IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 205 OF 2017 (NSJ)

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

-and-

(1) LOPAG TRUST REG.
(A Trust Enterprise registered under the laws of the Principality of Liechtenstein)

(2) PRIVATE EQUITY SERVICES (CURACAO) N.V.
(A Company incorporated under the law of Curacao)

(3) FIDUCIANA VERWALTUNGSANSTALT
(An establishment incorporated under the laws of the Principality of Liechtenstein)

(4) GAL GREENSPOON- PERRY

(5) YAEL PERRY

(6) DAN GREENSPOON

(7) RON GREENSPOON,

(8) MIA GREENSPOON
(9) ADMIN TRUST VERWALTUNGS ANSTALT
(An establishment incorporated under the laws of the Principality of Liechtenstein)

Defendants

240507 – In the matter of Perry and another v Lopag and others – FSD 205 of 2017 – Judgment on the First and Ninth Defendants application in the TNOM for the striking out of certain evidence filed by the Second Plaintiff and the Fifth Defendant

ON THE PAPERS

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Graeme McPherson KC instructed by Shaun Tracey of Campbells LLP for the Applicants** **Nick Dunne of Walkers (Cayman) LLP for the Plaintiffs** **Guy Dilliway-Parry of Priestleys for the Fifth Defendant**
Draft judgment circulated:	**7 May 2024**
Judgment handed down:	**13 May 2024**

HEADNOTE

Motion for sanctions against the Plaintiffs and the Fifth Defendant for contempt of court – application to strike out paragraphs in the affidavit evidence filed by Plaintiffs and the Fifth Defendant in reliance on without prejudice – exceptions to without prejudice privilege - scope and application of the unambiguous impropriety exception

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JUDGMENT ON THE FIRST AND NINTH DEFENDANTS' WP SUMMONS DATED 9 OCTOBER 2023

Introduction

1. In their summons (the ***Summons***) dated 9 October 2023, the First Defendant and the Ninth Defendant (the ***Applicants***) apply for an order that [17] of the Twenty-Ninth Affidavit (***TP-29***) of the Second Plaintiff served on 28 July 2023 and [10] and [26] of the Twenty-First Affidavit (***D5-21***) of the Fifth Defendant also served on 28 July 2023, be struck out (the ***Challenged Paragraphs***).

2. The application is made in the contempt proceedings commenced by the Applicants by notice of motion dated 10 May 2023 (the ***TNOM***). In the TNOM the Applicants allege

(a) that the First Plaintiff and the Second Plaintiff acted in breach of undertakings given by each of them to the Court pursuant to orders made by the Court on 10 April 2018 and 15 January 2021) (the ***Undertakings***) and in breach of the Court's order dated 10 April 2018 and (b) that the Fifth Defendant assisted the Plaintiffs and thereby acted in breach of the Court's orders dated 10 April 2018 and 15 January 2021, in each case by (amongst other things) entering into a settlement agreement (the ***Settlement Agreement***) relating to the assets of two Curacao entities, namely SFPF and Solid, and taking certain other steps connected to that settlement agreement. Mr Boehler's Tenth Affidavit was filed in support of the TNOM. The TNOM is listed to be heard on 3/4 July 2024.

3. TP-29 and YP-21 were served in response to the TNOM.

4. The Applicants filed the Thirteenth Affidavit of Mr Klaus Boehler (***Boehler-13***) in support of the Summons while the Second Plaintiff filed her Thirtieth Affidavit (***TP-30***) and the Fifth Defendant filed her Twenty Fifth Affidavit (***D5-25***) in response. The Applicants filed the Seventh Affidavit of Mr Florian Zechberger (***Zechberger 7***) in response to TP-30 and D5-25 (Mr Zechberger is a partner in the Applicants' Liechtenstein legal advisers).

5. On 28 February 2024 the Applicants filed written submissions. The parties have requested and agreed that the Summons be dealt with on the papers. They have also agreed that I, rather than another Judge as would normally be the case, should deal with the application.

6. In [17] of TP-29 the Second Plaintiff refers to a February 2022 proposal made by the Applicants to the First and Second Plaintiff and to the Fifth Defendant relating to a proposed change to SFPF's articles and the transfer of its funds. The proposal was subject to various conditions precedent, none of which involved a variation or lifting of the Undertakings.

