingly, the first defender submitted that the court should consider all the documentation in respect of which without prejudice privilege was asserted and then identify any admissible admissions. It was stressed on behalf of the first defender that the individual documents ought not to be considered in isolation.

*The second defender's submissions*

[48] Senior counsel for the second defender also submitted that the court should approach the question of without prejudice privilege by examining the documents to identify any unequivocal admissions.

[49] The second defender's position was essentially entirely in accord with that of the first defender. In support of the first defender's arguments in respect of the policy underlying without prejudice privilege, senior counsel submitted that it was important to appreciate that this policy was reflected in practice. Parties reasonably did not expect the content of their negotiations to be opened up to inspection by the court and the wider world. Were this to happen, it would have an enormously chilling effect. It could hardly be suggested that the English courts had gone off on a frolic of their own. There was no difference between

the jurisdictions in recognising that there was a legitimate policy interest in protecting communications made during the course of negotiation. Insofar as there was a difference it arose at the margin and related to how that interest was to be protected.

[50] Senior counsel submitted further that the absence of Scottish case law arose from the universal practice of parties relying on the without prejudice formulation He also suggested that nineteenth century case law which pre-dated that practice had to be treated with caution.

***Decision***

[51] The defenders seek to resist production of documents in response to the pursuer's two specifications which were granted on 22 August 2023 and 7 September 2023 respectively. The basis of this resistance is that the documents are said to be covered by "without prejudice" privilege . In other words, that the documents were communications made between the defenders as parties to a dispute in an attempt to settle that dispute.

[52] The defenders develop their position on the basis of a series of English cases of the highest authority: *Rush & Tompkins* v *Greater London Council*; *Bradford & Bingley* v *Rashid*; *Ofulue* v *Bossert* (all referred to above); and *Oceanbulk Shipping & Trading* v *TMT Asia* [2011] 1 AC 662. Although I understand that the approach taken by the courts in England and Wales to without prejudice negotiations has undergone significant development over the years, the general position is as stated by Lord Griffiths in *Rush & Tompkins* (at 1299D to 1300B):

> "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 LJ in *Cutts* v *Head* [1984] Ch 290, 306… The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing

> from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice.' I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."

For present purposes, Lord Griffiths' speech in *Rush & Tompkins* is important in two other respects. First, Lord Griffiths held that the general public policy that applied to protect genuine negotiations from being admissible evidence should be extended to protect those negotiations from being discoverable (1305 C-E). Second, his Lordship concluded that the without prejudice rule was not limited to two party situations: the without prejudice rule applied also to protect negotiations between two parties from other parties involved in the same litigation (1305A-C). On this basis, the defenders argued that their negotiations ought to be protected from recovery by the pursuer in the present proceedings.

[53] However, the fundamental problem for the defenders' argument is that it is apparent that the courts in Scotland have not adopted the without prejudice rule as it is understood in England and Wales.

[54] In Scotland the starting point for the treatment of statements made in the course of negotiations is a recognition that offers, suggestions and concessions or other statements made for the purpose of negotiating a settlement cannot be converted into admissions of fact (see *Daks* at 692B-C). This appears to have been long settled in 1887 when William Dickson published his *Treatise on the Law of Evidence in Scotland* (at §305). However, it is also clear from Lord Sutherland's opinion in *Daks* that that principle does not apply to a clear and

unequivocal admission or statement of fact whether or not such a statement was said to be "without prejudice" (*Daks* at 692C-D). Lord Sutherland's statement of the law was expressly approved by the Inner House in *Richardson* (283 D-E per Lord Prosser; 289 I per Lord Abernethy; and 290 F-G per Lord Johnston).

[55] In *Bradford & Bingley*, an English appeal heard before the House of Lords, Lord Hope summarised the Scottish position as follows:

> "The cases that have been decided on this issue in Scotland indicate that the judges there have adopted the same guiding principle as that described by Oliver LJ in *Cutts v Head* [1984] Ch 290 , 306. But they take a more pragmatic approach to the question how it is to be applied in practice. They are more willing to find that admissions in a document which contains an offer to compromise are to be treated as admissible. Offers, suggestions or concessions made in the course of negotiations are, of course, given the benefit of the privilege. But they are distinguished from clear admissions or statements of fact which, although contained in the same communication, did not form part of the offer to compromise. On such admissions or statements, if they can be clearly identified as such, the other party is entitled to rely. Another important difference in the practice which is adopted in Scotland is that professional advisers who wish to take advantage of the without prejudice rule are expected to say so expressly, and invariably do so. Authority is lacking on the question whether the rule can be invoked where the letter in question omits these words." (at paragraph 25)

[56] As was recognised by Lord Hoffman in *Bradford & Bingley* (at paragraph 13), it appears as though the courts in Scotland have struck a different balance between the two competing public interests of promoting settlement, on the one hand, and the open administration of justice, on the other. However, it would appear that this difference of approach is not a recent development in our law. As senior counsel for the pursuer pointed out during his submissions, in 1852 Lord Justice Clerk Hope observed in *McCowan* v *Wright:*

> "But in considering these and other cases in the English books, even on points which appear free from technicality, there is always fertile source of error from not attending to points in the Scotch law clearly fixed, and which often affect the extent or the manner in which principles, perhaps common to both laws, are to be administered and applied by us. For instance, in the sort of sweeping attempt to call upon us to make a general and unreasoning surrender to English cases, pressed upon us in a way which I am sure no Judge in the House of Lords would sanction, it was

> entirely overlooked, that the right in Scotland to recover documents either from his opponent or from a third party, if the third party has no separate interest, is much broader than – I would almost say totally different from – any corresponding remedy in the law of England, as any one who looks into a recent learned treatise on the Right of Recovery in the English law, will at once perceive." (at page 232)

In this regard, it is also interesting to note that the need to approach questions of privilege in accordance with Scottish authority as opposed to by reference to the English legal position was emphasised relatively recently by the Inner House, in the context of legal professional privilege, in *Narden Services Limited* v *Inverness Retail and Business Park Limited* 2008 SC 335 at paragraph 11).

