THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Cases 9861/13 & 16844/07

KLD RESIDENTIAL CC **PLAINTIFF**

and

EMPIRE EARTH INVESTMENTS 17 (PTY) LTD **DEFENDANT**

Coram: ROGERS J

Heard: **14 JUNE 2016**

Delivered: **24 JUNE 2016**

JUDGMENT

ROGERS J:

Introduction

[1] The issue in this case is whether the plaintiff ('KLD') can rely on a without prejudice letter as an acknowledgment of liability interrupting prescription. The issue has been presented in the form of a special case as contemplated in rule 33. The stated case was supplemented by certain formal admissions to which I shall presently refer.

KLD's claim against Empire

[2] KLD's pleaded claim against the defendant ('Empire') is the following. In terms of a written mandate concluded in November 2006 and extended during March 2007, KLD was authorised to market erven in a development and to receive commission on sales of which it was the effective cause, such commission to be regarded as earned once the relevant purchaser took transfer. KLD was the effective cause of 99 sales set out in a schedule to the particulars of claim. It was thus entitled to commissions totalling R2,147 million, which commissions were earned on the registration dates specified in the schedule.

[3] Save in one instance (the sale of Erf 884 to Werner Grift), the registration dates specified in KLD's schedule range from October 2008 to November 2009.

[4] KLD issued summons in June 2013. According to the sheriff's return, service was effected on 26 June 2013. Empire alleges in its special plea that summons was served on or about 25 June 2013. Nothing turns on this.

[5] In its special plea Empire alleged that KLD's alleged right to commissions became due on the registration dates specified in KLD's schedule and that, save for the Grift sale, those registration dates were more than three years before service of summons. KLD's claim to all commissions other than on the Grift sale had thus prescribed.

[6] Empire pleaded over on the merits. Empire alleged inter alia that KLD had breached the mandate in various respects and that Empire had certain claims

arising from the breaches. Empire also alleged in general terms that the consequence of the breaches was that KLD was not entitled to commission in the amount claimed or at all. The plea concluded with a prayer that KLD's claim be reduced by an amount of R428 000 plus interest and that judgment thereon in any event be postponed pending determination of the claims advanced by Empire in an action already instituted by it against KLD.

[7] In its replication to the special plea KLD alleged that on 29 July 2011 Empire's then attorneys, Webber Wentzel, acting as Empire's authorized representatives, wrote a letter to KLD's then attorneys, Jooste Leidig Attorneys, acting in their capacity as KLD's authorized representatives, in which Empire acknowledged that pursuant to the mandate as extended KLD had become entitled to commissions totalling R2 105 960. This was alleged to have been an acknowledgment interrupting prescription in terms of s 14 of the Prescription Act 68 of 1969. I shall refer to this letter as the Webber Wentzel letter.

Empire's claims against KLD

[8] The Webber Wentzel letter and Empire's plea mention a summons Empire issued against KLD in 2007. By order made in September 2013 the cases were consolidated on the basis that Empire was to be treated as a claimant in reconvention in KLD's action. At the commencement of the hearing before me Mr La Grange SC, who appeared for KLD with Mr Cilliers, agreed that I could have regard to all pleadings in the consolidated cases to ascertain, insofar as might be relevant, when the pleadings were filed and what assertions the parties were making. Mr Howie, who appeared for Empire, agreed with this course which was in accordance with his client's position in earlier procedural skirmishing on the stated case.

[9] Empire issued its summons in November 2007, ie about three and a half years before the Webber Wentzel letter and about five and a half years before KLD's summons. Empire relied on the written mandate and extension thereof. Empire alleged breaches by KLD in terms similar to those subsequently alleged in Empire's plea to KLD's claim. Empire alleged that KLD owed it R428 000 in respect of KLD's contribution to an advertising and marketing fund and R35 889 as

damages in respect of expenses incurred by Empire in performing administrative functions which KLD should have performed. Empire also alleged that because of the breaches it had lawfully cancelled the extended mandate on 29 August 2007.