7. In [10] of D5-21 the Fifth Defendant also refers to this proposal and the omission from the conditions precedent of the lifting of the Undertakings. At [26] of D5-21, the Fifth Defendant says that she is surprised that the Applicants are now claiming that entering

into the Settlement Agreement constituted a breach of the Undertakings in view of the terms of their earlier proposal.

The Applicants' evidence

8. Mr Boehler says that the Applicants' objections to the Challenged Paragraphs arise because the matters referred to were the subject of confidential settlement discussions which were covered by a Non-Disclosure Agreement (the ***NDA***) signed by the Applicants (on 21 December 2020), the Second Plaintiff and her representatives (on the same date) and the Fifth Defendant (on 28 October 2021). In their written submissions the Applicants explained, and is confirmed by the Fifth Defendant at [6] of D5-21, that while the NDA had been signed by the Second Plaintiff on 2 December 2020 the Fifth Respondent had signed a shorter document confirming that she understood that the proceedings were confidential on 28 October 2021 (and I note that both the Second Plaintiff and the Fifth Defendant point out that the agreements were governed by Israeli law).

9. Mr Boehler says that the NDA contains terms in which the parties acknowledge that communications between them (or with the mediator) are settlement negotiations conducted on a without prejudice basis and that all communications occurring in the context of the mediation are inadmissible in any legal proceedings (he quoted paragraphs 1 and 2 of the NDA). The NDA also includes an obligation on the parties to maintain the full confidence of the mediation process and of the information disclosed therein and not to reveal it to anyone except as compelled to do so by law.

10. Mr Boehler asserts (and the Applicants submit) that the Challenged Paragraphs refer to a communication exchanged in the course of the confidential mediation between the Plaintiffs, the Applicants and the Fifth Defendant and which is subject to the provisions of the NDA. The Challenged Paragraphs are therefore inadmissible in any legal proceedings and should be struck out from TP-29 and D5-21)

11. Mr Zechberger points out that no settlement agreement has been reached in the mediation. The confidential information covered by the Summons only represents the content of settlement discussions between all interested parties, including a draft

settlement agreement. He explains that the draft settlement agreement did provide for the return of the assets of Solid and SFPF to BGNIC but that it also had as one of its terms a provision that all necessary steps would be taken to end the Cayman proceedings, which included the discharge of the Injunction and the Undertakings. He says that it was therefore incorrect for the Second Plaintiff and the Fifth Defendant to claim (as I explain below) that the Applicants were proposing that these assets be dealt with without the Undertakings being discharged.

12. Mr Zechberger also asserts that all the discussions with the Fifth Defendant in connection with the mediation were held on a without prejudice and confidential basis. He confirms that the Applicants were required to disclose information on the progress of the mediation to the Princely Court of Liechtenstein because the Court requested an update and exercises a supervisory jurisdiction over the trustees and the trusts. He also confirms that information concerning the mediation was disclosed by the Applicants to the Swiss Court of Appeal in the context of an allegation by the Fifth Defendant that by agreeing to the LFA the Applicants had engaged in criminal conduct. Mr Zechberger says that the Applicants consider that they are entitled, in the case of a criminal complaint made against them, to disclose to the Swiss Court material which shows that the Fifth Defendant has accepted and used funds deriving from the LFA to pay her own legal fees.

13. The Applicants submit that their proposal, referred to by the Second Plaintiff and the Fifth Defendant in the Challenged Paragraphs, was made in the context of a confidential settlement process involving a mediation pursuant to which the parties had entered into express confidentiality agreements which prevented disclosure of any of the discussions (which the Applicants say were necessarily without prejudice).

The Second Plaintiff's evidence

14. The Second Plaintiff says that she understands the case (and charge) made against her by the Applicants in the TNOM to be that entry into the Settlement Agreement was a breach of the Undertakings, that it was obvious that entry into the Settlement Agreement was a breach and that she in fact knew that entry into the Settlement Agreement amounted to a breach. While denying these allegations, she claims that the matters set out at [17] of YP-

29 relate to them and are relevant to a determination of the TNOM. A failure to disclose the Applicants' proposal to the Court would amount to misleading the Court by omission. She claims that the Applicants' reliance on the confidentiality provisions of the mediation agreement amounts to an attempt to mislead the Court. The TNOM alleges a failure to take steps which the proposal shows the Applicants considered to be unnecessary. The fact that the Applicants had represented to the Second Plaintiff that dealings with SFPF's funds could occur without the Undertakings first being removed contradicted the narrative they now relied on (that the alleged breach of the Undertakings was clear and deliberate). The evidence in [17] of YP-29 thus called into question both the reliability of Mr Boehler's evidence in support of the TNOM and the *bona fides* of the TNOM itself.

