Neutral Citation Number: [2024] EWHC 989 (Ch)

Case No: PT-2022-000121

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 29/04/2024

Before :

MASTER BOWLES (SITTING IN RETIREMENT)

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Between :

(1) Charles Steven Bond
(as executor of the estate of Reginald Charles Bond and personally)
(2) Graham Reginald Bond
(as executor of the estate of Reginald Charles Bond and personally) — **Claimants**

- and -

(1) Denise May Webster
(as executor of the estate of Reginald Charles Bond and personally)
(2) Karen Joyce Daddy
(as executor of the estate of Reginald Charles Bond and personally)
(3) Michael Ian Bond
(4) Lindsay Bond — **Defendants**

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Clare Stanley KC and Harry Martin (instructed by **Howard Kennedy LLP**) for the **Claimants**
Penelope Reed KC and Emilia Carslaw (instructed by **Withers LLP**) for the **Third and Fourth Defendants**

Hearing date: 10 April 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER BOWLES (SITTING IN RETIREMENT)

Master Bowles (sitting in retirement) :

1. By an application notice, dated 1 March 2024, the Claimants, Charles Steven Bond and Graham Reginald Bond (Charles and Greg) , apply to strike out certain paragraphs in witness statements which have been prepared in respect of a lengthy probate trial, listed in a trial window commencing on 29 April 2024. Underlying the application is the contention that the material passages in the witness statement in question contain inadmissible material because they make reference to what were, admittedly and explicitly, without prejudice negotiations.

2. The issue arising on the application and in respect of which I have had the benefit of substantial and helpful argument, on behalf of the Claimants and the third and fourth Defendants, Michael Ian Bond and Lindsay Bond (Michael and Lindsay), is whether this is one of those rare cases where the important privilege attaching to without prejudice negotiations is disapplied by reason of the 'unambiguous impropriety' of one or other party to the negotiations. In this case, it is contended, on behalf of Michael and Lindsay, that Charles and Greg, by their then representative, a solicitor, Mr Duncan Rann (Mr Rann), were guilty of such an unambiguous impropriety at and in the course of a without prejudice meeting with a Mr Matthew Rowley (Mr Rowley), a solicitor and partner in Harrowells Ltd (Harrowells), solicitors then acting for Michael and Lindsay, in respect of some, but not all, aspects of their affairs.

3. The meeting in question took place on 3 August 2021, at a café in Stamford Bridge, outside York. No contemporaneous note was made of the meeting and no recording exists as to what was said at the meeting. Neither Mr Rann nor Mr Rowley have been able in their witness statements to recall, with any exactitude, the words used at the meeting. Mr Rowley, at paragraph 67 of his witness statement, the paragraph central to the strike out application, provides a summary of the meeting extending, only, to some six lines. Mr Rann has provided a much fuller witness statement as to the meeting and as to 'the gist of what was discussed', but, unsurprisingly, in respect of what appears to have been a 30 minute meeting, some two and a half years ago, does not purport to recall the exact words used.

4. The context in respect of which this application is brought, is a substantial probate action relating to the purported will of Reginald Charles Bond (Reginald), dated 19 November 2019 (the will), together with a purported codicil dated 20 December 2019 (the codicil). Reginald died on 15 March 2021 and these proceedings were commenced on 17 February 2022. Charles, Greg, Michael and Lindsay are Reginald's children

5. The proceedings are brought by Charles and Greg, who are two of the named executors in the purported will, to propound the purported will and codicil. The first and second Defendants, Denise May Webster and Karen Joyce Daddy, are the two other executors named in the will. They were employees of Reginald and have, as I understand it, as paries, played no part in this litigation, but are joined so as to be bound by the outcome. The proceedings are resisted by Michael and Lindsay, who assert that the will and codicil fail on the grounds of Reginald's want of testamentary capacity and want of knowledge and approval and who seek to propound an earlier will dated 22 August 2017. They assert that the preparation of the will and codicil, together with the preparation of a number of lasting powers of attorney, were matters orchestrated by Charles and others, including allegedly Mr Rann, and that the will and

codicil were kept secret from Michael and Lindsay until after the death of their father. As already stated, the trial of this claim is listed for 13 days in a trial window commencing on 29 April 2024.

6. Although the meeting the subject of this application took place before the commencement of the current proceedings, the central allegation made by Michael and Lindsay, in respect of the meeting, is that an improper threat was directed by Mr Rann to Mr Rowley at the meeting, with a view to persuading, or coercing, Michael and Lindsay not to pursue concerns that had, at the date of the meeting, already been raised as to the validity of the will and codicil.