[10] In March 2008 Empire amended its particulars of claim in respects to which it is unnecessary to refer.

[11] KLD filed its plea in May 2008. This was about six months before the earliest registrations of transfer on which KLD relies for its commission claim. KLD admitted the initial mandate but denied the extension. On this basis KLD denied the alleged breaches.

[12] On 14 June 2011 Empire further amended its particulars of claim to add an additional claim for damages of R15 312 220 being alleged loss of profits it had suffered when various purchasers cancelled their sale agreements.

[13] The Webber Wentzel letter followed on 29 July 2011. Webber Wentzel were Empire's attorneys of record until their substitution by Empire's present attorneys during July 2013.

[14] In January 2015 Empire again amended its particulars by deleting the additional claim of R15 312 220.

The stated case

[15] On 19 March 2015 the parties' legal representatives signed a stated case for determination of the special plea. In the stated case the parties agreed that the Webber Wentzel letter, which they attached, was sent and received by authorized representatives and that a cheque of R1 082 334,55 attached to the Webber Wentzel letter was never presented for payment. The parties recorded that there were two issues for determination, which would dispose of the special plea: (i) whether the Webber Wentzel letter was, regardless of its admissibility for other purposes, admissible as evidence of an interruption of prescription; (ii) whether,

assuming the letter was admissible for that purpose, the letter did in fact interrupt prescription.

[16] The Webber Wentzel letter reads as follows (references therein to Seeff being to KLD):

'1. As you know, our client instituted a claim against Seeff on 20 November 2007 for the payment of certain amounts for which Seeff is indebted to our client.

2. Certain monies have now become due and payable to Seeff by our client. These are comprised of commissions to which Seeff has become entitled in terms of the agreement dated 27 November 2006 and the extension thereof dated 23 March 2007 (collectively "the agreement") entered into between our client and Seeff.

3.. We remind you that in terms of the agreement Seeff would become entitled to a four percent commission for each successful sale which Seeff effected, upon transfer of the sold property. For your convenience we include undercover hereof a list of the property sold by Seeff which was successfully transferred to the purchasers.

4. Accordingly Seeff has become entitled to commission in the amount of R2 106 960.

5. By virtue of the operation of set-off this amount has been reduced by the following amounts for which Seeff is indebted to our client:

5.1 the amount of R441 903,45 being Seeff's unpaid contribution to the development's media advertising and marketing fund. This amount is arrived at as follows:

5.1.1 R700 000 required marketing contribution less R97 253,75 contribution by Mortgage SA less R160 842,80 (R180 360,79 incl VAT) made up of payments made directly to Empire Earth, which totals R441 903,45;

5.2 the amount of R35 889 being expenses incurred by our client in attending to the administration of sales by Seeff;

5.3 interest of R241 515,81 and R19 650,48 respectively on the above amounts since 20 November 2007, at the rate of 15.5% per annum; and

5.4 R284 666,71 in respect of our client's estimated legal costs to date on the High Court party and party scale.

6. From the aforegoing, it is apparent that Seeff's indebtedness to our client amounts to R1 023 625,45.

7. Accordingly we include undercover hereof a cheque for R1 082 334,55 including VAT (being R2 105 960,00 commission less the total indebtedness of R1 023 625,45) in full and final settlement of any and all claims that Seeff may have against our client, and of the litigation forming the subject matter of case number 16844/2007.'

[17] Save for the omission of the Grift transaction, the schedule attached to the Webber Wentzel letter listed the same sales as in the schedule attached to KLD's particulars of claim.

