Neutral Citation Number: [2024] EWHC 940 (Ch)

Case No: PT-2023-CDF-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the Estate of Cyril Churchill deceased

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 26 April 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

NICOLA PAULINE WEST	**Claimant**
- and -	
(1) WENDY ELIZABETH CHURCHILL	
(2) JEMMA SALTER	**Defendants**

- -
- -

Thomas Cockburn (instructed by **Edward Harris Solicitors**) for the **Claimant**
John Dickinson (instructed by **Setfords Solicitors**) for the **First Defendant**

Hearing date: 11 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. This is my judgment upon the claimant's application dated 28 December 2023 for an order striking out parts of the first defendant's defence and counterclaim on the grounds that they are an abuse of process because they rely on without prejudice communications. If that primary relief is granted, the claimant seeks consequential orders in respect of other parts of the defence and counterclaim and passages in the first defendant's witness statement. There is an alternative application for summary judgment on those parts of the defence and counterclaim that rely on the without prejudice communications.

2. The proceedings were commenced by the issue of a Part 8 claim form on 28 April 2023 but have since been transferred to the Part 7 procedure. They arise in connection with the estate of Mr Cyril Churchill ("the deceased"), who died intestate on 25 April 2002. The first defendant is the deceased's widow. The claimant is one of several children of the deceased and the first defendant. The second defendant is a granddaughter of the deceased and the first defendant and is a niece of the claimant. The claimant and the first defendant are the joint administrators of the estate of the deceased pursuant to a grant of letters of administration dated 2 August 2002.

3. The main asset of the deceased's estate was various parcels of farmland in and around Graig Ddu Farm, Dinas, Rhondda Cynon Taff. Legal title to most of that farmland remains in the estate. By her claim form, the claimant alleges that she and the first defendant and another of the deceased's daughters, Deborah Rose Churchill ("Debbie"), have carried on the farming business there in partnership together. The first defendant denies this; she says that the farm and the farming business are beneficially hers alone and that the claimant and Debbie have merely been her agents. The first defendant's case is that in the course of negotiations aimed at settling a claim she, the first defendant, had brought under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"), the claimant, acting on behalf of herself and all her siblings, made a number of representations to the effect that the farm was or would be the sole beneficial property of the first defendant, and that she, the first defendant, relied on those representations to her detriment by not pursuing her claim under the 1975 Act, so that it would be unconscionable for the claimant to deny, and she is estopped from denying, that the farm is held by the estate on trust for the first defendant. The first defendant counterclaims for a declaration that the farm and other assets of the estate are held on trust for her.

4. The claimant's principal contention on this application is that the first defendant cannot advance a case that relies on the alleged representations because they do not fall within any exception to the rule that without prejudice communications are inadmissible in evidence ("the without prejudice rule"). The first defendant contends, to the contrary, that the alleged representations fall within the exception that admits without prejudice communications for the purpose of establishing an estoppel.

5. I shall set out, briefly, the relevant procedural law and, at greater length, the law relating to the without prejudice rule. Then I shall say something more about the facts

and the evidence and set the defence and counterclaim in context. Finally, I shall address the issues that arise for determination.

CPR Part 3, Part 24 and Part 32

6. CPR rule 3.4 provides in part:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"

7. The typical case within r. 3.4(2)(a) is where the facts set out in the statement of case, even if true, do not disclose any legally recognisable claim against the defendant or (as the case may be) defence against the claimant. As for r. 3.4(2)(b), one instance of a statement of case that is an abuse of the court's process is a statement of case that pleads facts that are within the scope of the without prejudice rule: *Unilever Plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 at 2449.

8. CPR r. 24.3 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

9. The principles applicable to applications for summary judgment under Part 24 have been set out countless times and I shall not recite them here. The classic summary by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] was approved by the Court of Appeal in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163, and I have it in mind. Summary judgment will be given against a party on a claim or issue only if the court is satisfied that her case on that claim or issue has no real, as opposed to fanciful, prospect of success; a case that is merely arguable but carries no degree of conviction will not have a real prospect of success. The court will not conduct a mini-trial or try to resolve contested issues of fact, unless it is satisfied that, having regard to the available evidence and to the nature of such further evidence as might reasonably be expected to become available for the purposes of the trial, a party's case is incoherent, self-contradictory

or simply incredible. Importantly, however, where the claim turns on a point of law that can properly be determined on the available evidence, the court is entitled to go ahead and determine it.

10. As regards the court's jurisdiction to strike out all or part of a witness statement, as Master Clark observed in *Rahman v Rahman* [2020] EWHC 2392 (Ch), at [48]-[52], there are two relevant principles: first, "if and to the extent that a statement of case is struck out, then the evidence relevant to the struck out allegations will no longer be admissible and (unless otherwise relevant to remaining parts of the statement of case) must be struck out"; second, even in the case of admissible evidence, the court has the power to control evidence pursuant to r. 32.1:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

The court's power under this rule is to be exercised in accordance with the overriding objective in r. 1.1.

The Without Prejudice Rule

11. Counsel referred me to a number of authorities on the without prejudice rule. I shall set out extensively some passages dealing with the scope and juridical basis of the rule and the exceptions to it, as they assist proper understanding of the development and scope of the rule and the basis both of the rule and of the exceptions to it. However, discussion of the matter directly in point, the "estoppel exception", begins at paragraph 20 below.

12. In *Rush & Tomkins Ltd v Greater London Council* [1989] 1 AC 1280, Lord Griffiths, with whose speech the other members of the Appellate Committee agreed, explained the without prejudice rule as follows:

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v Head* [1984] Ch. 290, 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 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'
>
> 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."

13. The basis and scope of the without prejudice rule were considered at length by Hoffmann LJ (with whom Leggatt and Swinton Thomas LJJ agreed) in *Muller v Linsley & Mortimer* [1996] PNLR 74, where in passages at 77 and 79-80 he said this:

> "Some of the decisions on the without prejudice rule show a fairly mechanistic approach, but the recent cases, most notably the decisions of this court in *Cutts v Head* [1984] Ch. 290, and the House of Lords in *Rush & Tompkins Ltd. v Greater London Council* [1989] A.C. 1280, are firmly based upon an analysis of the rule's underlying rationale. *Cutts v Head* shows that the rule has two justifications. Firstly, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others, only one or the other. So, in *Cutts v Head* the rule that one could not rely upon a

without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements … It followed that the only basis for excluding reference to a without prejudice offer on costs was an implied agreement based on general usage and understanding that the party making the offer would not do so. Such an implication could be excluded by a contrary statement as in a *Calderbank* offer."