7. As regards the two wills, in play; the 2019 will and the 2017 will, the major difference and, therefore, a matter at the heart of the current litigation was the treatment, in the 2019 will, of Reginald's shares in the successful tyre wholesale and distribution business that he had built up over many years. In the 2019 will, those shares, whether in the company through which the business had traded for many years, R &RC Bond (Wholesale) Ltd (Bond Wholesale), or in the new holding company, created in the circumstances explained below, R &RC Bond (Holdings) Ltd, were devised to Charles and Greg. Under the 2017 will and earlier wills, Reginald had distributed his estate (including his shares) equally between his four children.

8. Central, also, to the current application are the inter vivos arrangements made by Reginald, in respect of his shares in the business, in the years preceding his death, and the potential tax consequences of those arrangements, as they relate to Michael and Lindsay; it being their contention that the improper threat made to them, via Mr Rowley, at the without prejudice meeting, was that, unless they dropped their potential objections to the validity of the 2019 will, they would, or would be likely, to be faced with a very substantial Inheritance Tax liability, arising out of those arrangements and out of the implementation of subsequent arrangements designed to buy out Michael and Lindsay's shareholdings in the business and their consequent interests in the business.

9. In regard to those arrangements, the starting point is that, as at March 2015, there were 1000 issued shares in Bond Wholesale and that all but a handful of those shares were held by Reginald and his wife (Betty).

10. In September 2015, Betty died, leaving her 244 shares in Bond Wholesale to Reginald. He, in turn, by way of a Deed of Variation, dated 22 August 2017, transferred 234 of those shares to his children. The total value of those transfers is said by Charles and Greg to be in the order of £12,870,000. Mike and Lindsay each received 57 shares. Thereafter, by share transfers, dated 14 June 2018, Reginald transferred further shares to each of his children. 556 shares were transferred and each child received 139 shares. The total value of the shares transferred has been valued for Inheritance Tax purposes at £30,580,000. The consequence, in aggregate, of these share transfers was that Reginald retained 20% of the shares in Bond Wholesale and each of his four children, bringing into account a small handful of shares which had been gifted to Michael and Lindsay's children, owned 20% of the shares.

11. At or about the same time as the share transfers from Reginald to his children negotiations commenced for the sale of Bond Wholesale to private equity investors. This, however, was not pursued to completion, but, instead, it was agreed that

Michael and Lindsay would be bought out of their interests in Bond Wholesale. That buy out was to be effected by the incorporation of a new vehicle company, R&RC Bond (Holdings) Ltd (Bond Holdings), which was to purchase the entirety of the issued shares in Bond Wholesale.

12. Under the terms of the transaction, at completion, upon 12 February 2020, Michael and Lindsay each sold 54 shares in Bond Wholesale to Bond Holdings for a consideration of £2.95 million and entered into put and call options, to be exercised in a number of tranches, in respect of the balance of their shares (142 each) in Bond Wholesale. The ability to exercise the options was tied, among other things, to the level of profit made by Bond Wholesale, but the intention, as I understand it, was that the total additional consideration payable to each of Michael and Lindsay, when once the options were fully exercised, would be some £7,780,000.

13. Reginald, Charles and Greg each exchanged their shares in Bond Wholesale for shares in Bond Holdings. The result was that, pending the exercise of the put and call options, Bond Holdings owned the large majority of the shares in Bond Wholesale and Michael and Lindsay remained as minority shareholders, but with the intent that, when once the options had been exercised, they would retain no further interest in the business.

14. The potential tax liability with which, it is said, Michael and Lindsay were threatened arises out of the fact that Reginald did not survive his share transfers for seven years and, further, that the sale by each of Michael and Lindsay, prior to Reginald's death, of 54 of the shares that they had received, if regarded as having been received from Reginald, precluded them from securing Business Property Relief, in respect of the value of those shares.

15. Putting the matter in slightly more detail, the share transfers by Reginald to Michael and Lindsay, in June 2018 were potentially exempt transfers, in the sense that, if Reginald had survived the transfers by seven years, then the shares the subject of the transfers would not have been regarded as falling into Reginald's estate for purposes of Inheritance Tax. If, however, as was the case, Reginald died within the seven year period, then, in tax terminology, the transfers would have given rise to a failed PET and, subject to any available reliefs, would have been treated as part of Reginald's estate, upon which Inheritance Tax would be levied. In that situation the primary liability for the relevant tax would fall upon the transferees and, hence, upon Michael and Lindsay.

16. The only available relief (other than taper relief, mitigating but not exempting tax liability) was, or would have been, Business Property Relief. That, however, in respect of shares transferred by Reginald, would only have been available to Michael and Lindsay in the event that those shares had remained in their hands as at the date of their father's death. Accordingly, given that the shares in question were sold prior to his death, then, if those shares had emanated from him, no relief would be available and the tax liability arising from the transfers would be, as described, by Mr Rann, in an email of 4 August 2021, 'the thick end' of £1 million pounds each.

17. By contrast, if it could be established that the shares sold by Michael and Lindsay had, by reason of the Deed of Variation, derived from Betty, then, they would not have formed part of a failed PET, would not have been treated as part of Reginald's

estate for tax purposes and would not, therefore, give rise to any tax liability in Michael and Lindsay, arising out of and in respect of Reginald's estate.