The Fifth Defendant's evidence

15. The Fifth Defendant claims that the existence of the proposal is not confidential and critically that (as the Second Plaintiff asserts) it demonstrates that the Applicants are seeking to have her held in contempt for acting as they had requested. They had proposed that the SFPF funds be dealt with and paid away without imposing a condition that the Undertakings be released (or the related order amended or discharged) and without saying that there needed to be such a release (or discharge).

16. The Fifth Defendant says that prior to signing the NDA she had been told by the Applicants' legal advisers that the legal disputes between the parties participating in the mediation, including the utilisation of the SFPF funds, had been resolved and says that, as she understands it, under Israeli law the NDA does not prevent her from referring to terms of settlement agreed by the other parties and discussed with her openly before she joined the mediation. She also says that the Applicants referred to the proposal in open court in Liechtenstein in November 2021.

The Second Plaintiff's and the Fifth Defendant's submissions

17. The Second Plaintiff and the Fifth Defendant argue that preventing them from being able to refer to and rely on the Applicants' proposal (and the form of settlement agreement proposed by the Applicants in the mediation) because of the Applicants' claim to without

prejudice privilege would further an unambiguous impropriety or amount to an abuse of the privilege. They submit that the Applicants' application (to hold them in contempt), based on an allegation that they entered into the Settlement Agreement (which related to the assets of SFPF), without that agreement providing for the release of the Undertakings (or discharge of the Court's order) as a condition precedent to its effectiveness, amounted to an abuse or impropriety, when the Applicants themselves had previously suggested that they enter into just such an agreement.

18. The Second Plaintiff and the Fifth Defendant submit that the without prejudice privilege, which reflects a policy designed to facilitate full and frank discussions, did not extend to a party utilising the shield of without prejudice privilege to mislead the Court and advance a case which it knows not to be true. A party could not rely on different facts in negotiations to those which it advances before the Court.

19. They relied on the well-known summary of the exceptions to the exclusion of evidence in reliance on the without prejudice privilege set out by Lord Justice Robert Walker (as he then was) in *Unilever Plc v Proctor & Gamble Co* [2004] 1 WLR 2436 and in particular the following two passages from his judgment at 2444:

> *"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"...But this court has... warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion"*
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> .....
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> *"Lord Griffiths in Rush & Tompkins 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."*

20. The Second Plaintiff argued that the TNOM could only succeed if the evidence of the without prejudice discussions is withheld from the Court. She submitted that the Court should be particularly astute to, and take steps to eliminate or minimise, the risk of abuse in the context of a contempt application where the remedy sought is punitive and involves

a criminal sanction. There were obvious and strong public policy reasons why the Court's coercive and punitive jurisdiction should be exercised with particular care and on a factually sound basis. She argued that in this case there was no credible, honest explanation for the Applicants' approach to their application. Knowing full well what had previously taken place, they had nevertheless attempted to exploit the without prejudice nature of the settlement discussions in order to secure a finding of contempt , on what amounted to a false premise. This was compounded by the fact that the application was based on the assertion that the Plaintiffs' purported breach would require a finding of fact that was wholly incompatible with the approach taken by the Applicants in the draft settlement agreement.

The Applicants' submissions

21. The Applicants submitted that it was important for the Court to take into account the fact that in April 2022 the Fifth Defendant had herself relied on the without prejudice nature of the mediation discussions in order to apply for and obtain (following the Court's judgment in May 2022) the striking out of certain paragraphs of Mr Boehler's Sixth Affidavit. They argued that this was an overarching point. Unless the Court was satisfied that the circumstances referenced in and giving rise to the relief sought in the Summons were wholly different from those that justified the making of the 2022 order, the Court should once again exclude evidence that relates to the without prejudice mediation.

22. With respect to the unambiguous impropriety exception, relied on by both the Second Plaintiff and the Fifth Defendant, the Applicants relied on the judgment of Lord Justice Males in *Motorola Solutions Inc and another v Hytera Communications Corpn Ltd* [2021] EWCA Civ 11. They submitted that the following four propositions are confirmed in that judgment. First, the critical question is whether the privileged occasion is itself abused (paragraph 55). Secondly, 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 (paragraph 57). Thirdly, cases where the unambiguous impropriety has been found to apply are truly exceptional (paragraph 57). Fourthly, the party seeking to assert

unambiguous impropriety must establish the existence of unambiguous impropriety, not merely a good arguable case that there was such impropriety (paragraph 60). They also noted that, as is pointed out in *Hollander, Documentary Evidence* (14th ed., at [20-42]) that although unambiguous impropriety may not involve blackmail or perjury almost all of the cases involve such conduct. They argued that where the conduct falls short of this high bar, the without prejudice privilege remained. It had been held in *Williams v Hull* [2009] EWHC 2844 (Ch) (Mr Justice Arnold) at [58] that advancing a contention in without prejudice negotiations at odds with a pleaded case was not unambiguous impropriety.