[18] The stated case was set down for argument on 11 June 2015. Due to the unavailability of counsel who had signed the stated case on Empire's behalf Mr Howie was briefed. Pursuant to advice from him, Empire's attorneys wrote to KLD's attorneys on 3 June 2015 to advise that Empire's legal team now considered that further matters should be included in the agreed facts. The further facts specifically mentioned were: the institution of Empire's action in 2007; some of the terms of the mandate, the alleged breach of which gave rise to Empire's action; the filing of KLD's plea 8 May 2008; the fact that KLD disputed some of the terms alleged by Empire and denied the conclusion of the extended mandate; and the absence of a counterclaim for commission in the 2007 action. The letter continued that these were the only further matters which had emerged to date though '… in due course there may be further common cause facts which our client would like to be agreed to for the purposes of arguing the stated case'. KLD's attorneys were asked to say whether their client was willing to revisit the ambit of the agreed facts.

[19] KLD refused. On 10 June 2015 Empire served an application in which it sought orders: (i) that there was disagreement between the parties as to the stated facts to be considered by the court in its determination of the special case; (ii) that Empire was not bound to have the disputed issues determined as a special case on the terms set out in the stated case; (iii) that the stated case no longer constituted a special case for adjudication in terms of rule 33(1); (iv) that the disputed issues be referred to trial; (v) that the wasted costs occasioned by the granting of these orders be paid by Empire save in the event of opposition by KLD.

[20] Because of this application the hearing of the stated case did not proceed on 11 June 2015. Empire's application was argued before Van Staden AJ on 6 August 2015. On 29 October 2015 he dismissed the application with costs on the basis that Empire had failed to show special circumstances entitling it to resile from the stated case.

[21] The stated case was re-enrolled for hearing on 20 April 2016. Through no fault of the parties the matter could not proceed on that date and it was postponed to 14 June 2016, the date on which I heard it.

Additional matters

[22] In his heads of argument Mr Howie submitted that I was entitled to revisit the adequacy of the stated case because Van Staden AJ's decision was interlocutory. Since all the additional matters explicitly enumerated in the letter of 3 June 2015 would be apparent from the pleadings in the consolidated cases, I asked Mr la Grange whether his client had any objection to regard being had to those pleadings to the extent that they might be relevant. Mr la Grange said that there was no objection to this.

[23] Although Mr Howie did not formally concede that this fully addressed the concerns raised in the letter of 3 June 2015, he was unable to identify any additional facts which, if they were included in the stated case, might affect the outcome. In any event there is a difference between saying (i) that a stated case does not record sufficient facts to allow a legal point to be determined; (ii) that the inclusion of additional facts in a stated case would lead to a different determination. The decisions cited by Mr Howie (*Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) and *Feedpro Animal Nutrition Pty Ltd v Nienaber NO & Another* [2016] ZASCA 32) dealt with inadequacy in the former sense. Subject to the two further matters mentioned below, I do not think the stated case is inadequate in that sense. As to the second form of inadequacy, Mr Howie did not in oral argument press with any vigour the contention that I should revisit Van Staden AJ's ruling.

[24] I raised two further matters with Mr la Grange. The first was whether his client accepted as a fact that the Webber Wentzel letter was written without prejudice so that KLD would not be entitled to rely on it on the merits (ie if the special plea were dismissed). I did not want to decide the main legal point in the case, namely whether the without prejudice rule precludes reliance on a privileged letter as an acknowledgment for purposes of interrupting prescription, if there was a dispute as to whether the letter in fact engaged whatever protection the without prejudice rule affords. Mr la Grange said that KLD accepted that the letter was written without prejudice. More particularly, KLD accepted that the effect of the concluding paragraph of the letter was that KLD could not have presented the tendered cheque for payment and sued for the balance of the commission. Put differently, presentation of the cheque would have resulted in a compromise.

[25] This acceptance by Mr la Grange appears to accord with how his client in fact reacted to the letter (KLD did not present the cheque for payment) and with the way in which a tender of payment 'in full and final settlement' would usually be understood. A compromise may be concluded even where the debtor appears to acknowledge that he has no defence to a claim for the reduced balance tendered by him (see *Absa Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) paras 8-19; *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) para 11).