18. If follows from the foregoing that the identification of the source of the 54 shares sold by each of Michael and Lindsay was, for Michael and Lindsay, a matter of great importance.

19. It was, also, a matter of importance to the executors of Reginald's estate, since it was their obligation, as executors and as a necessary part of the process of obtaining probate in respect of Reginald's estate, to lodge with HMRC, by way of forms IHT 400 and 403, a record of lifetime gifts made by the relevant deceased in the seven years prior to his, or her, death. Form IHT 403 allowed the executors to claim any exemptions, including, therefore, Business Property Relief which might bear upon the estate's Inheritance Tax liabilities, or that of lifetime donees from the deceased.

20. It was, accordingly, open to the named executors, including, therefore Charles and Greg, if satisfied that the shares sold by Michael and Lindsay had not emanated from the 2018 share transfers and, therefore, that those shares had remained in Michael and Lindsay's hands at the date of their father's death, to claim full Business Property Relief in respect of those transfers. If, however, it was their genuine view that that was not the case, then, plainly, they could not properly claim that relief.

21. The potential Inheritance Tax liability, arising from the sale of the shares in question, had been the subject of some discussion at the time when the 2018 share transfers were under discussion and when Reginald's four children were not, as they are now, in conflict. In an email, dated 31 May 2018, Mr Rann foreshadowed the possibility of Inheritance Tax liability in the event of Reginald's death within seven years of the transfers and outlined the availability of Business Property Relief in respect of those transfers provided that the transferred shares had not been sold by the relevant donee prior to Reginald's death.

22. Correspondingly, in 2019, when the buy out was under negotiation and when, therefore, the sale of shares by Michael and Lindsay, during their father's lifetime was explicitly in point, Mr Rann, by email of 12 July 2019, outlined to Mr Rowley, then, as now, acting for Lindsay, that to preclude Inheritance Tax liability, in the event of Reginald's death in the seven year period, following transfer, the first tranche of shares to be sold by Lindsay should be those received from Betty.

23. That designation, or identification, of the 54 shares sold by each of Michael and Lindsay, in February 2020, as emanating from Betty, could have been contained in the Share Purchase Agreement (SPA) and would, had such a designation taken place, have precluded any argument as to the source of the shares sold by Michael and Lindsay and any corresponding risk of tax liability. The fact is, however, that no such designation, or identification, took place and the SPA is entirely silent as to the provenance of the shares sold by Michael and Lindsay to Bond Holdings.

24. The Inheritance Tax problem, as I will call it, emerged very early on in the period following Reginald's death.

25. By letter of 23 April 2021, Andrew Jackson Solicitors LLP (Andrew Jackson), acting for the executors named in the 2019 will, raised with Clarion, solicitors acting for

Michael and Lindsay, the prospect that some, or all, of the shares sold in February 2020 had emanated from Reginald and, because of their sale, would not be eligible for Business Property Relief, such that their proceeds would be chargeable to tax. To clarify the position, recognising the possibility that there might have been a pooling of shares, such that all the shares sold had not emanated from Reginald, Andrew Jackson asked that Clarion's clients provide evidence, either by way of self assessment tax returns, or via their accountants, as to the allocation of the shares sold, as between the shares obtained from Reginald and their other shares in Bond Wholesale.

26. Clarion responded to this request, by way of email dated 13 May 2021, in which Clarion passed on to Andrew Jackson, Michael and Lindsay's explanation as to their February 2020 share sales. That explanation was clear and specific, namely that none of the shares sold in February 2020 emanated from Reginald and that all the shares sold had emanated from Betty. The risk of a failed PET had been identified early on in the transaction process and the clear understanding between the parties was that the initial tranche of shares to be sold would be those acquired from Betty, precisely to mitigate the possible IHT risk. Professional advisers had been instructed on that footing, which was, they understood, reflected in the correspondence between advisers, as well as in their own filings for tax.

27. That response was met by Andrew Jackson in its letter of 14 May 2021. The letter acknowledged, as already stated, that there had been discussion between Mr Rann, representing, I think, Bond Holdings, and Mr Rowley, in 2019, as to the Inheritance Tax risk and, further, that, at that stage, Mr Rann had suggested that the shares to be sold could be designated, in the SPA, as emanating from Betty, either by reference to particular share certificates, or by reclassifying the Betty shares as a particular and specific class of shares. That process of identification, or differentiation, or redesignation had not, however, taken place, with the result that the shares sold were not shown in the SPA as forming a separate class, or category, of shares, emanating from Betty.