""If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e., independently of the truth of the facts alleged to have been admitted. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made: see *In re Daintrey* [1893] 2 Q.B. 116. Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting litigation. Here again, the relevance lies in the fact that the communications took place and not the truth of their contents. Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy. This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox L.J. pointed out in *Cutts v Head* [1984] Ch. 290, 316, it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions."

14. In *Unilever Plc v The Proctor & Gamble Co,* Robert Walker LJ, with whose judgment Simon Brown LJ and Wilson J agreed, considered these passages and at 2443 suggested the working assumption that the without prejudice rule, if not sacred, "has a wide and compelling effect." By way of conclusion, at 2448-2449 he said:

> "… I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head, Rush & Tompkins Ltd. v Greater London Council* and *Muller v Linsley & Mortimer*. Whatever difficulties there are in a complete reconciliation of those cases, 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 the *Rush & Tompkins* case [1989] A.C. 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.
>
> Lord Griffiths in the *Rush & Tompkins* case noted, at p. 1300c, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

15. Earlier in that judgment, at 2444-2445 Robert Walker LJ had identified exceptions to the without prejudice rule. It is the third exception ("the estoppel exception") that is relevant in this case, but I set out the wider passage for context, omitting some references and explanations:

> "Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> (1) As Hoffmann L.J. noted in *Muller's* case, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. …

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. …

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J. in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178, 191 and his view on that point was not disapproved by this court on appeal.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguoqs impropriety' … But this court has, in *Forster v Friedland* and *Faiil-Alizadeh v Nikbin* (unreported), 25 February 1993; Court of Appeal (Civil Division) Transcript No. 205 of 1993, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. …

(6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether· the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann L.J. treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in *Rush & Tompkins* [1989] A.C. 1280, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy … There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. …

> (8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation …"

16. The House of Lords considered the scope of the without prejudice rule and the exceptions to it in *Ofulue v Bossert* [2009] UKHL 16, [2010] 1 FLR 475. The registered owner of premises brought a possession claim against the occupier. The occupier defended the claim on the basis of his adverse possession of the premises for over 12 years. During the 12-year period, however, the occupier had acknowledged the registered owner's title in the course of negotiations to settle previous proceedings. The House of Lords held (Lord Scott of Foscote dissenting) that the acknowledgment was privileged by the without prejudice rule and was therefore inadmissible in evidence against the occupier. I restrict myself to the speech of Lord Neuberger of Abbotsbury, which commanded the agreement of the other members in the majority, who delivered concurring speeches. He referred to Lord Griffiths' speech in the *Rush & Tomkins* case and Robert Walker LJ's judgment in the *Unilever* case and at [86] observed that none of the exceptions identified by Robert Walker LJ was of direct assistance in that case. At [89] he commended the passage in Robert Walker LJ's judgment at 2448-2449, which I have set out above.

17. At [94ff] Lord Neuberger considered an argument, based on the passage set out above from Hoffmann LJ's judgment in *Muller v Linsley & Mortimer,* that the acknowledgment was outside the scope of the without prejudice rule because it was being relied on to show that an admission was made and not to show the truth of the fact admitted (that is, it was relied on as an acknowledgment of title and not as evidence of title). At [95] Lord Neuberger said:

> "95. Despite the very great respect I have for any view expressed by Lord Hoffmann, and the intellectual attraction of the distinction which he draws, I am inclined to think that it is a distinction which is too subtle to apply in practice; I consider that its application would often risk falling foul of the problem identified by Robert Walker LJ in the passage quoted above. In any event, the observation appears to be limited to the public policy reason for the rule, and says nothing about the contractual reason, which plainly applies here. Over and above this, even if the distinction is valid in principle, in any event, I do not consider that it would assist Mrs Ofulue in the present context: the distinction between an acknowledgement and an admission is not one which can be satisfactorily drawn, in my opinion, at least in the context of identifying exceptions to the without prejudice rule.
>
> …
>
> 97. I share Lord Walker of Gestingthorpe's difficulty, as expressed in *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066, at para [42], as expanded in paras [51]and [52] of his opinion in this case, in distinguishing between an admission and an acknowledgement. To invoke a statement in without prejudice negotiations as an

> acknowledgement seems to me to be as inconsistent with the protection afforded to such negotiations, and the policy behind it, as invoking such a statement as an admission of the truth of what is stated. …"

All four members of the majority considered that, although the House of Lords could recognise further exceptions to the without prejudice rule, beyond those identified by Robert Walker LJ, it ought not to do so, at least as regards the circumstances of the case before them. Lord Neuberger remarked at [98] that to do so "would severely risk hampering the freedom parties should feel when entering settlement negotiations."

18. The Supreme Court considered the rule in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662. The parties had reached a settlement agreement in respect of a dispute. When the claimant brought a claim alleging that the defendants were in breach of the settlement agreement, the defendants pleaded reliance on the without prejudice negotiations to support a particular interpretation of the relevant terms of the settlement agreement. The claimant applied for an order striking out those parts of the defence and counterclaim that relied on the without prejudice negotiations. The defendants resisted the application and applied for permission to amend their defence and counterclaim to plead that the claimant was estopped from denying the interpretation the defendants put on the settlement agreement. The Supreme Court restored the decision of the judge to refuse the claimant's application and grant the defendants' application. The six other Justices agreed with the judgment of Lord Clarke of Stone-Cum-Ebony. He referred to the earlier judgments that I have mentioned above and remarked at [22] that Robert Walker LJ had "set out the position with great clarity" in the *Unilever* case. At [25]-[26] he set out the passages from Robert Walker LJ's judgment at 2443-2444 and 2448-2449 to "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", and he continued:

> "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 v Bossert* [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."

