Neutral Citation Number: [2021] EWCA Civ 11

Case No: A4/2020/0884

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Jacobs
[2020] EWHC 980 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th January 2021

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LADY JUSTICE ROSE

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Between:

1) MOTOROLA SOLUTIONS, INC. **2) MOTOROLA SOLUTIONS MALAYSIA SDN, BHD**	**Respondents**
- and -	
1) HYTERA COMMUNICATIONS CORPORATION LTD. **2) PROJECT SHORTWAY LIMITED**	**Appellants**

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Charles Béar QC and **Alexander Milner** (instructed by **Steptoe & Johnson UK LLP**) for the **Appellants**
Thomas Sprange QC (of **King & Spalding International LLP**) and **Gayatri Sarathy** (instructed by **King & Spalding LLP**) for the **Respondents**

Hearing date: 15th December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11th January 2021 at 10.30 a.m.

Lord Justice Males:

Introduction

1. This is an appeal against the order of Jacobs J dated 24th April 2020 granting a domestic freezing injunction against each of the appellants in the sum of US $345 million. The injunction was granted under section 25 of the Civil Jurisdiction and Judgments Act 1982 in support of substantive proceedings brought by the respondents ("Motorola") in the United States ("the US proceedings").

2. The judge identified as "a critical issue" the question whether evidence of statements made by the first appellant ("Hytera") at without prejudice settlement meetings in October/November 2019 was admissible. Because statements made at such meetings attract without prejudice privilege, the issue of admissibility depended on whether the statements fell within the "unambiguous impropriety" exception to such privilege. The judge's view was that if the statements were admissible, there was sufficient evidence of a risk that Hytera would dissipate its assets in order to avoid enforcement of a US judgment to justify the making of a freezing order, but that without those statements the other features of the case on which Motorola relied were not sufficient to do so.

3. The statements in question were said to be to the general effect that, if Motorola obtained a judgment in the US proceedings which was "unacceptable" to Hytera, then Hytera would take steps to transfer its assets away from western jurisdictions in order to make enforcement of the judgment more difficult. The judge held that it was "self-evident" that such a threat, if made, amounted to unambiguous impropriety and, moreover, that he was bound so to hold by the decision of this court in *Dora v Simper* (15th March 1999, unreported). He held further that, even though Hytera denied making this threat, it was sufficient to render the statements admissible that there was a "good arguable case" (which the judge equated with a "plausible evidential basis") that they were indeed made as alleged by Motorola.

4. Hytera contends that the judge was wrong to reach those conclusions for two reasons:

   (1) first, he was wrong to hold that a party seeking to rely on the "unambiguous impropriety" exception to without prejudice privilege need only establish a good arguable case of such impropriety; and

   (2) second, he was wrong to hold that the statements allegedly made on behalf of Hytera were "unambiguously improper" for the purpose of the exception to the without prejudice rule.

5. In addition the second appellant ("Shortway"), an indirect subsidiary of Hytera and not a party to the substantive US proceedings, appeals against the judge's decision to grant a freezing injunction against it in the exercise of the "*Chabra*" jurisdiction (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231) which enables a freezing order to be made against a party when there is good reason to suppose that its assets will be available to satisfy a judgment, even though the claimant has no cause of action against that party.

6. Motorola supports the decision and reasoning of the judge and in addition contends by a Respondent's Notice that the judge ought to have found that there was a real risk of

dissipation of assets even without relying on the without prejudice material, in particular because of the complicity of Hytera's senior management in the theft and dishonest use of Motorola's trade secrets.

Factual background

7. Motorola and Hytera are respectively headquartered in the United States and China. They are both significant players in the worldwide markets for two-way digital mobile radio ("DMR") technology.

8. On 14th March 2017, Motorola brought proceedings in the US District Court for the Northern District of Illinois, Eastern Division, alleging theft of its trade secrets by Hytera and two of Hytera's US subsidiaries. Specifically, Motorola alleged that in or around 2008, at which time Hytera had no digital capability, Hytera had recruited three of Motorola's senior engineers, who stole confidential documents and source code from Motorola and used them to build competing DMR products which were sold by Hytera. Hytera did not deny that the engineers in question had stolen these documents and source code, and that Hytera remained in possession of documents containing Motorola's trade secrets, but sought to downplay their significance in the development of Hytera's DMR technology; it contended in addition that the claim by Motorola was time-barred.

9. On 14th February 2020 the jury in the US proceedings returned a verdict in favour of Motorola and awarded it US $345 million in compensatory damages and US $418 million in punitive damages. The court entered judgment in respect of those sums on 5th March 2020. Hytera has filed a number of post-trial motions and, although the court has ruled on some of them, others remain pending. In the result, the judgment is not yet enforceable. There is in addition the possibility of an appeal.

10. On 19th March 2020 Motorola issued an on-notice application for a domestic freezing order (limited to the amount of the compensatory damages of US $345 million) against Hytera and two of its indirect UK subsidiaries, Shortway and Sepura Ltd ("Sepura"), together with worldwide disclosure orders. The application was made under section 25 of the Civil Jurisdiction and Judgments Act 1982, in support of the US proceedings. Hytera is the ultimate parent of Shortway, via a chain of 100% ownership of intermediate companies in Hong Kong and Jersey, while Sepura is a 100% subsidiary of Shortway.

11. In support of its case that there was a real risk of dissipation of assets, Motorola relied on the evidence of one of its in-house lawyers, Mr James Niewiara, regarding statements made by Hytera's former Chief Financial Officer, Mr Nuo Xu, during without prejudice settlement meetings in the United States in October and November 2019. I shall have to consider the evidence about these statements in further detail in due course. In summary, they were said to be to the effect that Hytera would take various steps to limit Motorola's ability to enforce a judgment in western jurisdictions such as the United States or the United Kingdom, by concentrating its assets in China and other jurisdictions where enforcement would be more difficult. This was said to have been described by Hytera as a "retreat to China".

12. Hytera accepted that it had referred to a "retreat to China", but disputed Mr Niewiara's interpretation of what it had said. Its evidence was that the statements in question did not indicate any plan to avoid enforcement of a judgment and did no more than

reflect the commercial reality that, if a substantial judgment were to be enforced against Hytera's business and revenue around the world, it would naturally have to "retreat" to its key markets in China and elsewhere.