28. Andrew Jackson's position, in consequence, was that it would not be possible to represent to HMRC, in the IHT 400, that the shares sold had been Betty's, or that that had been the parties' agreement and that to vary from this clear legal position would be to reinvent history and would result in the submission of an incorrect IHT 400. The most, as I read it, Andrew Jackson was prepared to consider was that it might be possible to lodge the IHT 400 on the basis that the shares sold formed part of a pool of shares (some emanating from Betty; some from Reginald).That would, however, require a convincing explanation, as to the availability of pooling, ideally backed up by counsel's advice and would require, also, corrective self assessments from Michael and Lindsay to reflect that position.

29. The letter of 14 May 2021 resulted in Michael and Lindsay consulting tax accountants, BHP LLP (BHP), and counsel and in Clarion passing on BHP's advice as to the issue of share identification under cover of an email of 30 June 2021.

30. BHP's letter acknowledged that the SPA did not specify the source of the shares which had been sold. It further acknowledged that, although there was clear evidence of Michael and Lindsay's intention that the shares that they were selling were those emanating from Betty, that was, in itself, unlikely to be accepted by HMRC as a determinative identification of the shares sold. Correspondingly, the SPA did not

specifically identify the shares sold as emanating from Reginald, or reflected a pro-rata combination of both parcels of shares. The letter acknowledged, also, that, in contra-distinction to Capital Gains Tax, there was no statutory guidance as to the process of share identification.

31. Failing such guidance, counsel's advice was that resort be had to HMRC's non-statutory guidance and that, by analogy to guidance to be found in HMRC's Share and Asset Valuation Manual, as it related to additional shares acquired by a transferor within the two year period prior to a transfer and bearing, therefore, on the question as to whether, or which, transferred shares constituted business property for purposes of Business Property Relief, a 'first-in - first out' assumption should be adopted, such that, in the present case, it should be assumed that Betty's shares had been the first to be sold. BHP requested, accordingly, that the IHT400 be completed on that footing, but that, if the executors chose to adopt a different position, then BHP should be so informed, in order that it could take up the matter, separately, with HMRC.

32. BHP's letter gave rise, in due course, to a very detailed response from Andrew Jackson, by letter dated 13 July 2021. In summary, Andrew Jackson was not persuaded that the 'first in – first out' assumption was correct and was not, in consequence, prepared to advise the executors to lodge the IHT400 on the footing of that assumption. The executors were, however, reflecting Andrew Jackson's own analysis of HMRC guidance and 'on a cautious basis', prepared to apportion the shares sold as between those received from Betty and those received from Reginald and report the failed PET as being reduced by a proportion of the shares which had been received from Betty. Nonetheless it was expected that a significant amount of tax would be payable.

33. In the result, when the IHT 400 was, in September 2021, eventually lodged with HMRC, the approach adopted by the named executors closely reflected the approach suggested in the letter of 13 July 2021. In a four page annex, attached to the IHT 400, the executors explained the situation that had arisen, the rival approaches, as between the executors and Michael and Lindsay, and their conclusion that a pro rata apportionment of the shares sold, as between the shares received from Betty and the shares received from Reginald, was correct in law. That approach resulted in an attribution of the shares sold, as arising from the failed PET and giving rise to a charge to tax, of just under 71% of the shares and a chargeable gift, therefore, to each of Michael and Lindsay, to the value of just over £2.1 million.

34. In parallel with the correspondence relating to the Inheritance Tax problem, the parties were also in correspondence in respect of the continued implementation of the buy out. In this correspondence, Mr Rowley, of Harrowells, acted for Michael and Lindsay and Mr Rann acted for Bond Holdings, Charles and Greg.

35. The primary burden of the correspondence was as to the provision, by Bond Holdings, of financial materials bearing upon the profitability of Bond Wholesale, which, in turn, as I understand it, bore upon the circumstances triggering the entitlement of Michael and Lindsay to exercise their options in respect of the sale of their further tranches of shares in Bond Wholesale. In issue, also, although not, at this stage, central to the correspondence, was Bond Holdings' apparent intention to impose management charges upon Bond Wholesale, to the extent of some £3 million and in consequent reduction of Bond Wholesale's profitability; again, therefore, bearing

upon the circumstances in which Michael and Lindsay's options could be triggered and, also, I think, upon the monies immediately available in the event of the exercise of the options.

36. It was, as I read it, Michael and Lindsay's frustration, with what they saw as Bond Holdings continued delays in providing the financial information to which they were entitled under the SPA, which, in the event, brought matters to a head and gave rise to the meeting on 3 August 2021. By a letter from Harrowells' litigation department, dated 19 July 2021, Harrowells indicated that unless the information that it was seeking for Michael and Lindsay was received by return then proceedings would issue for the specific performance of Bond Holdings obligations under the SPA. Although the litigation foreshadowed in that letter was never commenced, my understanding is that the issues underlying the proposed proceedings, as they relate to Michael and Lindsay's entitlement to trigger their options, have, as it is put by the Claimants' counsel, in their skeleton argument, 'morphed' into an, as yet unissued, unfair prejudice petition

37. Be that last as it may, on receipt of the 19 July 2021 letter, Mr Rann emailed Mr Rowley and it was in that email, dated 20 July 2021 that he suggested the possibility of an informal meeting. Mr Rowley's response was to suggest a without prejudice telephone conversation and it was in response to that that Mr Rann indicated his feeling that, given (I paraphrase) the importance of the issues, the meeting, while as open as possible, as to content, should be without prejudice, in person and at a neutral venue. In the result, Mr Rann and Mr Rowley met at a café in Stamford Bridge.