23. The Applicants submitted that there was no question of unambiguous impropriety in the present case. First, the Applicants are not adopting in the TNOM a position which is inconsistent with that taken in the without prejudice negotiations. The without prejudice discussions related to a proposal made by the Applicants which included an offer to all parties which, if agreed, would have resulted in the discharge of the Cayman litigation. Necessarily this would have meant that the Plaintiffs were discharged from their undertakings (which were given to protect the Applicants). The Settlement Agreement which forms the basis of the TNOM did not involve the Applicants and a release of the Undertakings was not a condition precedent to it. Secondly, even if there was such an inconsistency, there was no abuse of the without prejudice privilege. The Applicants had not made any threat to the other parties or been guilty of any other misconduct. Thirdly, even if there had been such an inconsistency, the approach taken by the Applicants in the without prejudice negotiations had no relevance to the charge of contempt which is dealt with in the TNOM.

24. As regards the Fifth Defendant's claim that Applicants' position in the without prejudice negotiations had previously been disclosed before any cloak of confidentiality was agreed by her, this failed on the facts. As was set out in Zechberger 7, the discussion relied on by the Fifth Defendant was in fact conducted on a without prejudice basis.

25. The Applicants noted that the Fifth Defendant also appeared to rely on the doctrine of waiver although it was unclear from D5-25 whether she relied on the disclosure of the terms of the proposed settlement agreement to the Liechtenstein Court on 11 November

2021. The Applicants argued that the Fifth Defendant would be wrong to do so since such disclosure was in the context of an application made by Global PTC, a trustee appointed by the Fifth Defendant, to the Court when Global PTC had been informed about the 19 October 2021 Zoom call by the Fifth Defendant. It was Global PTC who had brought the issue of the settlement to the Liechtenstein Court not the Applicants. And Mr Zechberger (see Zechberger 7 at [10]) had been asked to provide an update by the supervising judge. This could not amount to a waiver. As regards the other disclosure to the Swiss Courts (in the context of a criminal complaint made by the Fifth Defendant), the Applicants believed that they were entitled, as a matter of Swiss law, to rely on that evidence to defend the criminal complaint. Permissible disclosure in the course of foreign legal proceedings could not amount to a waiver of confidentiality for the purposes of the TNOM proceedings.

Discussion and decision

26. The core complaint made by the Second Plaintiff and the Fifth Defendant is that (a) the evidence shows ("*on a careful reading of the evidence*", as the Second Plaintiff puts it in her written submissions) that the Applicants' proposal and draft settlement terms discussed in the without prejudice mediation negotiations did not contain any reference to the release of the Undertakings (or the Court's order) as a condition precedent nor was there any discussion of such a release so that (b) it was clearly improper for the Applicants to seek to hold the Second Plaintiff and the Fifth Defendant liable for contempt for acting as the Applicants themselves had suggested and (c) it would perpetrate a serious procedural unfairness for the Second Plaintiff and the Fifth Defendant to be prevented from adducing evidence of what the Applicants said in the without prejudice negotiations to defend themselves and show that the Applicants had assented to (or perhaps that they reasonably understood the Applicants to have assented to) the SFPF funds being paid away without the need for the Undertakings to be released.

27. The Second Plaintiff and the Fifth Defendant assert deliberate wrongdoing by the Applicants. They say that the Applicants are advancing a case which they know to be untrue (with the implication that the Applicants in filing the TNOM, and their witnesses in giving evidence by affidavit, have committed perjury, or in the latter case, will commit

perjury if the evidence is relied on at the hearing of the TNOM). The Second Plaintiff and the Fifth Defendant assert that the Applicants are deliberately seeking to mislead the Court.