13. The judge heard the application on 7th April 2020 and announced his decision on 9th April 2020, giving brief reasons for it. He handed down his full judgment on 24th April 2020. In summary, he granted Motorola's application for a domestic freezing order, and also its application for a freezing order against Shortway under the *Chabra* jurisdiction. He dismissed Motorola's application for worldwide disclosure and its application for a freezing order against other defendants (which had no assets in this jurisdiction). He did not need to determine the application against Sepura, which was separately represented and which offered voluntary undertakings in lieu of a freezing order, conditional upon Motorola succeeding against any of the other defendants.

The judgment

14. The judge noted at [23] that the principal issue for resolution was whether Motorola had sufficiently demonstrated that there was a risk of dissipation of assets by Hytera. For that purpose, in addition to the statements made by Mr Xu at the without prejudice meetings, Motorola relied on (1) Hytera's theft of trade secrets, now established by the jury's verdict in the US proceedings, (2) the fact that, as Motorola submitted and as the judge found to be established to the standard, at the very least, of a good arguable case, this must have occurred with the complicity of Hytera's senior management, (3) the fact that the three engineers were not dismissed for some time after Motorola's commencement of the US proceedings and, even then, were given a handsome payoff and were required to sign non-disclosure agreements, and (4) the fact that Hytera continued to sell products containing Motorola's code.

15. Hytera contended that Motorola had not demonstrated a risk of dissipation of assets sufficient to justify the grant of a freezing order. The evidence of statements made at the without prejudice meetings was inadmissible and, in any event, did not demonstrate such a risk, while other factors pointed strongly away from the grant of a freezing order, including the fact that Hytera is a substantial and well established company with a large asset base. There was no evidence that Hytera's senior management had knowledge of or involvement in the wrongful conduct of the three engineers and there was no logical connection between that conduct and any decision whether to transfer or dispose of assets in response to the judgment in the US proceedings.

16. The judge concluded at [35] and [36] that the issue whether to admit the evidence concerning the without prejudice meetings in October/November 2019 was critical. If the evidence was admitted, "it would be strange to come to any conclusion other than that Motorola has demonstrated a real risk that a judgment against Hytera may not be satisfied as a result of unjustified dealing with Hytera's assets". On the other hand, if those statements could not be relied on, the evidence as to a real risk of dissipation was less clear and, ultimately, would not justify such a conclusion.

17. Having summarised the parties' evidence about the without prejudice meetings, the judge noted that it was common ground that the admissibility of the statements was to be decided by reference to English law as the *lex fori*; that the statements were made in the context of meetings which an English court would regard as being covered by without prejudice privilege; and that there is an "unambiguous impropriety" exception

to this privilege which permits a party to rely on what has been said in the course of without prejudice discussions.

18. The judge then considered whether "a threat to deal with assets in order to frustrate a judgment" amounted to unambiguous impropriety for the purpose of this exception. He held that it did, for two reasons. First, at [54], he regarded himself as bound to reach that conclusion by the decision ofthis court in *Dora v. Simper*, at least if the threat was to accomplish this by improper means. Second, he held at [55] that it was self-evident that such a threat "unambiguously exceeds what is permissible in the settlement of hard fought commercial litigation", applying a test stated by Flaux J in *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm), [2015] 3 All ER 577 at [132].

19. The judge then turned to the question of the evidential standard that a party seeking to rely on without prejudice communications must satisfy before the privilege will be disapplied. Here, he noted that the approach of this court in *Dora v. Simper* had been to admit the evidence simply on the basis that, if it was true, it established unambiguous impropriety, without any need to resolve any factual dispute about what had been said. From this he concluded at [64] and [65] that the test for admissibility was whether there was a "good arguable case", or in other words a "plausible evidential basis" (see *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 at [38]), that there had been an unambiguous impropriety and that he should not seek to resolve the dispute about what had been said at the meetings:

> "65. … The question is therefore whether, if Motorola's evidence as to what was said was true, this is a case of unambiguous impropriety."

20. Applying this test, the judge held at [67] that the statements alleged by Mr Niewiara, if proved, would constitute unambiguous impropriety. He reached this conclusion despite accepting at [71] that there was scope for misunderstanding what had been said at the meeting. In the judge's view, that was irrelevant because what mattered was whether Motorola's evidence amounted to a good arguable case.

21. In a separate section of his judgment the judge dealt with the application for a *Chabra* injunction against Shortway. He held, in outline, that his conclusion as to a risk of dissipation of assets by Hytera applied equally to Shortway (whose principal asset consisted of its shareholding in Sepura) and that a *Chabra* injunction was appropriate because a judgment against Hytera could ultimately be enforced against Shortway by the appointment of receivers down the chain of companies in Hong Kong, Jersey and ultimately here.

The grounds of appeal – unambiguous impropriety

22. Hytera appeals against the finding of unambiguous impropriety on two grounds. First, it contends that the judge was wrong to conclude that what was said by Mr Xu amounted to unambiguous impropriety so as to lose the protection of without prejudice privilege. Second, it says that the judge applied the wrong test for admissibility of the evidence. Instead of holding that it was sufficient that there was a "good arguable case" or "plausible evidential basis" for asserting that the exception applied, the judge should have held that the relevant impropriety had to be proved unambiguously.

23. These grounds overlap to some extent, but in my view it is sensible to consider first the test for admissibility of the evidence. Before doing so, I must review the case law, acknowledging that much of this ground has been covered by the judgment of Rix LJ in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, [2004] 1 WLR 667.

The authorities on unambiguous impropriety

24. I will take the principal cases cited to us in chronological order.

25. The first case to which it is necessary to refer is *Hawick Jersey Ltd v Caplan* (26th February 1988), a decision of Mr Anthony May QC sitting as a Deputy High Court Judge. It concerned the admissibility of statements made orally at a meeting which had been covertly tape-recorded. Accordingly there was no doubt about what had actually been said. The issue arose at trial and the claimant's witnesses were cross examined about the meeting. The judge found their evidence entirely unconvincing. He found that the clear implication of what had been said was that the claimant was bringing a claim which it knew to be false in order to pressurise the defendant into a favourable settlement of other litigation. He concluded that the court should be slow to find that settlement negotiations were not covered by without prejudice privilege, but that the statements made amounted to plain admissions that the proceedings were brought dishonestly and that in those circumstances they amounted to threats to further a dishonest purpose which were not protected by the without prejudice rule.

