NEW EXCEPTIONS TO THE WITHOUT PREJUDICE RULE IN COURTS LITIGATION AND ARBITRATION PRACTICE

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> The meaning of a rule depends not only on its internal logic and its relation to other rules, but on the way the rule is embedded in institutions of enforcement, on the population of those who use it, on their habits, outlooks, and resources, on the state of communications among them, on what's at stake, and so forth[1].

1. Introduction

In human society, people must interact in one way or the other. As the interaction is going on, the parties assume that in every interaction they have with others each party must transact with utmost good faith. However, not in every case that people behave as expected or reciprocate in the same way. This is because the mind is very deceitful and outward appearance is also deceitful. It is when this happens that people are disappointed in the behaviour of others and business fail in a sleight of hand.

If one keeps his promise and the other also keeps his promise in return, there will be success and there will be economic development and trust will be built. In the same vein, men should be able to assume that those who engage in a particular course of conduct or activity should take care so that their action(s) do not cause harm to another person.[2] It is because the assumptions of people do not turn out the way they were thought that doubts come in. Based on doubt, the without prejudice rule becomes necessary as people are sometimes loath to accept their intentions/motives. Parties can choose not only actions but also general rules.

So, without prejudice rule we can say is a gap filling provision that is necessary in a carefully drafted contract agreement. This provides a platform for socialistic-economic democracy in interpersonal dealings and transactions now being catapulted by modern business economy that worth so much money. More so now that the concept of the lawyer-

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1 Marc Galanter, "The Legal Malaise; Or, Justice Observed". 19 *Law & Soc'y Rev.537.* 537 (1985) at 546.

2 *Donoghue* v *Stevenson* (1932) All ER. Rep 1; (1932) A.C. 562.

generalist, equipped to handle all legal tasks, has become, an anachronism as laws and regulations have increased in numbers and complexity.[3]

We have to decide what the "essence" of the rule is and what its "purpose" is. However, it does not go into "who deserves what". In fact, there is no way to decide the legal issues without deciding an underlying moral question or philosophy of without prejudice rule. In practice at least, parties might agree on their own procedural rules rather than select among, different official rules. The rules they choose could be different than-indeed, inconsistent with-the official rules that would otherwise apply.[4]

In effect, this provision (without prejudice) is like cheer leader with admirable school spirit and capacity to feel and spread enthusiasm. It is the "virtue" (so to speak) in a well-drafted contract agreement. Time only provides the worth of the parties' relationship. The provision of without prejudice looks like a badge of honour even though the benefits are sometimes trivial although inspires in the parties solidarity plank and affiliation that motivates business in a community with a common good of any sort.

2. Without Prejudice Rule - What is it?

In the area of contract agreement, the words "without Prejudice" simply mean this: "I make you an offer, if you do not accept it, this letter is not to be used against me" or" they/are tantamount to saying, I make you an offer which you may accept or not, as you like; but, if you do not accept it, my having made it, is to have no effect at all.[5] In fact, the policy underlying the rule was explained by *Oliver L.l.* in *Cutts* v *Head*[6] thus:

> That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Calauson J in *Scott Paper Co.* v *Drayton Paper Works Ltd.* (1927) 44 RPC 151, 156, be encouraged fully and frankly to put their

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[3] Richard E. Levy & Robert L. Glicksman. "Agency-Specific Precedents". *Texas Law Review,* Feb. 2011 Vol. 89 No.3. 499 at 558.

[4] Robert G. Bone. "Party Rulemaking: Making Procedural Rules Through Party Choice", *Texas Law Review,* May 2012. Vol. 90 No.6. 1331 at 1339.

[5] In Re River Steamer Co. Mitchell's Claim, LR6 Ch. App. 822 at 832. For the meaning of the words. See also *Woodward v. E.C, & L &B Rail Co. I Jur.* (N.S) 899 per Wood V.C.

[6] (1984) Ch. 290 at 306.

> cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability'.
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

Without prejudice rule strives/aspires to achieve *neutrality,* erecting and protecting procedures that leave persons free to choose among competing values for themselves. The merit of the rule or of the legal reasoning involved is that which remains neutral as to the underlying moral questions. Such legal reasoning is restrained in ways that all reasonable citizens or parties are likely to accept.