28. As regards the applicable law, the Second Plaintiff and the Fifth Defendant are clearly right that it is well established that there are a number of situations in which a without prejudice communication may be given in evidence, that a list of eight such situations was given by Robert Walker LJ in *Unilever* and that one of those situations is where *the exclusion of the evidence [of the without prejudice discussions] would act as a cloak for perjury, blackmail or other "unambiguous impropriety."*

29. I agree with the Applicants summary of the core propositions endorsed in *Motorola Solutions* but would add the following points by way of brief elaboration:

(a). the exception that permits evidence of without prejudice negotiations to be adduced is narrow. It requires exceptional circumstances. In *Berry Trade Ltd v Moussavi* [2003] EWCA 715 Lord Justice Peter Gibson (as he then was) (whose approach is discussed and approved in subsequent cases, for example by Arnold J in *Williams v Hull*) said at [48] that there had to be a very clear case of abuse of a privileged occasion. In *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667 Lord Justice Rix said (at [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."*

(b). it is the fact that the privilege is abused that loses a party the protection of the privilege, which must be unequivocally proved. In *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667 Lord Justice Rix said this (at [57]) (underlining added):

> *"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 the Unilever case [2000] 1 WLR 2436 <u>when he repeatedly spoke in terms of the abuse of a privileged occasion, or of the abuse of the protection</u>*

> *of the rule of privilege: see at pp 2444g, 2448a and 2449b. That is why Hoffmann LJ in Forster v Friedland 10 November 1992 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 Ltd v Moussavi (No 2) [2003] EWCA Civ 715 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 Fitts 29 DLR (2d) 260 , rather than to an admission in itself.."*

(c). it is not sufficient to remove the protection of the privilege that there is the mere possibility of future perjury or that a statement in without prejudice negotiations indicates or demonstrates that there may already have been perjury (see *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667 per Lord Justice Rix at [57]).

(d). the unambiguous impropriety exception does not apply to a mere inconsistency between, on the one hand, the pleaded case and the evidence filed in support of a claim and, on the other, what is said in the without prejudice discussions. See Peter Gibson LJ in *Berry Trade* at [37] and Lord Justice Rix in *Savings & Investment Bank* at [57] where he said that (underlining added):

> "*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 v Nikbin 25 February 1993,... 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 [in the without prejudice discussions], 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."*

(e). what has to be established very clearly by the evidence is that the party making the claim was guilty of perjury when filing the claim (or notice of motion) and confirming the truth of what was asserted therein or when deposing to a particular fact in their evidence in support of their claim. The discussion of whether there had been unambiguous impropriety on the facts before him by Peter Gibson LJ in *Berry Trade* at [48]-[50]) is instructive (underlining added):

> *"48. ……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.*
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> *49. Does the evidence establish such unambiguous impropriety? We shall consider that question first having regard to the Claimants' evidence, leaving aside the evidence of and for Mr. Ghadimi. The judge was impressed by two points on which heavy emphasis was laid in the Claimants' evidence.*
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> *50. One is the absence from what Mr. Ghadimi said in the without prejudice discussions of any reference to an agreement between Mr. Ghadimi and Mr. Moussavi based on the fixed commission of $9 per metric tonne which was later pleaded in the Defence and Counterclaim. There is a plain inconsistency between that omission from the discussions and the pleadings; but a mere inconsistency, as the cases show, is not sufficient to amount to unambiguous impropriety. What has to appear very clearly from the evidence is that Mr. Ghadimi was guilty of perjury in signing the statement of truth as to his belief in the truth of the pleaded facts and in deposing to the sum claimed in the counterclaim as owed to him. We do not see how it can be said that that is shown, still less if account is taken of the explanation by Mr. Ghadimi, supported as it is by Mr. Buss, to which we have referred in paras. 23 and 24 above*

(f). it is not necessary or determinative that the party asserting the without prejudice privilege challenges (and seeks to explain their position in response to) the evidence adduced by the party seeking to rely on the without prejudice communications (see Lord Justice Rix in *Savings & Investment Bank Ltd v Fincken* at [56]).

30. It seems to me that for the unambiguous impropriety exception to apply the evidence must unequivocally establish that the party asserting and relying on the without prejudice privilege has acted improperly and been guilty of serious misconduct. That misconduct can occur, and often will occur, in the without prejudice discussions themselves (for example by conduct amounting to blackmail or improper threats) or in the relevant proceedings (by lying about their case and committing perjury). As the Applicants noted, *Hollander, Documentary Evidence* (14th ed., at [20-42]) points out that although unambiguous impropriety may not always involve blackmail or perjury almost all of the cases involve such conduct.