38. Mr Rann's account of that meeting is contained in a witness statement, dated 1 March 2024, made in support of the current application. The content of his statement has not been challenged by Mr Rowley, the only other participant in the meeting. As already stated, he acknowledges that he cannot give a verbatim account of the meeting and that his recollection is limited to the gist of the discussion.

39. In regard to that gist, his evidence is that, at the meeting he put an offer to Mr Rowley. Although Mr Rowley was only acting for Michael and Lindsay in respect of matters relating to their shareholdings in Bond Wholesale, it was explicit in their email exchanges that that offer could be carried back to all other interested parties, such as Clarion, then dealing with the Inheritance Tax issue.

40. The offer, according to Mr Rann had three elements. Firstly, the offer was made on the basis that Michael and Lindsay would agree not to proceed with the challenge that they had intimated in respect of the 2019 will and codicil; secondly, that, in that event, Charles and Greg would take such steps as they could to resolve the Inheritance Tax problem with the aim that Michael and Lindsay would not face an Inheritance Tax liability, in respect of the shares that they had received from Reginald in 2018; thirdly, that Charles and Greg would procure the immediate purchase by Bond Holdings of a portion of Michael and Lindsay's remaining shares in Bond Wholesale and, in due course, the balance and, thereby, settle any issues relating to the exercise by Michael and Lindsay of their options under the SPA.

41. Mr Rann explained that, in regard to the share purchases, he had contemplated a variation of the SPA so that the buy out of Michael and Lindsay's remaining shares was not tied to the exercise of the pre-existing options.

42. As to the Inheritance Tax problem, Mr Rann's thinking, he said, was that, to rectify Michael and Lindsay's position, Charles and Greg would go to experienced tax counsel to find out whether better arguments existed, such as to preclude Michael and Lindsay's potential Inheritance Tax liability than had currently been advanced and, in particular, whether it would be open to Charles and Greg to procure a resolution of Bond Wholesale categorising, or designating, the shares sold by Michael and Lindsay as emanating from Betty's estate, or to rectify the SPA so as to specifically identify the shares in Bond Wholesale sold by Michael and Lindsay as emanating from Betty's estate, or to write up Bond Wholesale's statutory books to that effect. These, or other, steps, were, or would have been, intended to persuade HMRC that the shares sold by Michael and Lindsay were not the shares which they had received from Reginald, did not form part of the failed PET and did not, therefore, give rise to a tax liability in Michael and Lindsay.

43. Mr Rann was frank that he had not gone into the tax position in the detail just outlined. He explained that Mr Rowley had not wanted to go into detail because he did not 'really understand the tax'. Mr Rann was, however, clear that his offer was an offer to help rectify Michael and Lindsay's tax position.

44. Implicit in the foregoing was, of course, that Mr Rann had had, prior to the meeting, a clear understanding of the potential tax risk to which Michael and Lindsay were subject and the need, certainly as he saw it, that their position required to be rectified. That he had that knowledge is not in doubt. It was Mr Rann who, as set out in paragraphs 22 and 27 of this judgment, had, prior to the completion of the SPA outlined the potential tax risk arising if the shares to be sold by Michael and Lindsay were not designated as emanating from Betty; the very risk that had materialised.

45. Reverting to the meeting, itself, as I have already indicated, Mr Rowley's recollection is set out in six, or so lines, in paragraph 67 of his witness statement, dated 25 October 2023. His summary of the meeting is that Mr Rann told him that Charles and Greg would lodge an IHT 400, indicating that there was no tax to pay in respect of Michael and Lindsay's shares if Michael and Lindsay did not challenge the will, or the issues with the Company (meaning, I think, the issues as to the exercise of the share options, outlined in paragraph 35 of this judgment) and that, in those circumstances, Greg and Charles would get Michael and Lindsay's shares purchased and get Michael and Lindsay their extra money. In the absence of agreement, 'all bets were off' and Charles and Greg would lodge the IHT 400 stating that IHT was due in respect of Lindsay and Michael's shares. In paragraph 68 of that witness statement, Mr Rowley went on to state that, in his view, the meeting did not amount to a genuine attempt to settle either the will, or the share disputes, but was simply an attempt to blackmail Michael and Lindsay, using the content of the IHT 400 as leverage in order to get the other disputes dropped.