19. Turning to the exceptions to the rule, Lord Clarke set out with evident approval Robert Walker LJ's summary of those exceptions, noting additionally at [33] that "another of the exceptions to the rule is rectification." None of the recognised exceptions applied to the case before the Supreme Court. However, the Court accepted the defendants' submission that a further "interpretation exception" should be recognised: that facts which are communicated between the parties in the course of without prejudice negotiations, and which form part of the factual matrix of the eventual settlement agreement, and which (but for the without prejudice rule) would

be admissible as an aid to the construction of the settlement agreement, should be admissible as an aid to construction notwithstanding the without prejudice rule. Lord Clarke said:

> "41. The parties entering into such negotiations would surely expect the agreement to mean the same in both cases [i.e. whether or not the without prejudice rule applied]. I would not accept the submission that to hold that the process of interpretation should be the same in both cases would be to offend against the principle underlying the without prejudice rule. The underlying principle, whether based in public policy or contract, is to encourage parties to speak frankly and thus to promote settlement. As I see it, the application in both cases of the same principle, namely to admit evidence of objective facts, albeit based on what was said in the course of negotiations, is likely to engender settlement and not the reverse. I would accept the submission made on behalf of TMT that, if a party to negotiations knows that, in the event of a dispute about what a settlement contract means, objective facts which emerge during negotiations will be admitted in order to assist the court to interpret the agreement in accordance with the parties' true intentions, settlement is likely to be encouraged not discouraged. Moreover this approach is the only way in which the modern principles of construction of contracts can properly be respected.
>
> 42. Any other approach would be to introduce an unprincipled distinction between this class of case and two others which have already been accepted as exceptions to the without prejudice rule. I have already expressed the view that the rectification exception is correctly accepted because no sensible line can be drawn between admitting without prejudice communications in order to resolve the issue whether they have resulted in a concluded compromise agreement, which was the first exception identified by Robert Walker LJ in *Unilever* [2000] 1WLR 2436, 2444, and admitting them in order to resolve the issue what that agreement was. There is also no sensible basis on which a line can be drawn between the rectification case and this type of case.
>
> …
>
> 46. For these reasons I would hold that the interpretation exception should be recognised as an exception to the without prejudice rule. I would do so because I am persuaded that, in the words of Lord Walker in the *Ofulue* case [2009] AC 990, para 57, justice clearly demands it. In doing so I would however stress that I am not seeking either to underplay the importance of the without prejudice rule or to extend the exception beyond evidence which is admissible in order to explain the factual matrix or surrounding circumstances to the

> court whose responsibility it is to construe the agreement in accordance with the principles identified in the *ICS* case [1998] 1 WLR 896 and the *Chartbrook* case [2009] AC 1101. In particular nothing in this judgment is intended otherwise to encourage the admission of evidence of pre-contractual negotiations."

20. In this context, I turn relatively briefly to the third of the exceptions identified by Robert Walker LJ in the *Unilever* case, namely the "estoppel exception". The judgment referred to by him was that of Neuberger J. in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178, at 190-191, where Neuberger J said:

> "The second argument raised by the plaintiffs is that it would be wrong for the defendant to be able to hide behind the cloak of the correspondence being 'without prejudice' in circumstances where the defendant put forward suggestions or statements upon which the plaintiffs relied and reasonably relied in acting as they did. As a matter of principle, it seems to me that, even where a party can in principle rely upon correspondence being 'without prejudice' on contractual as well as public policy grounds, the court will not allow him to do so if it is satisfied that it would be unconscionable. So far as the public policy ground is concerned, it seems to me self-evident that, just as much as it is in the public interest that parties should feel completely free to negotiate under the cloak of 'without prejudice', so it is in the public interest that they should not be able to use the protection of 'without prejudice' for the purpose of 'unambiguous impropriety' (an expression to be found in two unreported decisions of the Court of Appeal, *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* both helpfully summarised in Foskett and Hodge on *The Law and Practice of Compromise* (4th ed., at 154-56)). Equally, so far as the contractual ground is concerned, a contractual right to 'without prejudice' privilege should not be upheld or enforced where it is invoked for an improper purpose. However, mere inconsistency, in the absence of dishonesty will not do—see *Independent Research Services Ltd v Catterall* [1993] I.CR. 1.
>
> By analogy with this line of authority, there is, to my mind, a powerful
>
> argument for saying that if a clear and unambiguous statement is made by one party in 'without prejudice' correspondence, and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the court. There is another reason for reaching that conclusion. In *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 W.L.R. 1378, it was held that 'without prejudice' correspondence could be

> looked at by the court to see if the negotiations therein contained resulted in a settlement. Although, of course, contract and estoppel are quite separate concepts, it appears to me logical and consistent that, if 'without prejudice' correspondence can be looked at to see if it gives rise to a contract, then such correspondence can also be looked at to see if it gives rise to an estoppel. However, I do not suggest that there is an absolute rule to that effect.
>
> The plaintiffs' case, particularly in light of the way it is put in their solicitor's affidavit, does seem to be based on estoppel. In my judgment, however, that case does not, on analysis, succeed."

The Circumstances of this Case

21. The essential facts have been summarised in the Introduction to this judgment. Here, I shall provide a little more detail on a few matters and, in that context, consider the text of the defence and counterclaim. I shall not explore the issues between the parties concerning the management and ownership of the farming business.

22. At the time of his death the deceased occupied several parcels of farmland, title to all but one of which was unregistered. One was Graig Ddu Farm itself. Another was the Farmhouse at Graig Ddu Farm. There was also a nearby freehold farm called Dinas Isaf Farm. The deceased was the registered proprietor of Dinas Isaf Farm. He also had unregistered title to 151 acres of freehold land known as Mynydd Dinas. However, it appears that he had held Graig Ddu Farm and Farmhouse and the other parcels of land under leases that had expired and that at the time of his death his continuing adverse possession of those lands (which have been referred to as "the Potential Adverse Possession land") had not extinguished the title of the true owner. According to the claimant's evidence, the calculations for inheritance tax attributed nil value to the deceased's interest in the holdings other than Dinas Isaf Farm and Mynydd Dinas. The other assets in the estate were the farming livestock and deadstock and some antiques from an antiques business that the deceased had run. The letters of administration recorded the gross value of the estate as £210,000 and the net value as £145,000.

23. The defence and counterclaim avers that the beneficial ownership of the assets in the estate at the date of the deceased's death was, by reason of section 46(1) of the Administration of Estates Act 1925, as follows:

- the personal chattels passed to the first defendant[1];
- the statutory legacy of £125,000 and simple interest thereon at 4% p.a. from 25 April 2002 onwards, free of death duties and costs, passed to the first defendant;

[1] The defence and counterclaim says "claimant" but I take this to be a slip.

- half the residue was held on trust for the first defendant during her life and thereafter on the statutory trusts under section 47 of the Administration of Estates Act 1925 for the children of the deceased and the first defendant;

- half the residue was held on the statutory trusts under section 47 of the Administration of Estates Act 1925 for the children of the deceased and the first defendant.

24. The claimant states that since the deceased's death the estate has remained in adverse possession of the Potential Adverse Possession land, and that beyond doubt good title has by now been acquired by the extinguishment of the title of those with paper title.