[26] The stated case does not record whether or not the Webber Wentzel letter was marked 'without prejudice'. During argument I pointed out that the copy attached to the stated case bore the faint outlines of a stamp. Neither side could tell me what the stamp contained. The presence or absence of the words 'without prejudice' does not work any magic. Their absence does not deprive a letter of its without prejudice protection if the letter was written with a view to reaching a compromise (*Gcabashe v Nene* 1975 (3) SA 912 (D) at 914E; Schmidt & Rademeyer *Law of Evidence* p 20-19; Zeffertt & Paizes *The South African Law of Evidence* 2nd Ed p 703). Whether their presence can confer an additional protection is not something I need decide (cf *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 674D-H).

[27] The second matter I raised with Mr la Grange was whether his client accepted that prescription began to run more than three years before service of summons. The onus of course rested on Empire to allege and prove when prescription began to run. The premise of the special plea was that prescription began to run before 25 June 2010 but Empire made no allegation as to when KLD ascertained or could reasonably have ascertained the facts giving rise to its commission claims. KLD, perhaps understandably, did not address this in its replication. I did not want to decide a question of interruption unless it was accepted by KLD that, but for such interruption, its claim would have prescribed.

[28] The matter stood down for Mr la Grange to take instructions. He then placed on record that KLD accepted that it could reasonably have ascertained the facts giving rise to its commission claims not later than 30 days after the relevant dates of transfer. Save for the Grift sale, prescription thus began to run well before 25 June 2010.

[29] Although these additional matters do not form part of the signed special case, they constitute formal admissions made on KLD's behalf in open court. They are admissions to Empire's advantage since the latter's position is that (i) the Webber Wentzel letter engages the without prejudice rule; and (ii) prescription began to run before 25 June 2010.

Admissibility of Webber Wentzel letter as interruption of prescription

[30] Subject to any overriding constitutional imperatives or specific legislation, the law I must apply in determining whether the Webber Wentzel letter is admissible as an acknowledgment of liability for purposes of interrupting prescription is the English law as at 31 May 1961 (see s 42 of the Civil Proceedings Evidence Act 25 of 1965; *Naidoo* supra at 677F-H). As a rule of law, the without prejudice rule is based on public policy. Parties to disputes are to be encouraged to avoid litigation, with the expense, delay, hostility and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions may be used against them in the ensuing litigation (*Naidoo* 677C-D).

[31] English law, and accordingly our law, allows some exceptions. One is where a party alleges that the settlement discussions resulted in a compromise agreement. The explanation for this exception is not, I think, that the exchanges are relied upon as acts of offer and acceptance rather than as proof of admissions made. The exception, rather, is inherent in the public policy underlying the without prejudice rule: if the law wishes to encourage the avoidance of litigation by compromise, a party must be entitled to rely on the without prejudice communications to establish that the outcome desired by public policy was achieved (cf *Gcabashe* supra at 914H).

[32] Certain other exceptions based on public policy have been recognised. If the without prejudice communication contains a threat or constitutes an act of insolvency, and if the making of the threat or the commission of an act of insolvency is relevant to particular proceedings, evidence of the communication may be adduced despite its without prejudice character (*Naidoo* 681B-D where such circumstances were described as 'exceptional'; see also the summary in Schmidt & Rademeyer op cit p 20-22).

[33] In *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) the court recognised a further exception, akin to an act of insolvency, namely an admission by a company of its commercial insolvency. Mbha JA, in delivering the court's judgment, said that the reason for the exception is that liquidation or insolvency proceedings are matters involving the public interest.[1] A concursus creditorum is created and the public is protected from the risk of further dealing with a person or company trading in insolvent circumstances (para 13). Mbha JA also said that the company's admission of liability was not made in the course of negotiations but in response to a letter of demand for payment of arrear instalments (para 14). The court concluded that the letter was admissible as evidence of the company's commercial insolvency and as an acknowledgment of liability interrupting prescription (para 15).[2] It is not altogether clear to me whether admissibility for the

[1] See also *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 at 1092I-1093A.
[2] My statement in para 15 of *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd & Another* 2015 (4) SA 623 (WCC) that the allegedly privileged document was received not as an admission of insolvency but as an acknowledgment interrupting prescription is erroneous – it was received for both purposes.