46. Mr Rowley's account, in his witness statement, is to be compared with a contemporaneous email that he sent to Michael and Lindsay on the afternoon of 3 August 2023, the day of the meeting. The gist of the meeting, as he put it then, was that if Michael and Lindsay dropped the will challenge, then they (meaning Charles and Greg) would not file the IHT 400 and would spare Michael and Lindsay the risk of paying IHT on the shares they had sold and Charles would honour his word and get Michael and Lindsay paid out in respect of their remaining shares. If, however, the will challenge was persisted in, then the IHT 400 would be filed and Michael and

Lindsay would be subject to what he termed the 'tax issues.' He summarised the meeting, ultimately, as 'a bit of blackmail on the arguments surrounding' Reginald's will and 'an offer of not filing an IHT 400 (demonstrating that whether they do or do not file an IHT 400 has absolutely nothing to do with the proper administration of (Reginald's) estate'.

47. Following the meeting, on 4 August 2021 there was a further email exchange between Mr Rann and Mr Rowley. Mr Rowley informed Mr Rann that he had put Mr Rann's offer to Michael and Lindsay and had explained to them that they should weigh up their position in respect of the will, set against the possibility of the executors filing an IHT 400 in respect of Reginald's estate, with the IHT risk that went with that filing, and should also weigh up the prospect of a breakdown in relationships with regard to Bond Wholesale and the exercise of their options.

48. Lindsay's understanding of Mr Rann's offer, as appears from her witness statement, dated 26 October 2023, is set out in paragraph 222 of that witness statement. In that paragraph Lindsay summarised Mr Rowley's email account of his meeting with Mr Rann as being along the lines that if she and Michael backed off the will then Charles and Greg would not put in a 'failed PET' and would honour the SPA, but if she and Michael did not back off the will then they would 'fail the PET' and not honour the SPA.

49. Mr Rann replied to Mr Rowley's 4 August email, without prejudice and at some at length, expressing his concern that Michael and Lindsay might be too confident as to their position as to Inheritance Tax and might have a false hope as to tax on the failed PET not being payable. He explained that he had looked at the issue in conjunction with Andrew Jackson and that, in his experienced view, the first in – first out approach adopted by BHP was not as strong as it had been made out to be. He also explained that, the executors could not, as he put it, chance their arm in respect of the IHT 400 but had to act properly and present the IHT 400 as they thought appropriate and, accordingly, specify any tax due. In that context a different position presented by Michael and Lindsay, in reliance upon BHP's advice would result in an investigation by HMRC and would have to be technically convincing. If it was not (and Mr Rann's view was that it was not) then tax would be found due and there would be a possibility of penalties and, as Mr Rann put it, a 'tax hit' that Michael and Lindsay could not withstand.

50. Mr Rann concluded his email by saying that Mr Rowley could choose to do nothing about anything he had set out and take the view that it was none of Mr Rann's business. Mr Rann, however, wanted to make clear that it was the executors' genuine belief that a large tax payment would be due, unless steps were taken to agree the position.

51. The email exchange terminated with a short, later, without prejudice email from Mr Rann, informing Mr Rowley that his clients, Charles and Greg, had been informed of the offer that had been made and that, in the absence, of a response by 12 August 2021, 'all bets were off'.

52. As indicated, in paragraph 2 of this judgment, the issue on this application is whether, Charles and Greg, by Mr Rann, were guilty of such an 'unambiguous impropriety', at the otherwise without prejudice meeting on 3 August 2021, that the privilege applying

to without prejudice communications should be disapplied in relation to the meeting, or put another way, whether, properly analysed and because of the 'unambiguous impropriety' of Mr Rann's alleged conduct, the meeting should not be regarded as reflecting a genuine attempt to settle and, therefore, for that reason, no privilege applied.

53. The considerable body of authority, bearing upon the circumstances in which matters apparently canvassed on a without prejudice basis are, nonetheless, to be deprived of privilege, was reviewed by the Court of Appeal, in **Motorola Solutions Inc v Hytera Communications Corpn Ltd [2021] QB 774** .

54. The clear message, if I may put it in that way, to be derived from that case is that, for obvious public policy reasons, the without prejudice rule must, taking a phrase from **Fazil-Alideh v Nikbin (unreported) 25 February 1993**, be 'scrupulously and jealously protected', such that it is only in the very clearest of cases that the 'unambiguous impropriety' exception can be shown to be made out. At paragraph 31, in **Motorola**, Males LJ, in a judgment with which Rose LJ (as she then was) and Lewison LJ agreed, described, as important to the appeal in **that case,** that even in a case where the alleged impropriety was probable that would not be sufficient to satisfy the demanding test that there is no ambiguity. Evidence which is asserted to establish impropriety and satisfy the test of unambiguous impropriety must be rigorously scrutinised.