26. *Forster v Friedland* (10th November 1992, unreported), a decision of this court, was another case where a meeting was covertly tape-recorded, and where it was sought to rely on what was said in order to show that (in this case) a defence was being put forward dishonestly (i.e. in which the defendant had no honest belief). Hoffmann LJ (with whom Neill and Butler-Sloss LJJ agreed) held that all that was necessary to attract without prejudice privilege was that negotiations must be "genuinely aimed at settlement" (see *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280). He described *Hawick Jersey Ltd v Caplan* as a clear case of an improper threat, but added an important note of caution:

> "These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape-recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."

27. This is the origin of the term "unambiguous impropriety" although not of the concept, which can be seen in previous cases.

28. Hoffmann LJ added also that it was dangerous to import analogies from the rule in *R v Cox & Railton* [1884] QBD 153 which excludes legal professional privilege in cases where a party has sought legal advice in order to facilitate the commission of a dishonest

act. Although a number of cases on legal professional privilege were cited to us, it is unnecessary to consider them.

29. *Fazil-Alizadeh v Nikbin* (25th February 1993, unreported) was yet another case of covertly tape-recorded conversations. The defendant sought to rely on them in order to show that the version of a settlement agreement on which the claimant relied had been forged. Because the meeting in question had been recorded, there was a record of what had been said, but the Iranian parties had spoken in Farsi and the translation had not necessarily captured all the nuances of the conversation. Simon Brown LJ (with whom Balcombe and Peter Gibson LJJ agreed) held that the meeting was a genuine attempt to negotiate a settlement and that "the crucial question" was whether without prejudice privilege was lost because of misconduct. He said that the approach to this issue was plain, having been clarified by the decision in *Forster v Friedland*, and that the critical question was whether there was "unambiguous impropriety". Having analysed the transcript of the recording and referred to the defendant's case that it contained an admission of forgery by the claimant, he said:

> "Speaking for myself, I readily see the force of these points. But it is one thing to suggest, as I for my part would be prepared to recognise, that that is certainly one possible interpretation of the tape, one inference well capable of being drawn from the actual words exchanged -- indeed, particularly if one looks at this through Dr Nikbin's eyes, this might even be thought the more probable explanation of the plaintiff's comments -- it is quite another thing to contend that this is the unambiguous conclusion to be drawn from this conversation. That contention I certainly cannot accept … Even accepting that the test of unambiguous impropriety involves a less stringent approach than that adopted by the criminal courts when dealing with allegations such as forgery, I would still not regard the test as having been satisfied on the facts of this case."

30. Simon Brown LJ concluded by emphasising the important policy reasons underlying the without prejudice rule:

> "I add only this. There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likely to have participated in discussions with half a mind at least to their litigious rather than their settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitably it must, against the prospects of successful settlement."

31. In my judgment this case demonstrates three points which are of importance to the present appeal. First, the without prejudice rule must be "scrupulously and jealously

protected" so that it does not become eroded. Second, even in a case where the "improper" interpretation of what was said at a without prejudice meeting is possible, or even probable, that is not sufficient to satisfy the demanding test that there is no ambiguity. Third, evidence which is asserted to satisfy this test must be rigorously scrutinised. While this last point was made with particular emphasis in the context of evidence procured by clandestine methods, the point itself applies generally. All this is inconsistent, in my judgment, with an approach which simply takes at face value the evidence of a party seeking to disapply the without prejudice rule.

32. The next case is *Dora v Simper*, where that approach was taken. The claimant sought to adduce evidence that, at a without prejudice meeting, the defendants threatened to transfer assets to a new company so as to render any judgment obtained effectively unenforceable. The defendants denied that any such statement had been made. The issue arose in advance of the hearing at which it was proposed to deploy the evidence. Reversing Park J, this court held that the evidence could be adduced pursuant to the unambiguous impropriety exception.

33. Referring to the dispute about whether the statement in question had been made, Aldous LJ said:

> "I should at this stage make it absolutely clear that the affidavit evidence of [the defendants] is to the effect that no such statement was made. In those circumstances, I proceed upon the basis that the statements were made but note that it may turn out that [the claimant's witness] will not be believed."

34. After citing *Forster v Friedland* and *Fazil-Alizadeh v Nikbin*, Aldous LJ said:

> "In this case we are considering the matter at an early stage when we have not even reached the stage of witness statements. This is an application to strike out and/or to set aside a *Mareva* order. In my view the court should at this stage decide whether the statements would, if proved, form the basis for establishing unambiguous impropriety. It is for the judge who hears the matter to decide whether they do. In my view, when [the relevant paragraphs of the claimant's evidence] are taken into account together with the evidence of [the defendants] it is established that the evidence sought to be struck out should be understood as disclosing unambiguous impropriety. The evidence alleges that these gentlemen would make sure that the judgment, which might be obtained by [the claimant], would not be satisfied due to the action they would take, resulting in the company's assets being transferred out of reach of the order of the court.
>
> I also take into account the affidavits of [the defendants] which states that these statements were never made. They may turn out to be right, but they do not suggest that what is alleged to be said was not improper or that something like that alleged was said, but that it was taken out of context. For that reason, I believe that this case is an exception to the without prejudice rule."

35. Thus the approach of Aldous LJ was to take the evidence of the claimant at face value and to consider whether, if proved, it would amount to unambiguous impropriety. In a case where the evidence was disputed, and where Aldous LJ accepted that the defendants' denial might turn out to be true, that approach seems to me to be impossible to reconcile with the rigorous scrutiny which this court held to be necessary in *Fazil-Alizadeh v Nikbin* before without prejudice privilege should be lost. It appears that Aldous LJ contemplated that the question whether the statements had indeed been made would be determined at some later hearing, but it is not entirely clear what he had in mind. By that stage it would be too late as the evidence had been adduced: unambiguous impropriety is a test of admissibility, not of credibility. It is not clear either why Aldous LJ regarded it as significant that the defendant's witnesses had not denied that the statements, if made, would have been improper. As Peter Gibson LJ was to say in the later case of *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715 at [40], "Why should they, when they had denied making the statements at all?" To that question I would add that whether the statements would have been improper was a matter for submission rather than evidence and was therefore not something which it would have been appropriate to include in an affidavit or witness statement anyway.

36. Otton LJ, the other member of this two judge court, adopted the same approach, saying:

> "The words were capable of bearing the meaning that if the plaintiff was to pursue what he perceived to be his legal rights and remedies, then some of the defendants would ensure that the first and second defendants would so conduct the affairs of the third defendant as to ensure that there would be nothing left and that the plaintiff would be left with an empty judgment. The question is whether what was allegedly said disclosed an unambiguous impropriety."