second of these purposes was based on (i) the fact that the letter was found not to have been made in the course of settlement negotiations; or (ii) the same policy considerations which justified its admissibility in regard to the company's commercial insolvency; or (iii) the pragmatic view that, once the letter had been accepted as evidence in the liquidation proceedings for purposes of commercial insolvency, it was admissible for all purposes in those proceedings. If the second or third of these explanations underlies the decision, the justification for the exception was the public interest in insolvency and liquidation proceedings. Mr la Grange accepted that *Hammerle* did not determine admissibility in private proceedings.

[34] Legislation which is consistent with the Constitution may override the without prejudice rule. This was the position in another case cited by Mr la Grange, *Santam Ltd v Sayed* [1998] 4 All SA 564 (A). That case concerned the proper interpretation of s 14(2) of the Motor Vehicle Accidents Act 84 of 1986. In terms thereof the running of prescription in respect of claims under the Act was suspended for 90 days from the date on which the insurer delivered to the claimant a notice to repudiate liability or 'to convey an offer of settlement of the claim'. The offer of settlement in that case was expressly stated to be without prejudice. The court held that there was nothing in the language of s 14(2) to exclude from its ambit settlement offers made expressly without prejudice. Section 14(2) necessarily entailed that a claimant relying on suspension could adduce evidence of the settlement offer. (*Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N), which Mr la Grange also cited, is an earlier decision to similar effect.)

[35] Section 14(1) of the Prescription Act refers to an 'express or tacit acknowledgment of liability'. There is nothing in this formulation to justify as a necessary implication that reliance can be placed on settlement negotiations as an exception to the without prejudice rule. As will appear below, the English decisions do not recognise any such exception in relation to the equivalent provision in their limitation statute.

[36] It is sometimes argued that a without prejudice communication which is inadmissible as evidence to establish the truth of something admitted by the debtor is nevertheless admissible if it is the fact of the communication rather than the truth

of an admission which is relevant. As applied to the present case, the argument would be that KLD is relying on the Webber Wentzel letter not as proof of Empire's liability to pay the commissions but as an acknowledgment in fact. An argument along these lines was rejected in *Naidoo*. The facts are instructive. The defendant wrote various without prejudice letters to the plaintiff's attorney in the course of which the defendant apparently accepted that it had been the insurer of the negligent driver at the relevant time. The settlement negotiations failed and the plaintiff issued summons. The defendant denied that it was the negligent driver's insurer. By then the plaintiff was out of time to sue the true insurer. In his replication the plaintiff alleged that the defendant was estopped from denying that it was the insurer, having regard to the statements made in the without prejudice correspondence. The defendant disputed the admissibility of the correspondence.

[37] The trial judge ruled that the letters were inadmissible and this conclusion was upheld by the Appellate Division. The plaintiff, I stress, was not relying on the without prejudice correspondence to prove that the defendant was in fact the insurer at the relevant time. Indeed it appears that by the time of the hearing in the trial court the plaintiff accepted that the defendant had not been on risk. The plaintiff was relying on the letters as constituting a representation, for purposes of estoppel, that the defendant was the insurer at the relevant time, on the strength of which the plaintiff had acted to his detriment (by not taking action against the true insurer). The Appellate Division rejected an argument that the without prejudice rule only precluded use of the relevant statements as factual admissions and not for other purposes (681A-E).

[38] Apart from the fact that I am bound by *Naidoo*, the counter-argument I have summarised is based on an a priori assumption about the scope and purpose of the without prejudice rule, namely that the shield of inadmissibility is limited to evidence on the merits. There are no sound considerations of public policy for protection to be confined in that way. A person who makes a statement in the course of without prejudice discussions can be harmed as much by reliance thereon as an acknowledgment (for purposes of prescription) or a representation (for purposes of estoppel) as by its use as an admission of fact on the merits. The law's policy of

encouraging full and frank discussions without fear of prejudicial disclosure would be hampered by limiting protection in the manner supposed by the argument.