The literal use of the phrase "without prejudice" is no more than indicative that evidence[7] prefaced by it may be intended to lead to the settlement of a dispute, and so be protected.[8] It is certainly immaterial that a different formulation is adopted, or the words used elsewhere than at the beginning of a document.[9] Nevertheless, it must be stated that without prejudice is blithely stated or expressed as a widely held article of faith. This is because official law does not preside over a landscape barren of regulations, but over a thick tangle of rival and companions.[10]

3. Scope of the Exceptions to the Without Prejudice Rule

There is always-limit to events as no event or principle/rule is without limit or scope. So it is for "without prejudice" rule. The exceptions to the principle that statements made in the course of without prejudice negotiations are not admissible in evidence ("the without prejudice rule") also has scope. Specifically, the question is whether fact which (a) are communicated between the parties in the course of without prejudice negotiations and (b) would, but for the without prejudice rule, be admissible as part of the factual matrix or surrounding circumstances as an aid to construction of an agreement which results from the negotiations, should be admissible by way of exceptions to the without prejudice rule.

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7 The rule applies to oral as well as to documentary statements. However, we have to note that the Evidence Act stated - "This Act shall apply to all judicial proceedings in or before any court established in the Federation of Nigeria but is shall not apply - (a) to proceedings before an arbitrator; or ...

8 *South Shropshire District Council vAmos* [1987] 1 All ER 340 at 344.

9 *Cory v. Bretton* (1830) 4 C & P. 462.

10 Marc Galanter, "The Legal Malaise; Or, Justice Observed", 19 *Law & Soc) Rev.* 537: 537 (1985) at 544.

A letter written with regard to an action and marked "without prejudice" was only privileged for the purpose of that action.[11] Any "without prejudice" letter is admissible to see if there was a *bona fide* dispute between the parties or if a settlement had been arrived at between them.[12]

According to the case of *Rush & Tompkins Ltd.* v *Greater London Council*[13] the rule applies to exclude "all negotiations genuinely aimed at settlement whether oral or writing". The negotiating correspondence should be headed "without prejudice" by the solicitor. But it is not fatal if that phrase is not used, so long as "it is clear from the surrounding circumstances that the parties were seeking to compromise the action'.[14] The rule not only protects 'without prejudice' communications between parties to litigation from production to other parties in the same litigation, but also renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.[15]

Just as it concerns litigation in the courts without prejudice rule is also applicable in arbitration practice. In English law, arbitrators are bound by the rules of evidence which regulate court proceedings,[16] unless they are excluded by the parties, as they sometimes are - especially in commercial arbitrations.[17] In English jurisdiction, the courts allow considerable latitude when they consider the handling of evidence by arbitrators, particularly in commercial disputes handled by laymen.[18] They do not insist that in reaching a decision on the question of admissibility of evidence, an arbitrator must rigidly conform to the strict rules of evidence. In general, and provided that the arbitrator acts honestly and judicially, an award will not be set aside on the ground that he let in evidence which is inadmissible in court trials. This is so even where the arbitrator is a lawyer.[19]

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11 *Stretton* v. *Stubbs* lOCWN 42n.
12 *Aluminum Industries* v. *Cookermate* (1990)2 CU.
13 (1989) AC. 1280.
14 *1bid,* per Lord Griffiths.
15 Alan Taylor, *Principles of Evidence,* 2nd Edn. (2000),373.
16 *Attorney-Gen.* v. *Davison* (1825) M.ce & Y 16.
17 G.Ezejiofor, *The Law of Arbitration in Nigeria,* Longman (1997),81.
18 Re Enoch and Zaretzky, Bock & Co. [1910] I K.B. 327; *Hagger* v *Baker* (1845) 14L.1. Ex 227; *Eastern Counties Railway* v *Robertson* (1848) 6 M & G 38; *Macphoyson Train & Co. ltd* v *Milhen & Sons* (1955) 1 Lloyd's Rep. 597.
19 *Parryman* v *Steggall* (1833)2 L.1.C.P. 151.

In Nigeria, the provisions of the Evidence Act do not apply to proceedings before an arbitral tribunal.[20] This Act provides that arbitral proceeding are to be in accordance with the Arbitration Rules scheduled thereto. If the arbitration Rules are silent on any matter in the reference, the arbitral tribunal is empowered, subject to the Act, to conduct the proceedings in such a manner as it considers appropriate so as to ensure a fair hearing to the parties. The arbitral tribunal is required to do this with particular reference to the determination of the admissibility, relevance, materiality and weight of any evidence placed before it. It is at this point that arbitral tribunals consider the expressed or implied "without prejudice" rule in agreement between parties. This is because an arbitral tribunal is expected to handle pieces of evidence led before it in a judicial manner and as a body constituted by honest and intelligent individuals determined to do justice between the disputing parties.

If an arbitral tribunal neglects the expressed or implied "without prejudice component of a document before it, and which is fundamental that it goes to the root of the dispute which it is required to settle, the arbitrator(s) becomes guilty of legal misconduct, for which the award will be set aside.[21]

It is, however, worth stressing that if the negotiations lead to agreement, an enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and its terms; because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence.[22]

4. Without Prejudice - The Legal Principles

The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or as it is usually called, the without prejudice rule, initially focused on the case where the negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be

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[20] Evidence Act Cap. E14 2011, Section 1 (4)(a) .