37. Otton LJ concluded that it did:

> "The judge undoubtedly considered and applied the correct principle, but I am reluctant to say that I cannot share the judge's view that the defendants did not display an unambiguous impropriety. The words allegedly used, given their ordinary and proper meaning, amount to an unequivocal implication that the assets of the company would be placed outside the reach of the court by improper means. The words can only have been uttered with the intention or in an attempt to deter the plaintiff from pursuing his rights. Moreover, the words complained of were in themselves capable of amounting to an overt act in furtherance of a conspiracy between the first and second defendants to deter the plaintiff from pursuing his action through the court process and to deprive him of his just desserts [*sic*.] should he persist and win. They went well beyond the colourful or exaggerated language test."

38. The approach adopted in *Dora v Simper* creates a dilemma for a defendant who disputes the claimant's account of a without prejudice meeting. If he says nothing, it will be said that he has not challenged the claimant's account. If he denies the claimant's account with a bare denial, that denial will count for nothing because the court will only be

looking at the claimant's evidence and in any event it will be said that a bare denial carries little or no weight. But if he goes into detail about what was said at the meeting in order to put the claimant's account into context or to explain how the claimant has misinterpreted something which was said, he will risk opening up more of what was said without prejudice and may find in any event that his evidence is to no avail if all that the claimant needs is a good arguable case or a "plausible evidential basis" for his assertion that an improper threat was made.

39. I have no difficulty in accepting that a threat to transfer assets to a third party otherwise than in the ordinary and proper course of business in order to render a judgment unenforceable may, at least in some circumstances, amount to unambiguous impropriety for the purpose of the exception to the without prejudice rule. That is, after all, the kind of conduct which the court will restrain by a freezing order. But I cannot regard *Dora v Simper* as establishing that this will always be so as a proposition of law. Whether it is must depend on the facts of the particular case. Nor can I regard *Dora v Simper* as binding authority that, when considering whether evidence of such a threat is admissible, it is sufficient to take the claimant's evidence at face value. Although that was indeed the approach of the court, (1) it was inconsistent, as I have sought to show, with previous authority, in particular *Fazil-Alizadeh v Nikbin*, (2) the reasoning was described in *Berry Trade Ltd v Moussavi*, rightly in my respectful view, as being "of doubtful cogency", and (3) there is, as we will see, no trace of this approach in the subsequent cases.

40. *Unilever Plc v Procter & Gamble Co* [1999] EWCA Civ 3027, [2000] 1 WLR 2436 was a case where a patentee was alleged to have threatened to bring an infringement action during a without prejudice settlement meeting. The case was not concerned with unambiguous impropriety, but with whether the without prejudice statement could be relied on to found a "threats" action under section 70 of the Patents Act 1977. It was held that it could not. In a judgment which has been cited many times and regarded as authoritative, Robert Walker LJ explained the rationale of the without prejudice rule and the difficulties which would arise in giving evidence of what was said in the course of "wide-ranging unscripted discussions during a meeting which may have lasted several hours":

> "Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (*Hoghton v Hoghton* (1852) 15 Beav 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.
>
> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings

> may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in *Muller*, a concept as implausible as the curate's egg (which was good in parts). …"

41. Nevertheless, he acknowledged that there were exceptions to the rule including the "unambiguous impropriety" exception:

> "(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 'unambiguous impropriety' (the expression used by Hoffmann LJ in *Forster v Friedland* (unreported), 10 November 1992, CAT 1052 of 1992). Examples (helpfully collected in *Foskett's The Law & Practice of Compromise*, 4th ed, para 9-32) are two first-instance decisions, *Finch v Wilson* (unreported), 8 May 1987 and *Hawick Jersey International v Caplan* (The Times, 11 March 1988). But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (unreported), 25 February 1993, CAT 205 of 1993, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

42. The issue in *Berry Trade Ltd v Moussavi* was whether statements made by a defendant at a without prejudice meeting which were said to demonstrate that his defence was dishonest could be admitted in evidence. Giving the judgment of the court, Peter Gibson LJ analysed not only the evidence relied on by the claimant, but also the account of the meeting given by the defendant, who denied making the statements in question. At first instance David Steel J had directed himself that:

> "For present purposes the standard of proof, in my judgement, must be such as to establish a serious and substantial risk of perjury, which only the content of the negotiations would readily reveal."

43. It appears that the claimant contended on appeal, relying on *Dora v Simper*, "that evidence regarding what was said during the without prejudice discussions could be adduced, even where it was contested by [the defendant], if such evidence was *prima facie* true and, if proved, would show perjury, dishonesty or other unambiguous impropriety on [the defendant's] part" (see the judgment at [29] and [38]). It is evident that the court in *Berry Trade* was not impressed by the reasoning in *Dora v Simper* and, as I have done, found it hard to reconcile with the previous authorities. I have already referred to some criticisms which it made of that reasoning. In addition Peter Gibson LJ said:

> "42. … This court did not address the difficulty of how evidence which was disputed could establish unambiguous impropriety, save in the passage of Aldous LJ's judgment where he refers to

> what the directors did not say, the cogency of which point we have respectfully doubted. This court seems to have adopted the approach of admitting the disputed evidence on the footing that the judge who heard the second action would decide whether the statements were made. In the circumstances of that case for that judge to determine that point would not have caused any difficulty because his ability to decide the substantive issues before him would not have been hindered by hearing evidence of statements made without prejudice to the issues in the first action. In the present case the alleged admissions are relied on for the truth of their content and not for the fact that they were made, and, if made, they were indisputably made in the course of genuine negotiations to settle the action; further, as David Steel J himself said, their admissibility could not properly be determined by the trial judge. This last point was disputed by Mr Marshall [counsel for the claimant], who referred to a number of cases where the trial judge has determined, or it has been held that the trial judge should determine, whether evidence was to be excluded by the application of the without prejudice rule. None of those cases was concerned with disputed oral admissions in the course of lengthy negotiations where the unambiguous impropriety exception was in point, and it seems plain to us that it would be undesirable for the trial judge in this case to be left to decide whether the statements were made. We would not therefore accept that the approach in *Dora v Simper* is one to be applied in the present case."