25. As has been mentioned, letters of administration were granted on 2 August 2002.

26. By a letter dated 13 November 2002, Mr Jeremy Davies of JA Hughes, the solicitor instructed by the first defendant, wrote on her behalf to the estate's solicitors, Edgar Cule & Evans. The letter expressed surprise, especially in light of the declared net value of the estate, that the claimant and her siblings wished to insist on the estate being dealt with according to the letter of the Non-contentious Probate Rules, and it said that the first defendant was seeking their advice regarding a potential claim against the estate under the 1975 Act.

27. By a further letter dated 19 December 2002 Mr Davies wrote to Edgar Cule & Evans to say that the first defendant had given instructions that she and the children had agreed "that she and they would enter into a deed of variation varying the intestacy rules to the effect that the entirety of the deceased's estate belong to and become [the first defendant's] absolutely." The letter sought confirmation that this was correct and stressed the need for the deed of variation to be executed within six months of the grant of letters of administration. However, by letter dated 20 December 2003 Edgar Cule & Evans replied that the children and the first defendant were continuing to discuss the matter with each other directly. The letter continued: "So far as the farm is concerned we believe that the proposal is that their mother should have the benefit of the farm for her lifetime, or as long as she wishes, but that it should be retained within the family for the future." The letter said that different arrangements had been proposed in respect of other parcels of land and different members of the family.

28. No agreement was reached, and in early 2003 the first defendant[2] commenced a claim under the 1975 Act in Pontypridd County Court. JA Hughes served the claim on the claimant under cover of a letter dated 13 May 2003. The letter said:

> "It is our understanding that matters have been agreed as between your mother and yourself and your siblings and we are serving the papers upon [you] solely to protect our client's interest.
>
> We understand that it is intended that full agreement be reached at a meeting to take place shortly. …"

[2] All references to the parties will continue to be made by their titles in the current proceedings.

A letter dated 15 May 2003 from JA Hughes to Edgar Cule & Evans said: "We understand that in fact our client and the children fully agreed all matters relating to the disposition of the estate."

29. Again, no agreement was finalised. By an order made by consent on 5 November 2003, District Judge Doel stayed the claim under the 1975 Act until 1 May 2004 "to enable the parties to attempt settlement."

30. In March 2004 all the children instructed Mr Davies of JA Hughes in relation to the deceased's estate and (as Mr Davies put it in one letter) "putting the same in order." Having received those instructions, Mr Davies wrote to the claimant to say that, although he was "more than happy to assist", he could not do so "without information."

31. Mr Davies obtained counsel's opinion and on 2 December 2004 he met the claimant to discuss the opinion. The first defendant had been asked to attend but did not do so. The attendance note of the meeting read in part:

> "I confirmed to [the claimant] that the valuation undertaken by Fairfax & Co would not stand. I indicated that it was my guess that the value of the estate would in fact be less than £150k. I indicated that if that proved to be the case it would of course be that [the first defendant] would be entitled to the entirety of the estate and there would be no claim against the same by the children. [The claimant] indicated that she understood the same. I indicated that the difficult matter related to the fact that Counsel had confirmed, as I had advised previously, that the occupation of Pencae Cottage and Graig Ddu farmhouse and its outbuildings had since the expiry by affluxtion (sic) of time of the two Leases been as trespassers only and 3 years adverse possession was not sufficient to obtain title."

In a letter dated 8 December 2004 Mr Davies advised the claimant regarding possible courses of action open to the estate, such as obtaining indemnity insurance or attempting to trace the freeholder with a view to making an offer to purchase the lands of which the estate was in adverse possession. In a further letter on 6 January 2005 Mr Davies advised the claimant and the first defendant that the valuer was attributing a nil value to those lands to which the estate had no title. He wrote: "The same reduces the value of the Estate significantly and I believe below £150,000.00."

32. On 13 May 2005 Mr Davies wrote to the district judge at Pontypridd County Court to request a further stay of the 1975 Act claim. The letter mentioned the new valuation evidence and continued:

> "As a result we have concluded that the value of the deceased's Estate is less than £150,000.00 and that our client is entitled to the entirety of the same in accordance with the non-contentious probate rules.
>
> The writer had a meeting with Mrs Churchill and her co-Administratrix, Mrs West on the 26th April 2005 when matters

> were discussed at considerable length. Mrs West indicated that she wished to have the opportunity of considering matters with her co-defendants before returning to the writer with proposals for final resolution of this matter. To date, and notwithstanding the time constraint imposed by Mr Dole's Order the writer has not heard from Mrs West. It was the intention that Mrs West should write on behalf of herself and the co-defendants with proposals for settlement. We can confirm that it was agreed that the writer would then meet with Mrs Churchill to discuss the same with a view to finalisation of matters and the presentation to the Court of a Consent Order for approval by the Court.
>
> There is no prejudice to any party in these matters by the further delay but in the circumstances the writer would seek a further stay of proceedings for a period of 3 months and would ask that an Order be made in suitable terms."

I have not seen the order for a further stay but believe that one was made.

33. On 25 July 2005 Mr Davies wrote to the claimant:

> "Following discussions with your mother and indeed your *goodself at this office it is* (sic) proposed that the proceedings issued to protect your mother's interests in the County Court under the Inheritance Provision of Family Dependants Act be compromised on the following basis;
>
> 1. The property known to the family as "the mountain land" will be sold to you and your sister Debbie at the market price to be established by Mr Alan Fairfax and
>
> 2. That part of Dinas intended by your late father to be transferred to you (as a result of your making repayment of the mortgage thereon) to be transferred to you and
>
> 3. You and your sister Debbie will purchase from the Estate at market value the stock and
>
> 4. The sale proceeds resulting from the sale of the "mountain land" and the remaining assets of your late father's Estate are to be your mother's absolutely subject only to the repayment to Debbie of the monies loaned to the Estate during in its administration.
>
> I believe, and I will await confirmation from your mother, that the above fairly reflects the proposed compromise of matters discussed at this office.
>
> I of course act for your mother and I do not act either for you or any of your siblings. It is vitally important that you and your

> siblings take your own independent legal advice from Solicitors other than a Solicitor in my firm in order that you are fully advised in relation to your rights and liabilities. I strongly urge you and your siblings to take independent legal advice prior to agreeing to the above.
>
> *I confirm that* (sic) it is the intention that if matters are agreed as indicated above that an application will be made to the County Court for a Consent Order whereby the terms of the agreement are made into an Order of the Court. The Order will be made in full and final satisfaction of all claims of your mother and indeed of you and your siblings. There will be no coming back after the Order is made. It is for that reason that I urge you and your siblings to take independent legal advice."