[39] It is sometimes said that because public policy favours the settlement of disputes the law should not compel a creditor to rush to court where his debtor has admitted liability in the course of without prejudice discussions. I do not think that this consideration has much force. In many without prejudice negotiations the alleged debtor will not make any admission of liability. Although such negotiations may appear to be worth pursuing, the running of prescription is not suspended. I do not see why a separate rule is required where it so happens that, during the course of the negotiations, the alleged debtor makes an admission of liability (and whether he has or has not made such an admission, expressly or tacitly, may often require a much more extensive enquiry into the without prejudice negotiations than is necessary in the present case). The three-year prescription period is not an ungenerous allowance of time. If the parties need more, the creditor can make further talks conditional upon agreement to hold prescription in abeyance. This is often done in practice.

[40] Mr la Grange referred in argument to decisions from Canada (*Kirschbaum v "Our Voices" Publishing Co et al* 1971 CanLII 608 (ON SC)) and Scotland (*Richardson v Quercus Ltd* [1998] ScotCS 112). Since the law in these jurisdictions is not the law applicable in South Africa, it is unnecessary to determine quite how they would resolve the issue arising in the present case. Many of the Canadian authorities were reviewed in *Langley (Township) v Witschel* 2015 BCSC 123 where the learned judge concluded that the balance of Canadian authority was against allowing an exception in relation to the interruption of prescription (paras 44-49). As to Scottish law, the two leading decisions of the House of Lords indicate that English and Scottish law differ on the subject: see *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 (HL) and *Ofulue & Another v Bossert* [2009] 1 AC 990 (HL), both of which I shall discuss more fully below.

[41] I was not referred to Australian authority. My brief research indicates that prior to the statutory regulation of the without prejudice rule the leading authority was *Field v Commissioner of Railways (NSW)* [1957] HCA 92, a personal injury

case. Although the defendant disputed liability, he was willing to entertain settlement discussions. It was agreed that the plaintiff would be examined by a doctor appointed by the defendant. The examination had a dual purpose: to enable the defendant to form an estimate of the plaintiff's injuries for purposes of settlement and as a basis for expert evidence if the case should go to trial. At the examination the doctor took a history from the plaintiff, in the course of which the plaintiff made a damaging admission about how the accident happened. The court held that the parties' legal representatives must have understood that the material on which the doctor would form his opinions included what the plaintiff told him during the consultation and the doctor's physical examination. What took place during the consultation was not 'reasonably incidental' to the negotiations. The plaintiff's admission was made 'without any proper connexion with any purpose connected with the settlement of the action' (paras 7-8).

[42] The without prejudice rule now operates in Australia by virtue of statute (s 131 of the Evidence Act, 1995). A without prejudice communication is admissible if it 'affects the right of a person' (s 131(2)). Two recent cases which discuss the meaning of this exception in relation to acknowledgments for limitation purposes are *Liu v Fairfax Media Publications Pty Ltd* [2012] NSWSC 1352 and *Greenway v Teoh* [2014] ACTSC 224.

[43] To return to English law, all five Law Lords in *Rashid* delivered opinions. They agreed, though for differing reasons, that the creditor should be permitted to rely on the correspondence in question as an acknowledgment of liability for purposes of the Limitation Act, 1980 .

[44] Lord Brown held that an acknowledgment of liability where the issue of quantum is the subject of settlement negotiations should qualify for without prejudice protection (para 75). In distinguishing Scots law from English law, he quoted with approval (in para 65) the following passage from the judgment of Rix LJ in *Savings and Investment Bank Ltd v Fincken* [2004] 1 All ER 1125 (CA) para 57:

'It is not the mere inconsistency between an admission and a pleaded case or 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…It is the fact that the

privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.'

[45] Lord Brown held, however, that the without prejudice rule did not extend to cases where the liability was admitted in full and the debtor was merely seeking to reach an arrangement to pay off the debt by way of a concession from his creditor. It was for this reason that he held the correspondence in *Rashid* to be admissible. This was not by way of exception to the without prejudice rule but because the letter was not protected by the without prejudice rule at all, ie for any purposes.