44. This court rejected the test of "whether there is a serious and substantial risk of perjury" on the ground that this would seriously erode the without prejudice rule:

> "48. We start with the judge's self-direction that the court, when considering whether statements made in without prejudice discussions may be admitted in evidence, applies the test of whether there is a serious and substantial risk of perjury. Mr Marshall does not suggest that that test has been applied before and we can see nothing in the authorities to support it. On the contrary, it seems to us to weaken significantly the requirement of unambiguous impropriety and of the need for a very clear case of abuse of a privileged occasion. Although the judge in the final paragraph of his judgment says that he bears in mind the need to restrict applications to admit without prejudice statements to the clearest cases of abuse, he then applies the test of a serious and substantial risk of perjury. In our judgment that is too low a test and one which would seriously erode the without prejudice rule. The judge should have looked for nothing less than unambiguous impropriety."

45. The court then applied the test of "nothing less than unambiguous impropriety", looking first at the claimant's evidence. Bearing in mind the absence of any transcript or detailed record of what was said over the course of a number of lengthy meetings, the court

concluded that it was not unambiguously clear that the defendant had indeed made the statements which were said to show that his defence was dishonest:

> "53. In our judgment this is simply not the sort of case where the court should be prepared to admit the evidence of without prejudice statements as falling within the exception from the without prejudice rule for unambiguous impropriety. The situation here is precisely what Robert Walker LJ. referred to in *Unilever* (at p. 2444A) when he talked of without prejudice communications which 'consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.' It seems to us quite wrong to select from many hours of without prejudice discussions what are said to be an admission here and an admission there in order to mount a claim that by his subsequent statements on oath the alleged maker of the admissions committed perjury. These were not even discussions at which, through tape-recording or the keeping of a detailed note, what was said and the context in which it was said could not be doubted. If the without prejudice rule can be breached in this case, we do not see why it cannot be breached in any case where an admission, inconsistent with some pleading or sworn assertion, is alleged to have been made. No litigant could be advised to enter into without prejudice discussions without a lawyer at his elbow or a prepared script approved by his lawyer. To allow such admissions in evidence flies in the face of the public policy justification for the without prejudice rule."

46. It was therefore unnecessary for the court to decide whether the defendant's denial that the statements in question had been made was itself destructive of the claimant's case of unambiguous impropriety. Nevertheless, the court made some important comments about this:

> "55. The judge, having stated that it would not be appropriate to resolve factual disputes at that interlocutory stage and that the very need to call witnesses to determine differences of recollection as to what was said during the negotiations would undermine the existence of a clear case, nevertheless proceeded to find the disputed evidence admissible. The judge does not explain how he envisaged the matter would then proceed. He knew that the evidence was required by the Claimants for use on the application for summary judgment, but he surely could not have envisaged that on that application evidence contested by the party against whom judgment was sought could be accepted as true. On such applications that party's case is taken to be true. Mr Marshall told us that the Claimants intended that all the material would be available to the judge hearing the application, though he accepted that in so far as there was a conflict of evidence, that judge would not resolve disputes of fact. But given that Mr Ghadimi does dispute making the statements that the agreement

> was for $2 per metric tonne only, we have difficulty in seeing what utility the judge's ruling on admissibility had for the summary judgment application.
>
> 56. The judge gave no directions for the trial of the factual dispute. Had he done so, that trial of that dispute should surely have been the occasion to rule on admissibility. But we would not suggest that, in a case like the present, directions for the trial of the issue whether the alleged statements were made should be given. Not only is there no unambiguous impropriety on the Claimants' evidence, at such trial it would be inevitable that the witnesses would have to give even more evidence to explain what occurred in the without prejudice discussions. Satellite litigation of this sort is bound to discourage settlement negotiations for fear of such consequences, and is in our opinion highly undesirable."

47. These comments underline the procedural difficulties which any dilution of the unambiguous impropriety test will create. Justice to a defendant requires that his evidence about what was said should at least be considered, but it is not easy to see how this can be done without encouraging highly undesirable satellite litigation and damaging the important public policy which the without prejudice rule exists to promote.

48. In *Savings & Investment Bank Ltd v Fincken* it was alleged that at a without prejudice meeting the defendant had admitted owning shares that he had not disclosed in an affidavit of means sworn in previous proceedings. The claimant sought to rely on that admission pursuant to the unambiguous impropriety exception. Rix LJ, with whom Carnwath LJ agreed, held that it was not entitled to do so. The judgment of Rix LJ contains an analysis of the previous authorities at [40] to [53] on which I have drawn in what is said above, concluding that:

> "53. … All four authorities in this court, while allowing the existence of an exceptional rule to cover cases of unambiguous impropriety, have stressed the importance of the public interest which has created the general rule of privilege and have cautioned against the too ready application of the exception."

49. The four cases referred to were *Forster v Friedland*, *Fazil-Alizadeh v Nikbin*, *Unilever* and *Berry Trade*. It appears that *Dora v Simper* was cited, and is of course discussed in the judgment in *Berry Trade*, but is not referred to in the judgment of Rix LJ, from which it can be inferred that he did not regard it as casting doubt on the conclusion set out at his [53].

50. In *Savings & Investment Bank Ltd v Fincken* the defendant had not adduced evidence about the without prejudice meetings, which led Rix LJ to say at [54] that it was "probably correct to regard the admitted ownership of the shares as unambiguous, because unchallenged". Even so, however, it was necessary to proceed with caution and the evidence should not be admitted unless there was a clear abuse of the without prejudice privilege:

> "56. These considerations throw into relief the fact that SIB's evidence has gone unchallenged. How important is that factor in the present context? In my judgment, the courts ought to treat it with considerable caution, for otherwise there is a danger of the exception to the rule displacing the rule by a process of begging the question. If the exception applies, then Mr Fincken is obliged to explain himself or face the consequences, for his admission is in the public domain. The absence of challenge may therefore be critical. If, however, the exception does not apply, then the admission is not in the public domain, the court ought not to know about it, and the absence of challenge is irrelevant. … I can see that the absence of challenge may enable an applicant to establish more easily that an alleged admission is unequivocal. That, however, is not the same thing as an unequivocal or unambiguous impropriety. I would therefore be reluctant to find in the circumstances that an absence of challenge is a critical factor taking this case outside the philosophy of the jurisprudence expressed in the leading authorities cited above.
>
> 57. In my judgment that philosophy is antagonistic to treating an admission in without prejudice negotiations as tantamount to an impropriety unless the privilege is itself abused. That, it seems to me, is what Robert Walker LJ meant in *Unilever* when he repeatedly spoke in terms of the abuse of a privileged occasion, or of the abuse of the protection of the rule of privilege: see at 2444G, 2448A and 2449B. That is why Hoffmann LJ in *Forster* emphasised that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable under the label of an unambiguous impropriety. And that is why Peter Gibson LJ in *Berry Trade* suggested, without having to decide, that talk of 'a cloak for perjury' was itself intended to refer to a blackmailing threat of perjury, as in *Greenwood v. Fitt*, rather than to an admission in itself. It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege (see the first holding in *Fazil-Alizadeh,* described in para 47 above). It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

51. If *Savings & Investment Bank Ltd v Fincken* emphasises the need for caution even where the defendant has not challenged the claimant's evidence, that need for caution is all the greater where it has.