34. No settlement had been reached by the time the further stay of the 1975 Act proceedings expired. On 21 September 2005 Mr Davies wrote to the first defendant:

> "I have received an indication from the Pontypridd County Court that Mr District Judge Doel considers that a Hearing is necessary.
>
> He has set the date of 29th September 2005 at 10.20 a.m. at Pontypridd County Court, The Courthouse, Courthouse Street, Pontypridd, CF37 1XR. You do need to attend [t]his Hearing. I confirm that I will be present. It is the intention to advise the District Judge as to the stage that has been reached in negotiations to settle matters.
>
> I understand from my conversations with Nicola that matters have not as yet been finally agreed. I would be grateful if you would contact me to discuss the matters that are still in dispute if any."

35. By order made on 29 September 2005 the first defendant's claim under the 1975 Act was adjourned generally with liberty to restore. It was never restored.

36. On 17 March 2006 Mr Davies wrote on the first defendant's behalf to the land valuer. He said that the first defendant had informed him that the claimant and Debbie had suggested that they rent the whole of the land in the estate from the claimant, at a proposed rent of £100 per acre per month, and purchase the stock from her at valuation. The letter said that the first defendant did not consider the proposed rent to be fair; it sought the valuer's opinion on the correct rental value. In his reply dated 26 April 2006 the valuer indicated that the market rent of the land would be significantly higher than had been proposed.

37. In 2008 an assent was made of some of the land at Dinas Isaf to the claimant and her husband. A document signed by the first defendant and her other children stated:

> "We the undersigned agree for Mr & Mrs West to take ownership of woodland area & top field at Dinas Isaf providing

> the following terms and conditions are upheld.
>
> If the above areas are sold even in part for building purposes only, the first £50,000 shall go to Mr & Mrs West & the undersigned shall be entitled to 10% of the profit after any costs incurred from the sale. Decision to sell will be made solely by Mr & Mrs West. These terms shall be upheld for the first fifteen years of ownership only; commencing from the date that said land is signed over to Mr & Mrs West. If one of the undersigned dies within this period it is their responsibility to will their percentage. We hope you will find these terms satisfactory."

38. An attendance note records a meeting on 9 December 2009 between Mr Davies and the first defendant in the company of the claimant:

> "Attending Mrs Wendy Churchill at this office she was accompanied by Nicole West after a considerable discussion it was agreed the property known to the family as 'the mountain land' and Dinas Isaf Bam (sic) would be let by Mrs Churchill to Nicola and Debbie for £2000 per annum.
>
> It was further agreed that the debt due Debbie at £16,000 would be made through the farm payments and Mrs Churchill would sell the stock to Nicole and Debbie at valuation.
>
> I was instructed to instruct HRT [Herbert R Thomas LLP] to undertake a stock valuation.
>
> It was also agreed that the arrears of Mrs Churchill's caravan rental would be paid from the estate money in January once the terms up of which the monies were currently invested and matured."

A stock valuation was duly obtained. An attendance note dated 22 February 2010 recorded:

> "Attending Wendy Churchill by telephone.
>
> …
>
> She confirmed to me that she is happy to settle matters on the basis indicated in our meeting and indicated in my letters and to sell the sheep for the valuation indicated in the Valuation undertaken by HRT."

39. However, no concluded agreement was reached. The next letter in evidence was from Mr Davies to the first defendant and dated 1 August 2011, in which he sought her instructions on "a proposal for settlement of matters" made by the claimant at a meeting with the first defendant and Mr Davies. The terms of those proposals are set out in the defence and counterclaim (below) and were substantially similar to those repeated in a letter dated 13 September 2011 from Mr Davies to David & Snape,

solicitors then acting for the claimant. The letter was marked "Without Prejudice". Despite its length, I set it out in full.

> "Following numerous meetings between our respective clients and discussions between them, our client put forward proposals for settlement of matters. We confirm that we are now instructed by our client to put forward the proposals for settlement, for consideration by you with your client and agreement thereof.
>
> The proposals are as follows:
>
> 1. Our client to grant a farm business tenancy in the form prepared by Messrs Watts & Morgan to Nicola and to Debbie for a maximum term of 10 years subject to notice being served pursuant to Section 1 of the Agricultural Tenancies Act 1995 to avoid Nicola or Debbie gaining security of tenure.
>
> 2. The annual rent for the initial term is to be £2,000.00 per annum.
>
> 3. The farm business tenancy is to be in respect of both the holdings known as Graig Ddu Farm and Dinas Isaf.
>
> 4. At the end of the initial 10 year term (subject to Mrs Churchill surviving) Mrs Churchill is to grant to Nicola and to Debbie a further farm business tenancy for a further term of 10 years in terms equivalent to that to be granted referred to at 1 above subject to a new rent being agreed.
>
> 5. Nicola and Debbie be at liberty to terminate the proposed farm business tenancy in the event of the business failing in which case the outstanding balance of £16,500.00 owed to Debbie will be discharged one half thereof by Nicola and the remaining one half thereof from the sale proceeds of the property.
>
> 6. Mrs Churchill has indicated that the farm business tenancy is to commence from the date that the sheep are returned to the land.
>
> 7. The Zeta and Tipper trailer are to remain on the farm for no consideration.
>
> 8. Debbie and Nicola are to pay to Mrs Churchill £10,500 for the sheep, £1,500 for the cattle and £5,200 for the machinery other than that referred to above.
>
> 9. Debbie to be granted a formal right of way formal right of way of access to and egress from her home.

> Doubtless you will take your clients instructions in respect of the above and return to us as soon as you have done so."