[21] See *Walford, Baker* & *Co.* v, *Macfie* & *Sons* (1915) 48 L.1.K.B. 2221.

[22] See *Tomlin* v *Standard Telephones* & *Cables Ltd.* (1969) 3 All ER20l; *Lukies* v *Ripley* (No.2) (1l94) 35 NSWLR 283 for a full discussion of policy in this context.

able to rely upon admissions made by the other in the course of the negotiations. The underlying rationale of the rule was that the parties would be more likely to speak frankly, if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.[23]

This rule inspires vigilant parties and watchdog groups or relations to patrol the perimeters of the document and encourage care or caution in the chess game. Each person concerned would say: "I'm not a Lawyer. That's why I can see what Law is like. It's like a single bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia"[24]

Lord Lindley LJ in *Walker* v *Wilshe*[25] asked what was the meaning of the words "without prejudice" in a letter written "without prejudice" and answered the question in this way:

> I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

It is now well settled that the rule is not limited to such a case. This can be seen from a series of decisions in recent yeas, including most clearly from *Cutts v Head,*[26] *Rush & Tompkins Ltd v Greater London Council*[27] *Muller v Linsley & Mortimer*[28] *Uniliver plc v The Procter & Gamble Co.*[29] and the most recently *Ofulue v Bossert.*[30]

In particular, Lord Clarke referred to what Robert Walker LJ said in Uniliver (as agreed by Simon Brown LJ and Wilson J.). He (Robert Walker) set out the general position with great clarity at pp 2441 - 2444 and 2448 - 2449. He first quoted from Lord Griffiths speech in Rush & Tompkins, with which the other members of the appellate committee agreed. Rush & Tompkins is important because it shows that the without prejudice rule is

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[23] *Oceanbulk Shipping & Trading* SA *v TMT Asia Ltd & ors* [2010] UKSC 44 per Lord Clarke.
[24] Robert Penn Warren, All The King's Men 194 (Noel Polk ed., Harcourt 2001) (1946).
[25] (1889) 23 QBD 335 at 337.
[26] [1984] Ch. 290.
[27] [1989] AC. 1280.
[28] [1996] PNLR, 74.
[29] [2000] 1 WLR. 2436.
[30] [2009] UKHL.16, [2009]AC.990.

not limited to two party situations or to cases where the negotiations do not produce a settlement agreement. It was held that in general, the rule makes inadmissible in any subsequent litigation connected with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation or arbitration are also inadmissible, whether or not settlement is reached with that party.[31]

The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants and arbitration parties to settle their differences rather than litigate to a finish or complicate/prolong arbitration proceeding.

Apart from Robert Walker LJ's observation that the rule was recognized as being based on at least in part on 'public policy, its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite their negotiations,. a contested hearing ensures. Robert Walker L.J further noted that these two justifications for the rule are referred to in some detail by Hoffmann LJ in *Muller v Linsley & Mortimer.*[32]

Two paragraphs from the judgment of Robert Walker LJ show that the rule is not limited to admission but now extends much more widely to the content of discussions such as occurred in the case of *Uniliver plc v. The Procter & Gamble Co.*[33] He said this at pp.2443H - 2444C:

> Without in any way under-estimating 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 characterized 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

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[31] Per Lord Clarke in *Oceanbulk Shipping* & *Trading* SA I'. *TMT Asia Ltd.*
[32] *Op cit.*
[33] [2000] 1 WLR. 246.

> in Mulled a concept as implausible as the curate's egg (which was good in parts).

Finally, at pp. 2448 - 2449 Robert Walker LJ expressed his conclusions on the case as follows:

> [they] make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in Rush & Tompkins [at p. 1300] 'to speak freely about all issues in litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

The without prejudice rule is now very much wider than it was historically. Its importance has been judicially stressed on many occasions, most recently; perhaps in *Ofulue,* where the House of Lords identified the two bases of the rule and held that communications in the course of negotiations should not be admissible in evidence. It held that the rule extended to negotiations concerning earlier proceedings involving an issue that was still not resolved and refused on the ground of legal and practical certainty, to extend the exceptions to the rule so as to limit the protection to identifiable admissions.

5. The Importance of the "Without Prejudice Rule"

The essence of [the rule] lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognizes that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in the case of *Oceanbulk, Ofulue* etc. that would deny them that protection. The protection that these

words claim will be given to it unless the other party can show that there is a good reason for not doing so.