31. In the present case, it seems to me that the Applicants have established that the Challenged Paragraphs cannot be adduced in evidence and that their application should be granted. The opposition of the Second Plaintiff and the Fifth Defendant to the Summons fails.

32. As regards the first part of what I have described as the Second Plaintiff's and the Fifth Defendant's core complaint, I do not consider that they have clearly established on the evidence that the Applicants' proposal in the without prejudice mediation negotiations assumed or acknowledged that SFPF's funds could be paid away and rights to a distribution of those funds could be amended without a release of the Undertakings or the related Court order. The basis on which the settlement terms were proposed is disputed and that factual dispute cannot be resolved on this interlocutory application. Further, the Applicants' evidence and explanation, based on the documents, is at least *prima facie* convincing (namely that their draft settlement deed included a term that all necessary steps would be taken to end the Cayman proceedings, which would include the discharge of the Injunction and the Undertakings and the related Court orders). In addition, as the Applicants pointed out, their draft settlement proposal presupposed their agreement to dealings with SFPF's funds, which was not sought or obtained in relation to the Settlement Agreement. Therefore, on the facts, I do not accept the premise of the Second Plaintiff's and the Fifth Defendant's case that the Applicants cannot honestly make the case set out in the TNOM because they had previously and unequivocally accepted, agreed, or represented that the Plaintiffs and the Fifth Defendant could unilaterally agree to (or procure) the amendment of their rights in respect of, or to rights in, SFPF's funds without the consent of the Applicants or the discharge of the Undertakings (and the related Court orders).

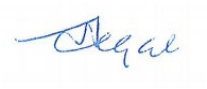
33. It follows from this that the Second Plaintiff and the Fifth Defendant are unable unequivocally to prove that the Applicants have been guilty of serious misconduct in the conduct of the TNOM proceedings (they have not alleged that the Applicants' conduct in the without prejudice discussions was improper). Adopting the phraseology of Peter Gibson LJ in *Berry Trade* at [50] what has to appear very clearly from the evidence is that those verifying and filing evidence in support of the TNOM were guilty of perjury.

I do not see how it can be said that that has been shown, still less if account is taken of the explanation by Mr Zechberger.

34. I also accept the Applicants' submission that, to the extent that the Fifth Defendant sought to argue that the Applicants had waived or lost their right to rely on the without prejudice privilege in relation to their proposed settlement proposed in the mediation, such a claim has not been made out.

35. I accept that in contempt proceedings the Court must and will be concerned to protect the party accused of contempt and must put in place appropriate procedural protections (consistent with the protections given to a defendant in a criminal case) for their benefit (I note that the Second Plaintiff and the Fifth Defendant have not suggested that the without prejudice privilege is not available in a criminal or contempt proceeding). But those protections do not extend to allowing the accused to ignore the without prejudice privilege and to adduce evidence which is protected by it in the absence of circumstances which establish an exception to its operation. The Second Plaintiff and the Fifth Defendant must be given a fair and proper opportunity to defend themselves but in this case there is no sufficient basis for disapplying the without prejudice privilege. Furthermore, it seems to me that the exclusion of the evidence of the Applicants' settlement proposal in the mediation will not adversely affect the Second Plaintiff's and the Fifth Defendant's defence since they could never realistically say that they had assumed that an agreement for the release of the SFPF Funds with the Applicants (and which would involve the termination of the Cayman proceedings and the discharge of the Injunction) meant that the Applicants had agreed that if that agreement was not entered into the Plaintiffs and the Fifth Defendant could then unilaterally agree to a modification of their rights in and to the release of the SFPF Funds without the discharge of the Undertakings and the Court's orders (even if, as the Second Plaintiff and the Fifth Defendant say, the Settlement Agreement envisaged that the Receivers would be discharged and therefore envisaged that there would be further orders of this Court before the Settlement Agreement came into effect – a matter they can still assert in their defence).

36. As regards the Applicants' overarching point, it seems to me that the circumstances of the April 2022 application made by the Fifth Defendant are different in a material respect from those relating to the application now made by the Applicants in the Summons. The Fifth Defendant now claims that an exception to the reliance on the without prejudice privilege applies in relation to the relief sought in the Summons. She is not, as I understand her position, arguing that the mediation discussions themselves did not attract the without prejudice privilege. She is asserting that the Applicants cannot rely on it for the purpose of excluding the evidence in the Challenged Paragraphs because, *inter alia*, the unambiguous impropriety exception applies or because such reliance would be an abuse.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
13 May 2024