40. By a letter dated 4 October 2011 and marked "Without Prejudice [and] Subject to Contract", David & Snape replied:

> "Thank you for your letter dated 13 September upon which we have now been able to take instructions.
>
> We respond to your numbered paragraphs as follows: -
>
> 1. This is agreed (but see 3 below).
>
> 2. Agreed (but see 3 below).
>
> 3. Agreed. However, it is intended that Debbie will be the tenant of Graig Ddu together with the top field which is part of Dinas Isaf. It is also intended that Nicola will be the tenant of Dinas Isaf (excluding the top field). The rent should be apportioned as to £1,000 per annum for each tenancy.
>
> 4. Our clients are naturally concerned as to what will happen so far as the farms are concerned on the death of Mrs Churchill. What comfort or security can be offered to encourage Debbie and Nicola to continue running the running farms and to enable the farms to be kept within the family?
>
> 5. It is agreed that each Tenancy Agreement should contain a break clause to be exercisable by the tenant at any time. It has been agreed between Debbie and Nicola that Nicola will pay Debbie the sum of £8,250 so that the sum of £16,500 will then be owed jointly to them by the estate.
>
> 6. We are instructed that the sheep are on the farm and that Nicola and Debbie will be purchasing the livestock from the estate as mentioned in paragraph 8 of your letter.
>
> 7. Noted.
>
> 8. Agreed. However, we are instructed that the sum of £3,000 has already been paid towards the cost of the machinery.
>
> 9. Agreed.
>
> It would seem sensible for matters to be dealt with in the following manner: -
>
> a) First of all the personal representatives should grant a formal right of way to Debbie as referred to above. In addition we understand that a property is to be transferred to Stuart together with a right of way in his favour only.

> b) The tenancies are granted to Debbie and Nicola as mentioned above and it is to be confirmed that they will each be entitled to the Single Farm Payments/Rural Farm Payments.
>
> c) An assent of the freehold (other than the land to be transferred to Stuart) should be made in favour of Mrs Wendy Churchill who should then grant a charge over the property to secure:
>
> i) the outstanding sum of £16,500 owed to Debbie and Nicola,
>
> ii) an additional sum of £20,000 to reflect the work done and expenditure incurred on the farm by Debbie and Nicola over the past ten years.
>
> d) Debbie and Nicola pay the balance of £14,200 for the livestock and the machinery to Mrs Wendy Churchill.
>
> Please note that Debbie and Nicola are anxious to resolve these matters by the end of this calendar year because of impending changes to the structure of the Single Farm Payment.
>
> We shall therefore be pleased to hear further from you as soon as possible."

41. On 22 December 2011 Mr Davies wrote to David & Snape to say that he had yet to receive the first defendant's instructions. It is not alleged or contended that any final agreement was reached.

The Defence and Counterclaim

42. The parts of the defence and counterclaim that are chiefly important for the purposes of this application are mainly set out as sub-paragraphs of paragraph 4[3]. The claimant has distinguished between two different groups of text in these sub-paragraphs: one group expressly refers to without prejudice communications, and the claimant asks that these texts be struck out as an abuse of process; the other group consists of text that is not open to that objection but that has no purpose once the text in the first group has been removed. The point of the distinction is clear enough, but I do not need to differentiate between the two groups in what follows, at least within individual paragraphs of the defence and counterclaim.

43. The first tranche of sub-paragraphs, which supports an allegation in respect of "Representation 1", takes the narrative from 13 November 2002 until 29 September 2005 and contains the following paragraphs to which the claimant objects:

---

[3] Because the sub-paragraphs are numbered in the style (1), (2), (3) etc and because there are a lot of them, this makes the document difficult to follow. For the purposes of this judgment, I shall change the style to 4.1, 4.2 etc.

> "4.6 On about 19 December 2002 following a meeting with JA Hughes Solicitors an agreement in principle was reached between the First Defendant and the Deceased's Children that the Deceased's Children would forgo any interest they had in the Deceased's Estate and enter into a deed of variation to confirm that the entirety of the Deceased's Estate passes to the First Defendant. Further negotiations between the First Defendant and the Deceased's Children followed this."
>
> "4.14 Sometime shortly before 25 July 2005 Mr Davies of JAH met with the First Defendant and the Claimant. Mr Davies advised that the First Defendant was entitled to the entirety of the Deceased's Estate and following discussions between them all it was proposed that the First Defendant's 1975 Act claim be compromised on terms that:
>
> 4.14.1 'the mountain land' Dinas Mountain be sold to the Claimant and Debbie at the market price to be established by Mr Fairfax.
>
> 4.14.2 Part of Dinas Isaf farm be transferred to the Claimant.
>
> 4.14.3 The Claimant and Debbie would purchase the stock from the Estate at market value.
>
> 4.14.4 The sale proceeds of the Dinas Mountain and the remaining assets of the Deceased's Estate would pass to the First Defendant absolutely, subject only to repayment to Debbie of monies she had loaned to the Deceased's Estate during its administration.
>
> 4.15 The '25 July 2005 agreement' in principle was to be confirmed with the First Defendant and was recorded in her solicitor's letter of 25 July 2005. The intention was that there would be an application in the 1975 Act claim for a consent order to be approved. Thereby the Claimant represented to the First Defendant that she was entitled to the entirety of the Deceased's Estate ('Representation 1')."

Sub-paragraph 4.16 states that as at 21 September 2005 the claimant's instructions to JA Hughes were that matters had not yet been finally agreed. Sub-paragraph 4.17 avers that Mr Davies of JA Hughes informed the court "that the revised valuation of the Potential Adverse Possession land meant that the entirety of the Deceased's Estate belongs to the First Defendant", and that this was the basis on which the court made the order dated 29 September 2005 adjourning the claim under the 1975 Act generally with liberty to restore. The claimant does not object to those sub-paragraphs;

however, they lose their point if the sub-paragraphs alleging Representation 1 are removed.

44. The next tranche of texts alleges two further representations:

> "4.18 On or about 17 March 2006 the Claimant and Debbie suggested to the First Defendant that the First Defendant should let the land in the Deceased's Estate to them for £100 per month and purchase the stock from her at a valuation. The First Defendant did not consider £100 per month to be a fair and appropriate rent and asked JAH to arrange for Mr Fairfax to advise on the correct rent rate per acre for the land. Thereby the Claimant and the witness, Debbie Churchill, represented to the First Defendant that they acknowledged that she was the beneficial owner of all the land in the Deceased's Estate ('Representation 2').
>
> 4.19 Both, the Claimant and the First Defendant gave instructions to J A Hughes to prepare an assent of land at Dinas Isaf from the Deceased's Estate to the Claimant, in line with paragraph 4.14.2 above of the agreed proposals at paragraph 4.14 above. That land was transferred to the Claimant and is held by her in title CWM383045. This was a further acknowledgment and representation by the Claimant to the First Defendant that the First Defendant was the beneficial owners (sic) of the entirety of the Deceased's Estate ('Representation 3')."