52. The issue in *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 AC 990 was whether an acknowledgement of title made in without prejudice negotiations could be relied on to renew the running of time under section 29 of the Limitation Act 1980. The House of Lords held that it could not be and, in the course of doing so, approved the exceptions to the without prejudice rule set out in the judgment of Robert Walker LJ in *Unilever*. In refusing to create a further exception to the rule, the House of Lords was concerned not to "risk hampering the freedom parties should feel when entering into settlement negotiations" (see e.g. Lord Hope at [12], Lord Rodger at [39] and Lord Neuberger at [98]). Further approval of Robert Walker LJ's judgment in *Unilever* can be found in the judgment of the Supreme Court in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662, where Lord Clarke said that:

> "30. The cases to which I have referred (and others) show that, because of the importance of the without prejudice rule, its boundary should not be lightly eroded."

53. In *Boreh v Republic of Djibouti* the claimant Republic obtained a freezing order, in part by relying on telephone transcripts which were said to demonstrate the involvement of the defendant in a terrorist attack. In fact, however, the conversations transcribed had taken place before the attack in question and therefore could not have shown what the claimant alleged them to show. The freezing order was set aside on the grounds that the claimant had deliberately misled the court. The defendant sought to rely on without prejudice conversations which he had recorded secretly, in which the claimant had threatened to continue its campaign against him through the use of terrorist charges if he did not agree to a settlement of the litigation. There was no objection to the admission of this evidence, which Flaux J described at [132] as unsurprising, falling as it did within the unambiguous impropriety exception, and going beyond what was "permissible in settlement of hard fought commercial litigation".

54. Finally, in *Ferster v Ferster* [2016] EWCA Civ 717 an email sent in the course of a mediation threatened that unless the claimant accepted an offer to settle, the defendants would bring proceedings for contempt of court and would cause criminal proceedings to be brought against him, which would also have an impact on the claimant's partner. Rose J held at first instance [2015] EWHC 3895 (Ch) that the email was an attempt at blackmail which fell within the unambiguous impropriety exception. Referring to *Dora v Simper*, she said that:

> "15. … The reasoning of Aldous LJ has been respectfully criticised by the Court of Appeal in *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715, but it appears to me that the criticism there is more to do with the situation where there is some dispute about what was said in the course of the without prejudice negotiations. Such a dispute about what was said raises difficulties for the court in arriving at a conclusion about what was said at an interlocutory stage, when it is really only once that conclusion has been arrived at that the court can properly determine whether there has been an unambiguous impropriety at all. In the instant case, however, there is no dispute about what was said, because it is all set out very clearly in the email …"

55. The decision of Rose J was upheld on appeal. Citing *Forster v Friedland*, *Unilever* and *Savings & Investment Bank Ltd v Fincken*, Floyd LJ (with whom Patten LJ and Baker J agreed) said that:

> "11. … the critical question is whether the privileged occasion is itself abused. Although the test remains that of unambiguous impropriety, it may be easier to show that there is unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth."

56. As the impropriety was apparent on the face of the email, this was a clear case. Adopting what Flaux J had said in *Boreh v Republic of Djibouti*, the court held that the threat "unambiguously exceeded what was permissible in settlement of hard fought commercial litigation".

57. From this review of the cases I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and (leaving aside *Dora v Simper*) there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest claim in *Hawick Jersey Ltd v Caplan*) or because it was in writing (the email threats in *Ferster v Ferster*). I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare. *Dora v Simper* itself is clearly an outlier which has been criticised in later cases and, until the decision of the judge in this case, has never been followed. In my judgment its approach of asking whether one party's disputed evidence, if true, demonstrates an unambiguous impropriety is contrary to the weight of authority, wrong in principle and should not be followed.

58. There is, moreover, no support in any of the cases to which I have referred for the judge's adoption on an interim application of a test of good arguable case of unambiguous impropriety for the admission of without prejudice evidence. This was not in fact the test applied in *Dora v Simper* itself. In saying this, I do not overlook the dictum of Mr Simon Picken QC sitting as a Deputy High Court Judge in *Tata Consultancy Services Ltd v Sengar* [2014] EWHC 2304 (QB) at [25] that, "it seems to me that, on an interim application such as the present, it is sufficient that there is at least an arguable allegation of impropriety". Jacobs J at [64] of his judgment in the present case derived some support from this dictum for his view, but *Tata Consulting* was a case where there was no objection to the admission of the email in question and no argument on the point, which did not need to be decided. In my judgment, as will appear, Mr Picken's "instinctive view", as Jacobs J described it, was mistaken.

The test for admissibility

59. It follows from what I have said so far that in my judgment Jacobs J was wrong to regard himself as bound by *Dora v Simper* to apply a test of good arguable case to the admissibility of statements made without prejudice. It remains to consider, however,

whether the adoption of that test was wrong in principle. It appears that the judge's adoption of this test was largely the result of two considerations. The first was his view, stated at [62] and [63], that "[t]he case-law indicates that the purpose of the exception is to prevent abuse of the privilege", coupled with a concern that a more demanding test "would facilitate the abuse of the without prejudice privilege which the exception to the ordinary rule is designed to prevent". The second, at [64], was that the test of good arguable case is commonly applied in different contexts at an interim stage, where "[t]here are necessarily limits to the conclusions that a court can reach on evidence for interlocutory hearings".

60. In my judgment neither of these considerations justifies the erosion of the without prejudice rule which a test of good arguable case undoubtedly represents. First, as to erosion, it is to my mind obvious that it will be far easier for a party seeking to rely on without prejudice material to say that there is a good arguable case of unambiguous impropriety (or a plausible evidential basis for saying that this has occurred) than it will for that party actually to establish the existence of unambiguous impropriety. So the danger of erosion is clear. If all that is needed to be shown is a good arguable case, parties engaging in settlement discussions will need to exercise care not to say anything which might be misconstrued; they will need a careful record of what has been said; there will be scope for manoeuvring to obtain an advantage in the litigation at the expense of frank discussion with a view to settlement; and evidence of statements made without prejudice will be admitted much more often than has hitherto been the case. All this runs directly counter to the policy of promoting settlement which the without prejudice rule exists to support.