Without Prejudice rule would not be restricted unless justice clearly demands it. However, the rule is not absolute as resort may be had to it for a variety of reasons where the justice of the case requires it.

6. Exception to the Without Prejudice Rule

Due to the importance of the without prejudice rule, its boundaries should not be highly eroded. The facts identified during without prejudice negotiations which lead to a settlement agreement of the dispute between parties are admissible in evidence in order to ascertain the true construction of the agreement as part of its factual matrix or surrounding circumstances. There are nevertheless numerous occasions on which the rule does not prevent the admission into evidence of what one or both parties said or wrote in the course of without prejudice negotiations. The most important instances are, as listed by Robert Walker LJ in *Uniliver plc v. The Procter & Gamble Co.*[34]

a. ".... when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible…

b. Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox,*[35] a decision from Ontario, is a striking illustration of this.

c. Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v. Wards Mobility Services*[36] and his view on that point was not disapproved by this Court of Appeal.[37]

d. 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

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[34] *Ibid* at pp. 2444D 2446D.
[35] (1912) 4DLR66.
[36] [1997] FSR 178, 191.
[37] *Ibid.*

exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety. But the court has, in *Forster v. Friedland and Fazil Alizudeh. v. Nikbin,*[38] warned that the exception should be applied only in the clearest cases, of abuse of a privileged occasion.[39]

e. Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ. in *Walker v. Wilsher,*[40] noted this exception but regarded it as limited to 'the fact that such letters have been written and the dates at which they were written'. But, occasionally, fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.[41]

f. In *Muller's case* (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the .principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.[42]

g. The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognized by the court in *Cutts* v. *Head,* and by the House of Lords in *Rush & Tompkins,* as based on an express or implied agreement between the parities. It stands apart from the principle of public policy (a point emphasized by the importance which the civil procedure Rules, attach to the conduct of the parties in deciding questions of costs). There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts* v. *Head* Fox LJ. said (at p. 316) 'what meaning is given

[38] (1993) CAT, 205.
[39] *Ibid.*
[40] at 338.
[41] *Ibid.*
[42] *Ibid.*

to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after'.[43]

h. In matrimonial cases there has developed what is now 'a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation"...[44]

i. Another of the exceptions to the without prejudice rule is ratification, A party to without prejudice negotiations can rely upon anything said in the course of them in order to show that a settlement agreement should be rectified. It was so held at first instance in Canada in *Pearlman* v. *National Life Assurance Co. of Canada*[45] and in New *Zealand in Butter* v. *Countrywide Finance Ltd.*[46] Neither case contains much reasoning but both courts treated the point as self-evident. The reason perhaps is that it is scarcely distinguishable from the first exception. No sensible line can be drawn between admitting without prejudice communications in order to resolve the issue of whether they have resulted in a concluded compromise agreement and admitting them in order to resolve the issue of what that agreement was. This can be seen most clearly where the alleged agreement is oral. It should equally apply where the agreement is partly oral and partly in writing and where the agreement is wholly in writing but the issue is whether it reflects the common understanding of the parties.[47]

7. Three Ways of Lifting the Veil of Without Prejudice Rule

In *Uniliver plc* v. *Proctor & Gamble Co.*[48] Laddie J. considered how the without prejudice veil could be lifted. They are as follows: (a) One or both parties to the without prejudice negotiations could elect to waive his or her privilege; (b) if a claim to the protection was *bona fide;* and (c) if there were public policy considerations overriding those which encouraged the settlement of disputes for example if the without prejudice nature of

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43 *Ibid.*
44 *Ibid.*
45 (1917) 39QLR 141.
46 (1992) 5PRNZ 447.
47 Per Robert Walker L J in *Uniliver Pic v. The Provter & Gamble Co.* [2000] 1 WLR 2436.
48 [2000) 1 WLR 2436; See also *Ofulue v. Bossert* [2009] UKHLl6; [2009] AC 990.

the discussions was being used to cover some form of reprehensible or criminal behaviour or conduct.[49]

8. Conclusion

Literally, the phrase "without prejudice" is no more than an indication of the fact that evidence prefaced by it may be intended to lead to the settlement of a dispute, and so be protected. It is certainly immaterial that a different formulation is adopted, or the words used elsewhere than at the beginning of a document.[50] At any point parties to a dispute agree to imply the rule, it is acceptable.

However, because a fact is considered to be of public interest immunity, there should not be disclosure but compliance with the without prejudice principle. It is for this that it should not be defeated by public policy considerations. Turn of events in the world change things from their former positions and without prejudice should not be an exception in turn of events of the world.

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[49] *Ibid.*

[50] *Cary v. Bretton* (1830) 4C & P. 462. See *Marks* 1'. *Beyfus* (1890) AC per Lord Diplock.