45. Sub-paragraphs 4.20 and 4.21 allege that the first defendant reasonably relied on Representations 1, 2 and 3 by agreeing to the transfer of part of the Dinas Isaf land to the claimant for no consideration and in not applying to lift the stay on the 1975 claim, and that the claimant is estopped from denying that the deceased's estate (including the Potential Adverse Possession land) is held on a bare trust for the first defendant. The claimant seeks an order striking out these sub-paragraphs, on the basis that they cannot ground any claim if the without prejudice communications on which they are based are not relied on.

46. The third tranche of texts relates to matters concerning the outworking of Representations 1, 2 and 3.

> "4.22 Mr Davies of JAH met with the First Defendant and the Claimant on 9 December 2009 and they had a long discussion after which it was agreed by the First Defendant and the Claimant on a subject to contract basis that Dinas Mountain and Dinas Isaf Barn would be let by the First Defendant to the Claimant and Debbie for £2,000 per annum. It was agreed that the Deceased's Estate's debt to Debbie of £16,000 would be settled through allowing her to take the sum from the

First Defendant's farm payment subsidies and that the Claimant would sell the stock to the Claimant and Debbie at a valuation. Elements of this agreement were recorded in an attendance note by Mr Davies. The Claimant's conduct in making this agreement reinforced Representations 1, 2 and 3 above.

4.23 The Claimant and Debbie retained Watts & Morgan to negotiate the terms of a lease from the First Defendant, and/or from the Deceased's Estate on behalf of the First Defendant.

…

4.25 Mr Davies of JAH met with the First Defendant and the Claimant sometime on or shortly before 1 August 2011. The Claimant put forward 'proposals for settlement of matters' on a subject to contract basis including:

4.25.1 The First Defendant was to grant the Claimant and Debbie a farm business tenancy of Graig Ddu Farm and Dinas Isaf in a form previously prepared by Watts & Morgan save that it would be for a 10 year term at an initial rent of £2,000 per year, with a notice under section 1 of the Agricultural Tenancies Act 1995 to avoid any security of tenure.

4.25.2 It was proposed that after the initial 10 year term the First Defendant would grant a further lease on similar terms and at a new rent to be agreed.

4.25.3 There were terms for the repayment of £16,500 to Debbie, asserted by her to have been paid on behalf of the Estate. …

4.25.4 Two items of machinery, being the Zeta and a tipper trailer, were to remain on the farm for no consideration.

4.25.5 The First Defendant was to be paid £10,500 for the sheep, £1,500 for the cattle and £5,200 for the machinery.

'the August 2011 Proposal'.

4.26 The August 2011 Proposal by the Claimant and Debbie was a further reinforcement of Representations 1, 2 and 3 that the First Defendant was the beneficial owner of the Deceased's Estate.

4.27 No farm business tenancy was agreed or entered into."

47. The remaining parts of the defence and counterclaim objected to by the claimant concern repetitions of the first defendant's claim to be the sole beneficial owner of the estate on the basis of the matters relied on in the paragraphs set out above. The assertion in the defence and counterclaim that the estate is held on bare trust for the first defendant is, so far as can be inferred from the document and as was confirmed by Mr Dickinson in submissions, based on a proprietary estoppel arising from reliance on the assurances and representations set out above.

Discussion

48. The passages in the defence and counterclaim that are set out above identify the following alleged representations, assurances or, perhaps, expressions of common ground:

    1) An "agreement in principle" by the claimant (at all times representing herself and her siblings) in December 2002 to forgo any interest in the deceased's estate and to enter into a deed to confirm that the entire estate was to be the first defendant's (sub-paragraph 4.6);

    2) A representation by the claimant that the first defendant was entitled to the entirety of the deceased's estate (Representation 1), which is said to be inferred from or implied by the "agreement in principle" on 25 July 2005 to compromise the first defendant's 1975 Act claim (sub-paragraphs 4.14 and 4.15);

    3) An acknowledgment and representation by the claimant in March 2006 that the first defendant was the beneficial owner of all the land in the deceased's estate (Representation 2), which is said to be implied by or inferred from the claimant's proposal to take a lease of land in the deceased's estate from the first defendant (sub-paragraph 4.18);

    4) A further acknowledgment and representation by the claimant that the first defendant was the beneficial owner of all the land in the deceased's estate (Representation 3), which is said to be implied by or inferred from the claimant giving instructions with the claimant for the assent of land from the deceased's estate to the claimant in line with one of the terms of the agreement in principle in July 2005 (sub-paragraph 4.19);

    5) The reinforcement of Representations 1, 2 and 3 on 9 December 2009, by the making of an agreement "subject to contract" for *inter alia* the leasing of land in the deceased's estate and the claimant's instruction of an agent to negotiate the terms of a lease (sub-paragraphs 4.22 and 4.23);

    6) The further reinforcement of Representations 1, 2 and 3 in August 2011, by the claimant putting forward "'proposals for settlement of matters' on a subject to contract basis" (sub-paragraph 4.25).

49. Mr Dickinson accepted that, subject to any exception that might apply, all these matters fell within the scope of the without prejudice rule. The "agreements in

principle" in December 2002 and July 2005 were with a view to setting the first defendant's claim under the 1975 Act, which had been intimated by the earlier date and was subsisting by the later date. The discussions in March 2006 were by way of a continuation of the earlier negotiations, as no concluded agreement had been reached and the proceedings under the 1975 Act had not been compromised but only stayed. The position is a little different as regards the giving of instructions for an assent: it is common ground that there was a concluded agreement that part of Dinas Isaf would be transferred to the claimant, and no privilege is asserted in respect of that agreement; however, the first defendant relies on it as being an act in pursuance of the agreement in principle in July 2005, and it is the making of this connection that engages the without prejudice rule. The "agreement 'subject to contract'" in December 2009 was by way of resumption of the previous negotiations, as was the making of proposals for settlement in August 2011.

50. It is not suggested that there was ever a concluded agreement in settlement of the claim under the 1975 Act. Mr Dickinson accepted that there was no such agreement.

51. Mr Dickinson submitted that the without prejudice communications relied on in the defence and counterclaim fell within the estoppel exception to the without prejudice rule. As he put it in his skeleton argument: "The first defendant and her children including the claimant had agreed in principle that the first defendant was entitled to the entire estate and need not pursue a claim she had brought against the estate under the Inheritance (Provision for Family and Dependants) Act 1975. It is the defendant's (sic) case that a proprietary estoppel interest arises for the first defendant to have the entire interest in the estate. Such proprietary interest or estoppel arises from representations being made as set out in the defence and counterclaim, those representations being reasonably relied upon by the first defendant in her acting to her detriment and it being unconscionable for the claimant to go back on the same."