61. As for the judge's first concern, I accept that the cases indicate that the unambiguous impropriety exception applies (and only applies) when the without prejudice privilege is abused. However, the discussion of this concept in cases such as *Unilever*, *Berry Trade*, *Savings & Investment Bank Ltd v Fincken* and *Ferster v Ferster* has been concerned to emphasise the demanding nature of the test which must be satisfied before without prejudice statements are admitted in evidence. Thus even when something said without prejudice is contrary to a party's open position, that will not be enough to allow the without prejudice statement to be adduced in evidence unless the statement demonstrably constitutes an abuse of the privilege.

62. There are competing considerations here. On the one hand, too demanding an evidential standard runs the risk that in some cases an abusive statement will not be admitted in evidence and that an impropriety will therefore not be exposed. On the other hand, too low a standard runs the risk that statements which were not in fact abusive (or which in fact were not even made) will be admitted in evidence when they ought not to be and that, in order to avoid this, frank discussion in settlement meetings generally will be inhibited. In weighing these considerations, the cases have firmly and rightly set their face against any erosion of the without prejudice rule, even if that means that some statements disclosing or constituting impropriety, albeit not unambiguously so, retain the protection of the rule. The policy choice is that the public interest in the settlement of litigation generally outweighs the risk of abuse of the privilege in individual cases.

63. There are sound reasons for this choice in addition to those already discussed. In particular, a party who is unable to adduce evidence of statements made without prejudice is no worse off so far as the evidence is concerned than if those statements had never been made or the settlement negotiations had not occurred. But a party who

is drawn into satellite litigation about the admissibility of statements made without prejudice would have been much better off if he had refused to negotiate at all. Further, if what was said (or the interpretation of what was said) at a without prejudice meeting is credibly disputed on an interim application to which a test of good arguable case is applied, there will be no occasion when that dispute will be resolved. Thus in the present case, having concluded that there was a good arguable case, the judge admitted the evidence and used it as the foundation for a freezing order even though, as he acknowledged at [72], he was not in a position to decide which of the competing versions was correct, and even though the consequence of that decision is that this issue will never be determined. I cannot regard that situation as satisfactory or just, not least in view of the harm to a defendant's business which a wrongly granted freezing order may cause.

64. As for the judge's second concern, I do not regard the fact that the test of good arguable case is used in other interim contexts as a sufficient reason to apply it to the issue of unambiguous impropriety when that issue arises at an interim stage of litigation. Rather, the position should be that the test remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it. In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply. Plainly it would not be appropriate on an interim application to direct a trial of an issue to resolve such a dispute.

65. For these reasons I conclude that the judge was wrong to hold that it was sufficient for the admission of the without prejudice evidence that Motorola had established a good arguable case (or a plausible evidential basis) as to what was said at the meetings in question and wrong to go on to pose the question whether, if Motorola's evidence as to what was said was true, that amounted to unambiguous impropriety.

Was there an unambiguous impropriety?

66. Accordingly the judge should simply have asked himself whether the evidence before him established an unambiguous impropriety. I shall consider this question, although I am not convinced that it arises. That is because it is not a question which the judge ever asked or answered and he acknowledged at [71] that "there was scope for misunderstanding what was said at the meeting, bearing in mind that the participants were from different cultures and that the discussions were not scripted or recorded". He went no further than saying that Motorola's account was plausible and, at [72], that he was not in a position to decide as to the competing versions of events. There is no Respondents' Notice asserting that, even if the judge had applied the right test, the case was nevertheless one of an unambiguous impropriety.

67. To address this question it is necessary to say something more about the parties' evidence.

68. The evidence of Mr Niewiara was that Hytera's CFO, Mr Nuo Xu, provided a presentation on 29 October 2019 during negotiations related to the US Proceedings

which Mr Niewiara attended, during which Mr. Xu covered what would happen if the trial resulted in a jury verdict that was "unacceptable" to Hytera:

> "23. Nuo Xu presented two options (1) appeal or (2) "retreat" to China. …
>
> 24. As part of Hytera's 'Retreat to China' plan, Nuo Xu said that Hytera would do at least the following:
>
> 24.1 Undercapitalize subsidiaries operating outside of China to keep on hand the minimum cash to operate their business. He gave an example of a U.K. subsidiary that now has $25M in cash, but Hytera would reduce that cash holding to $5 million.
>
> 24.2 Revise Hytera's 'Treasury policies' to frustrate enforcement of any judgment in favour of Motorola. For example, Hytera would shorten customer payment / credit terms to make payment due to Hytera in a shorter time frame than the collection process in that country would take. Mr. Xu also stated that Hytera would change the entities to be paid in its contracts to further frustrate collection by making payment due directly to a Chinese entity rather than local entities.
>
> 24.3 Move assets out of countries where collection is easier. Notably, Mr Xu stated that Hytera already had taken steps to move assets out of Motorola's anticipated reach and to reduce holdings in various countries.
>
> 24.4 To the extent Motorola engaged in collection actions, he stated that Hytera would further retreat to operate primarily in China, Russia, and Africa (which he described as the "murky" countries) and said in effect, 'good luck collecting in those places'. A nearly identical presentation and statements were also made by Mr Xu on 1 November 2019, where Hytera's CEO Qingzhou Chen was present, which Mr Chen did not contradict. Urgent relief is necessary because I witnessed Hytera make explicit threats to move cash from its UK subsidiaries and claim that it already has begun this process."

69. Mr Niewiara exhibited a photograph of a flipchart on which Mr Xu had illustrated his remarks. This included the two options, "appeal" and "retreat", to which Mr Xu had referred in the event of an "unacceptable" verdict at trial, together with numerous other markings including figures which Mr Niewiara's evidence did not explain.