55. At paragraph 57 of **Motorola,** Males LJ concluded that, in his words, the courts '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 rule has been recognised, cases in which it has been applied have been truly exceptional' and (leaving aside one case, **Dora v Simper (unreported) 15 March 1999,**, described by Males LJ as an outlier and not to be followed) ones where 'there has been no scope for dispute as to what was said, either because the statement was recorded, or because it was in writing'. While Males LJ did not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting might be so clear as to enable the court to reach a clear conclusion about it, such cases were likely to be rare.

56. In this case, there was, as already stated, no verbatim record of what was said and there can be no doubt but that the gravamen of what Mr Rann says that he sought to offer to Michael and Lindsay, in his discussion with Mr Rowley, namely help in enabling them to avoid the possible tax consequences arising out of the failure to designate the shares sold by Michael and Lindsay, in February 2020, as emanating from Betty, is very different from what Mr Rowley and, by him, Lindsay, seems to have understood as the message of the meeting.

57. That alone, in the submission of Ms Stanley KC and Mr Martin, counsel for Charles and Greg, should be the end of the matter. There is simply not the requisite clarity as to what was said as to warrant the bringing into play of the 'unambiguous impropriety' exception.

58. There is much in this submission. It is hard to see, given the very obvious variance between Mr Rann's evidence and Mr Rowley's apparent understanding of what was

said, that the court can, in this case, be satisfied that what was said at the meeting was so clear as to bring the unambiguous impropriety exception into play.

59. Ms Reed KC and Ms Carslaw submit, however, that the court need not be concerned as to the minutiae of what was said at the meeting, but can, simply, be satisfied that the impact, or effect, of the discussion was to threaten Michael and Lindsay that, unless they aborted their challenge to the 2019 will, they would be faced with a crippling tax bill. Their emphasis was not on the offer made by Mr Rann to assist them to escape from their tax predicament, but upon the threat as to what would happen if the offer of assistance was not taken up. This, in their submission, was the 'unambiguous impropriety' which warranted the disapplication of the without prejudice principle.

60. In support of their submission some reliance was placed upon the decision of Rose J (as she then was) and the Court of Appeal, in **Ferster v Ferster [2016] EWCA Civ 717**.

61. **Ferster**, as this case, was a case where the alleged impropriety was not in the making of admissions in a without prejudice situation which demonstrated that the case being advanced was perjured and where without prejudice privilege was being used as a cloak for perjury, but where the allegation was one of improper threat. In such a case, such as this case, then, as set out in paragraph 11 of the judgment of Floyd LJ, with which the other members of the court agreed, it may be somewhat easier to establish an unambiguous impropriety.

62. In that case, however, there was no issue as to what was said between the parties. The alleged threat, namely that, in the absence of an agreement to pay an enhanced and non-commercial price for certain shares, a company, controlled by the opposing parties in the relevant litigation, would bring committal proceedings against the threatened party, that wrongdoings by the threatened party might become public and that criminal proceedings for perjury and perverting the course of justice might ensue, was all to be found in an email forwarded to the allegedly threatened party by a mediator.

63. In that context, the question for determination did not require any resolution of fact by the court but rather, as explained in paragraph 23 of the judgment, an evaluation as to whether the threats in question unambiguously fell outside the ambit of what was 'permissible in settlement of hard fought commercial litigation'. In making that evaluation, as set out in paragraph 16 of the judgment, the focus was not on the result, if the threatened party had succumbed to the threat, but what would happen if he did not. In that context and on those undisputed facts, it is not at all surprising that the court held that the conduct complained of fell outside the bounds of the permissible.

64. The starting point, in this case, unlike **Ferster**, is to be found in the fact that there is no consensus as to what was said at the meeting and in the fact that, absent such a consensus, then, as explained, in **Motorola**, it would be a rare case if the facts were sufficiently clear as to enable the court to determine the existence, or otherwise, of an unambiguous impropriety.

65. I do not think that this is such a case, or that the patent differences, as between Mr Rann's and Mr Rowley's accounts can be overcome by the assertion, in effect, that

whichever way you look at it there was a threat. It seems to me that there is a radical difference between Mr Rann's evidence that he made an offer that his clients would, in return for Michael and Lindsay's agreement not to challenge the 2019 will, take such steps as they could to assist in the resolution of the Inheritance Tax problem and Mr Rowley's contention, in his witness statement, that, unless Michael and Lindsay dropped the will challenge, Greg and Charles would lodge an IHT 400 stating that Inheritance Tax was due in respect of the shares sold by Michael and Lindsay, or his alternative formulation, in his email of 3 August 2021, to the effect that, absent agreement, the IHT 400 would be filed and the 'tax issues' would arise.

66. In both the latter formulations, the effective contention is that the content of the IHT 400 was in the gift of Charles and Greg and that they could and would determine its content dependent upon whether the will challenge was, or was not, pursued. That is a very different thing, however, than that which Mr Rann said that he said and, if true, would, I would accept, constitute an abuse by Charles and Greg of their position as executors and, for that reason, an unambiguous impropriety, to which without prejudice protection should not apply.