52. For the claimant, Mr Cockburn did not accept that the estoppel exception existed. I regard that as a hopeless position. First, Neuberger J's reasoning in the passage just cited seems to me (with great respect) to be compelling. Of the estoppel exception, it may be said: "justice clearly demands it" (see the *Oceanbulk Shipping* case, *per* Lord Clarke at [91], citing the words of Lord Walker of Gestingthorpe in *Ofulue v Bossert*). Second, I do not agree with Mr Cockburn that the reasoning in the *Hodgkinson & Corby Ltd* case was obiter. Neuberger J held that there was an estoppel exception but that the matters relied on did not fall within it. That was a substantive reason for the decision. Third, whether they were obiter or not, Neuberger J's observations have been cited with approval by Robert Walker LJ in his judgment in the *Unilever* case, which in turn has been cited with approval (as regards exceptions among other matters) by the House of Lords in *Ofulue v Bossert* and by the Supreme Court in the *Oceanbulk Shipping* case. Moreover, in *Ofulue v Bossert* Lord Neuberger, with whose speech the majority expressed agreement, said at [99] that "*Hodgkinson and Corby Ltd v Wards Mobility Services Ltd* [1994] 1 WLR 1564 involved the well-established exception of estoppel, as explained in *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436, at 2444E–F." Fourth, even if it were possible to mount an argument that the estoppel exception does not exist, it would be inappropriate to purport to determine it on an application for strike-out or summary judgment.

53. However, I do not consider that the first defendant has shown a properly arguable case for reliance on without prejudice communications on the basis of a proprietary

estoppel.

54. A party seeking a remedy on the grounds of proprietary estoppel is required to establish: (i) that a sufficiently clear and unequivocal representation or promise was made or assurance given to her by another (the promisor) in relation to identified property owned, or to be owned, by the promisor; (ii) that she relied on the representation, promise or assurance and did so reasonably; and (iii) that she suffered detriment in consequence of her reliance. See, for example, *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776, at [18], [29], [56], [61]. If those three requirements are met, the court must consider what if any remedy ought to be granted. The principle that has been said to permeate the different elements of the doctrine of proprietary estoppel is that equity is concerned to prevent unconscionable conduct. For this reason, the analytical framework of the doctrine is not intended to divide the elements of proprietary estoppel into watertight compartments. The court must look at the matter in the round and take a holistic approach. See *Gillett v Holt* [2001] Ch 210 at 225c-d; *Davies v Davies* [2014] EWCA Civ 568 at [58].

55. The basic problem for the first defendant in the present case is that the "representations" or "assurances" on which she relies, even if they can be described in those terms, were positions in the course of negotiations that did not lead to a settlement. I entirely accept that in the course of unsuccessful settlement negotiations one party may make promises or give assurances that, despite the absence of a concluded agreement, can reasonably be relied on by the other party and thereby give rise to an estoppel. But the first defendant's pleaded case shows nothing of the sort. Despite Mr Dickinson's valiant efforts, the case advanced by the first defendant amounts simply to an effort to make proposals in negotiations binding even though the negotiations did not result in an agreement. Agreements "in principle", settlement proposals and the August 2011 Proposal" were just that: proposals that never advanced beyond agreements in principle to the point of a concluded agreement. Nothing more than that has been identified. The matters relied on fall squarely within the without prejudice rule and not within any exception to it.

56. Nothing relied on by the first defendant constituted a clear and unequivocal representation, promise or assurance. This follows from what has been said already. What is relied on as Representation 1 is said to be an agreement in principle that could not be put into a consent order, as had been envisaged, because settlement was not reached. Representation 2 was a suggestion that did not result in settlement. What is said to be Representation 3, the assent of land at Dinas Isaf from the estate to the claimant, simply effected what was acknowledged to be the deceased's intention (see paragraph 33 above[4]); the fact that it effected something that corresponded to a single proposal in a suite of proposals that were never agreed or put into effect cannot possibly turn it into an unequivocal representation such as is alleged. If the original proposal was privileged by the without prejudice rule, the cross-reference to the original proposal is impermissible. Further, the document signed by the claimant, her siblings and the first defendant (paragraph 37 above) is inconsistent with a construal

[4] A full explanation of the transaction is given in paragraphs 36 to 40 of the claimant's 2nd witness statement dated 28 December 2023. I refer to it but need not set it out. The explanation accords with point 2 in Mr Davies's letter of 25 July 2005. There is no evidence to contradict the claimant's evidence that the assent was not by way of part performance of a wider settlement agreement, and it may be noted that paragraph 4.19 of the defence and counterclaim does not assert that it was.

of the assent as an unequivocal acknowledgment of the first defendant's beneficial entitlement to the entire estate.

57. It is also not arguable that the first defendant reasonably acted in reliance on the matters she now refers to. She says that, in reasonable reliance on the three Representations and their reinforcement, she acted to her detriment by not reinstating her 1975 Act claim. I regard that as an impossible contention. No settlement had been reached and both she and her solicitor knew it, both at the date of the general stay (29 September 2005) and at all times thereafter. That is why, after Representation 1 and the stay, proposals and counter-proposals were still being made in 2011, long after Representation 3. The parties did not then or later reach a concluded agreement. The matters on which the first defendant relies as things on which she could reasonably rely were simply proposals that never resulted in agreement.

Conclusion

58. The application succeeds.

59. The main substantive result of my determination is that the first defendant's counterclaim for a declaration that the entire beneficial interest in the estate and the farm is held on bare trust for her will be dismissed.

60. Mr Cockburn has asked for a declaration that the claimant and the first defendant hold the farm on trust in accordance with paragraph 46(1)(i) of the Administration of Estates Act 1925, namely (a) as to one half for the first defendant during her life and, subject to such life interest, on the statutory trusts under section 47 of that Act for the deceased's children, and (b) as to the other half on the statutory trusts under section 47 of that Act for the deceased's children. Mr Dickinson objected to the making of such a declaration, on the grounds that the declaration is claimed only in paragraph 48 of the claimant's reply but not in the particulars of claim. In my judgment, a declaration to that effect is desirable, not least in the interests of making clear what does and does not remain in dispute. No substantive grounds have been shown why the declaration ought not to be made. I could permit amendment of the claim form. However, there is a prayer for further or other relief; that will suffice.

61. I shall hear counsel in respect of the detailed terms of the appropriate order and any consequential directions that might usefully be given for the further conduct of the case. This case cries out for settlement, in the interests of all parties. It will be helpful if counsel will give thought to directions that might assist in that regard.