[57] An illustration of the more pragmatic approach described by Lord Hope in *Bradford & Bingley* can be seen in *Richardson.* Importantly, for present purposes, the Inner House emphasised the need to consider the content of any document, including any with the "without prejudice" docquet, which was said not to be admissible in the context of all the surrounding circumstances (284 B-C per Lord Prosser; 290E-F per Lord Johnston). The need for such a consideration of the documents and their circumstances in order to resolve the underlying issue of admissibility strongly points away from the assertion of documentation being "without prejudice" providing a basis to resist its production in response to a specification of documents. It is more suggestive of this assertion providing a potential basis for objecting to admissibility of the statements contained therein and being determined at that stage.

[58] Were it to be otherwise, the court would, at least in theory, be put in the highly unsatisfactory position of requiring to determine the issue of admissibility of evidence in question without being able to hear relevant evidence as to the surrounding circumstances and without the benefit of informed submissions from both sides. I do not consider that to proceed in this way would be consistent with the pragmatic approach adopted in *Richardson*.

The alternative would be to hear any evidence, the admissibility of which was challenged, under reservation of all questions of competency and relevancy. Hearing evidence under reservation is a well-recognised procedural mechanism for enabling the court to resolve issues of admissibility arising from an assertion of privilege in the case of oral evidence (see Walker and Walker, *The Law of Evidence in Scotland*, Fifth Edition, 2020 at paragraph 10.1.1 and *MacNeill* v *MacNeill* 1929 SLT 251 (OH)).

[59] In these circumstances, I do not find it surprising that senior counsel for the defenders were unable to provide any Scottish authority for the proposition that "without prejudice" privilege provided a means for resisting the production of documentation in response to a specification of documents. For what it is worth, the only case cited to me in which the question appears to have been at issue, *Millar* v *Small*, pointed in the other direction. In that case, documents relating to the settlement of an action between two parties were held to be recoverable at the instance of a third. Albeit I accept that *Millar* is of limited assistance in that the opinions are brief and appear to have been influenced by the particular circumstances of that case, equally, it is also true, as was pointed out by senior counsel for the pursuer, that the case has never been doubted.

[60] The approach of the Scottish courts to the treatment of statements made in the course of negotiations can be contrasted with the treatment of claims of legal professional privilege (see *Dundee University* v *Chakraborty* at paragraph 16). Legal professional privilege has been described as an "absolute" right (*Narden* at paragraph 11). Accordingly, when dealing with legal professional privilege, the Inner House in *Narden* has given guidance that the procedure to be followed ought to involve a judge and, if necessary, a commissioner considering the documents without allowing the party contesting confidentiality to see the documents in advance of a decision (at paragraph 13). I consider that this difference in

approach flows from the different policy considerations arising in the context of legal professional privilege.

[61] Against this background, I have considered the documentation in respect of which the defenders seek to resist recovery on the grounds that they were covered by "without prejudice" privilege. In light of my consideration, I am quite satisfied that it would be wholly inappropriate for me to seek to determine at this stage either the extent to which the documents can properly be said to be covered by "without prejudice" privilege; or, in the event that that privilege does apply, to consider how the restriction to this privilege, as articulated by Lord Sutherland in *Daks,* in respect of clear and unequivocal admissions of fact, falls to be applied.

[62] Instead, I consider that these two questions ought properly to be resolved in the context of all the surrounding circumstances once any evidence deriving from these documents has been heard, under reservation. That exercise will be facilitated in the present case by the use of witness statements in lieu of evidence in chief. As such, parties will require to give notice in advance of any reliance on evidence the admissibility of which is disputed and the issue can then be effectively case managed.

[63] For completeness, I add that I was not persuaded by the arguments of senior counsel for the second defender that proceeding in the way I have identified would have "an enormously chilling effect" on the conduct of negotiations more generally. This is essentially for two reasons. First, it has been clear for the last 25 years since *Richardson* that clear and unequivocal admissions or statement of facts made in the context of negotiations are admissible evidence even made in expressly "without prejudice" correspondence. So far as I am aware, there has been no suggestion that the pragmatic approach of the Scottish courts for the last quarter of a century to this issue has had the profound effect on practice

contended for by senior counsel. Certainly, nothing of this kind was presented to me in argument.

[64] Second, I consider that this aspect of the second defender's argument overlooks the fact that in the present case the issue of "without prejudice" privilege does not arise solely as between the two parties to the negotiation. Rather it arises in the relatively unusual situation whereby both parties to the negotiations (the defenders) seek to prevent recovery by a third party (the pursuer). It is the involvement of a third party, who is unaware of the content of the negotiations, which gives rise to the particular procedural complexities in the present case.

**Disposal**

[65] I will put the case out by order in order that I may be addressed by the parties on further procedure in light of my findings in respect of the two issues about which I heard submissions.