67. Given, however that Mr Rann's account is different and given that I do not find and, indeed, have not been asked to find his account to be inherently implausible, I do not think that I can properly determine this application upon the basis of Mr Rowley's disputed evidence. Rather, it seems to me that the proper approach, unless I am simply to determine that the facts are too unclear to allow of any determination as to unambiguous impropriety, is to ask the question as to whether Mr Rann's account of his offer to Michael and Lindsay was permissible in the context of what is now hotly contested litigation.

68. My answer and my evaluation is that it was.

69. In this regard, an important first question is whether the position adopted by Andrew Jackson, on behalf of the executors, was held in good faith, or whether, as suggested from time to time, by Ms Reed KC, in her submissions, the executors' position as to Michael and Lindsay's potential I HT liability had been 'set up' by Andrew Jackson, in order to enable Charles and Greg to use that position as leverage in their dealings with Michael and Lindsay.

70. I do not consider that, on an interlocutory application of this nature, such a finding is open to me. A finding that legal professionals set up a false, or partisan, picture, in respect of the Inheritance Tax problem is, or would be, a strong thing and I see nothing in the evidence to support it.

71. Rather, it seems to me that the Inheritance Tax problem was a real one and that the lack of designation, at the point when Lindsay and Michael entered into the SPA and sold their shares, created genuine and not artificial difficulties for Michael and Lindsay, if they were unable to demonstrate that the shares they sold had been the shares they obtained from Betty. I have little doubt, given the concerns that Mr Rann expressed in 2019 as to the need for designation, as set out in paragraphs 22 and 27 of this judgment, that it was his honest belief that Michael and Lindsay were at risk.

72. Correspondingly, I am unpersuaded that the stance taken by Andrew Jackson, with, as Mr Rann, I think acknowledges, his own input, in regard to the proposed solution to

the problem, advanced by BHP was an unreasonable one, or one that conscientious lawyers, advising executors, in respect of substantial tax liabilities, should not have taken up. The fact, as it seems to me, is that BHP's 'first-in first-out' solution had very little to back it up and was not, therefore, one that the executors, by their advisers, could, or should, have unequivocally put forward. Granted that, the stance taken by the executors, on advice; namely to seek to alleviate the position, by suggesting pooling, while drawing HMRC's attention to BHP's possible solution, does not, as it seems to me, savour either of bad faith, vis a vis Michael and Lindsay, or an approach based upon animosity or a wish to take advantage. Certainly, neither of those conclusions seem to me to be open to the court, on this application.

73. Approaching Mr Rann's offer, in this context, I cannot see his offer as abusive, or as abusive of the without prejudice privilege.

74. There is no doubt that, consequent upon the Inheritance Tax problem, Michael and Lindsay were at risk of a very substantial tax liability. That, however, was not a risk created by Charles, or Greg, for whom Mr Rann was acting at the meeting. Unlike the position in **Ferster**, the risk with which Michael and Lindsay were faced was not one gratuitously advanced, or concocted, by Charles and Greg for their own purposes. It was a risk arising quite independently of the conduct of Charles, or Greg and for which Michael and Lindsay needed a solution.

75. Mr Rann's offer afforded at least the possibility of a solution and the possible solution, or solutions, that he envisaged, as explained, in paragraph 42 of this judgment, would, necessarily, have required the co-operation of Charles and Greg, both in their personal capacities and as the controllers of Bond Holdings and Bond Wholesale.

76. I can see no reason why, in offering the chance of a solution to the Inheritance Tax problem, Charles and Greg should not have sought a quid pro quo and, as that quid pro quo, should not have asked Michael and Lindsay to give up their will challenge. In so doing, they were undoubtedly taking advantage of the Inheritance Tax problem and the fact that they might be able to secure, for Michael and Lindsay, a resolution of that problem. There is no doubt, also, that, in pressing their offer, Mr Rann, on their behalf, emphasised, in strong terms, the tax risk that Michael and Lindsay ran, if the Inheritance Tax problem could not be resolved and if Michael and Lindsay did not take steps towards a resolution.

77. I do not see, myself, however, that that was improper conduct by Charles or Greg, or by Mr Rann, on their behalf, or that they acted improperly in choosing to take full advantage of the situation which had arisen. It would have been a very different thing if it was Charles and Greg who had concocted the situation and who then sought to take advantage of the situation so concocted. That, however, is not a finding which on the materials before me, can possibly be made.

78. In the result, I am satisfied that Mr Rann's conduct and his offer was not unambiguously improper and did not fall outside the proper ambit of settlement discussions in contested, or potentially contested, litigation.

79. The further result of the foregoing is that the passages identified in paragraph 1 of the application notice, as bearing upon the without prejudice meeting, must be struck out

and the witness statements, suitably redacted, re-served.