70. Taking this at face value, I accept that it includes an allegation that Hytera threatened to move assets out of Motorola's anticipated reach. But it is relevant that the "retreat" strategy was presented as an alternative to an appeal (which itself was perfectly proper) and that the specific courses of action identified as part of the retreat strategy involved no impropriety. The judge accepted at [69] that reducing the cash held by subsidiaries would not necessarily involve any impropriety. In principle, if a subsidiary holds more cash than it needs, there is no reason why it should not pay such cash to its parent

company by way of dividend. That would be no more than the ordinary course of business, with which a freezing order will not interfere. Moreover, to introduce shorter payment or credit terms would improve cash flow and, if customers will agree, would appear to be a sensible course of business. In any event, the new policy described appears to refer to the terms on which new assets (i.e. receivables from future customers) would be created and would not involve any transfer of existing assets. It is, therefore, by no means clear that the introduction of such a policy would be prohibited by a freezing order or that it would be in any way improper. That leaves a very general allegation that assets would be moved, without any analysis of what those assets were, but in circumstances where it appears that Hytera's assets outside China consist essentially of its direct and indirect shareholdings in subsidiary companies and its receivables due from sales of equipment. It does not appear that Hytera was threatening to dispose of subsidiary companies which, as they would continue to sell Hytera equipment, would not seem very likely, while the redirection of receivables relates to the terms on which future assets would be created rather than the transfer or disposal of existing assets. But even if Hytera was threatening to cease doing business in western markets (thus presumably leaving the field clear for Motorola, who might be expected to welcome such a retreat), it is difficult to see why this should be characterised as improper.

71. I doubt, therefore, whether Mr Niewiara's evidence does amount to a case of unambiguous impropriety when it is rigorously scrutinised, particularly when that evidence is taken out of the context of settlement meetings which extended over a period. On any view this evidence as to what was said is rather different from the threat to transfer assets for no value to a new entity for the sole purpose of frustrating enforcement of a judgment, as was alleged to have occurred in *Dora v Simper*.

72. Hytera's evidence, given on information and belief by its solicitor, did not dispute the use of the chart showing the "retreat" as one possible consequence of an "unacceptable" outcome to the trial. However, Hytera said that Mr. Niewiara's account did not reflect what Motorola was being told. In summary, the evidence was that in the course of the meeting which lasted several hours (1) Mr Xu did not threaten to repatriate assets to China in an attempt to prevent enforcement over those assets; (2) he explained that if there was enforcement of any judgment over Hytera's western assets, then the commercial reality would force Hytera to exit from the western markets; and (3) the idea that Hytera would "retreat" to its key profitable markets of China, Russia and Africa, etc, was not a threat of dissipation but merely a commercial response to Motorola's (so far successful) attempts to control the United States market. Indeed, Hytera's evidence was that it was Motorola which had asked about Hytera's business and assets, indicating that it was "very good" at enforcing United States judgments overseas and that it would be able to enforce a judgment in the United States, the United Kingdom, Germany and Canada. In response Mr Xu stated that this was of no great concern to Hytera as it held comparatively minimal assets outside China and provided a list of assets indicating that as of 30th September 2019 it had only the equivalent of about US $40 million in cash outside of China. This was the context for the discussion of a "retreat to China". According to Hytera, it was Motorola which first used the flipchart to demonstrate that more than half of Hytera's annual income was generated outside China and that a "retreat" would result in a 50% loss of income, while Hytera responded by explaining that its more profitable markets were in China, Russia and Africa and that a retreat from western markets would not cause any significant

detriment to its global operations. The exchange must also be seen against the background that part of the relief sought by Motorola in the US proceedings was a permanent cessation of sales in the United States of Hytera's products which, Motorola claimed, incorporated the stolen code.

73. In my judgment, if the Motorola evidence is plausible, the Hytera evidence is at least equally so. Certainly it provides an explanation, unlike Motorola's evidence, for many of the figures written on the flipchart and fully justifies the judge's observation at [71] that there was scope for misunderstanding what was said, although in order to provide this explanation and put what was said into context, Hytera has had to open up even more of the content of the without prejudice discussion. On this state of the evidence it is in my judgment impossible to say – and the judge did not say – that the evidence establishes an unambiguous impropriety.

74. It is, moreover, common for potential problems of enforcement to be a factor to which both parties will be alive in international litigation and it would be unfortunate if that was a subject which could not be discussed in settlement meetings for fear of being interpreted as a threat to move assets improperly. This is a context in which one party's "colourful or even exaggerated language" (to borrow Hoffmann LJ's phrase in *Forster v Friedland*) may well be viewed by the other party as a threat or even blackmail.

75. I conclude therefore, that the evidence of the without prejudice statements should not have been admitted.

The Respondents' Notice

76. Accordingly the judge's reason for granting a freezing order falls away but the question arises whether, contrary to the judge's view that the admissibility of the without prejudice statements was critical, the judge ought in any event to have granted a freezing order on the basis that the other factors relied on by Motorola, listed at [14] above, were sufficient to show a risk of dissipation of assets by improper means in order to frustrate the enforcement of a judgment.

77. Those factors were (1) Hytera's theft of trade secrets, now established by the jury's verdict in the US proceedings, (2) a good arguable case that this theft must have occurred with the complicity of Hytera's senior management, (3) the fact that the three engineers were not dismissed for some time after Motorola's commencement of the US proceedings and, even then, were given a handsome payoff and were required to sign non-disclosure agreements, and (4) the fact that Hytera continued to sell products containing Motorola's code.

78. The key principles concerning the test which an applicant for a freezing order must meet were summarised by Haddon-Cave LJ (with whom McCombe LJ and Sir Stephen Richards agreed) in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 at [34]:

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
>
> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
>
> (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
>
> (7) Each case is fact specific and relevant factors must be looked at cumulatively."

79. Mr Thomas Sprange QC for Motorola conceded that the judge had made no error of principle in concluding that, without the without prejudice material, there was insufficient evidence of a risk of dissipation. His complaint was that the judge had given insufficient weight to the factors which I have listed. But that is an evaluation which is for the judge at first instance to make. While it may be that some judges would have considered that there was in this case solid evidence of dishonesty with the complicity of Hytera's senior management and that this pointed to the conclusion that assets might be disposed of or concealed otherwise than in the ordinary course of business in order

to avoid enforcement of the United States judgment, Jacobs J was entitled to conclude that the evidence was insufficient.

The *Chabra* injunction against Shortway

80. In these circumstances the injunction granted against Hytera must be set aside and the question whether an injunction should in addition have been granted against Shortway pursuant to the *Chabra* jurisdiction does not arise. That injunction must also be set aside. I would, however, wish to reserve my opinion whether, if the injunction against Hytera had stood, it would have been appropriate to grant a *Chabra* injunction against Shortway.

Disposal

81. I would allow the appeal and set aside the freezing order against both appellants.

Lady Justice Rose:

82. I agree.

Lord Justice Lewison:

83. I also agree.