[46] Lord Walker gave a brief opinion in which he concurred in Lord Brown's opinion.

[47] Lord Mance said that there were two possible approaches where a claimant wished to rely on an acknowledgment made in without prejudice correspondence. The broader approach was that unequivocal admissions made during without prejudice communications may be isolated from the remainder and so used against the party making them, whether on the issue of liability or to restart a limitation period. That appeared to him to be the position in Scotland (para 89). He agreed, however, with Lord Brown that English law has viewed the matter in different terms (para 90). After quoting from two leading English cases, he concluded that the first instance Scottish authorities took an approach differing from the English appellate approach (para 92). His limited review of other Commonwealth jurisdictions suggested that they adopted an approach which was generally similar to English rather than Scottish law. Interestingly, he referred inter alia (at para 92) to a South African decision, *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T), where (so Lord Mance said) Viljoen J was

'able to distinguish a clear admission by a motor insurer as to liability in respect of a motor accident from the without prejudice negotiations which followed on that basis regarding quantum, and so to treat the admission as restarting the limitation period'.

He said he could understand that line of reasoning but that the Scottish cases appeared to go considerably further. He preferred to say nothing more about the scope of any such exception until a case arose where it fell squarely for decision (para 92).

[48] The other approach, Lord Mance said, was the one supported in Lord Hoffmann's opinion. In essence, Lord Hoffmann was doubtful whether the other Lords were right in finding that the without prejudice rule did not apply where a debtor admitted the liability and merely sought a concession as to paying it off. Lord Hoffmann's preferred solution was to distinguish between the use of without prejudice communications on the merits and their use as acknowledgments interrupting description. In the latter case, he said, the acknowledgment was not being used as evidence of anything – the statement was not evidence of an acknowledgment, it was itself the acknowledgment (para 16). Lord Hoffmann referred to an earlier decision of his along these lines in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74. Lord Mance observed that there was, in support of this distinction, the argument that a debtor who makes an unqualified admission in the course of without prejudice negotiations is, in effect, encouraging the creditor not to commence proceedings, so that, while it would be wrong to treat the admission as prejudicing the debtor on the merits, it would also be wrong to allow him to take the benefit of time gained when it came to a limitation issue. He continued (para 93):

'… On the other hand, it may be said that the public policy in allowing parties to negotiate freely would be undermined if, during any negotiations, they had to keep an eye open for the possible impact on limitation of any admissions they were without prejudice prepared to make. The argument that a creditor may in such a context be encouraged not to commence proceedings may also be said to have a certain circularity, on the basis that a creditor engaging in without prejudice negotiations should always keep an eye on the limitation position for the very reason that the negotiations are without prejudice…'

Ultimately, though, Lord Mance preferred to say no more on this point because the suggested distinction between the different effects (merits/limitation) of one and the same admission had not been explored in any detail in argument.

[49] Lord Hope considered the position in Scotland more fully (see paras 25-32), concluding that the general approach taken there was 'far from unorthodox' and

could not be regarded as 'out of line with that which is taken elsewhere', this latter phrase being a reference to a leading Canadian textbook (para 32) and *Kapeller* supra. Because he agreed with Lord Brown that the communications in question did not engage the without prejudice rule at all, he said it was unnecessary to decide what the position would have been if the correspondence had truly been without prejudice. He indicated a preference, however, for the Scottish approach, which in his view was 'more pragmatic' in the application of the rule. His understanding of the Scottish approach appears from para 25:

'… Offers, suggestions or concessions made in the course of negotiations are, of course, given the benefit of the privilege. But they are distinguished from clear admissions or statements of fact which, although contained in the same communication, did not form part of the offer to compromise. On such admissions or statements, if they can be clearly identified as such, the other party is entitled to rely. …'

[50] I have already referred to the essence of Lord Hoffmann's opinion. It does not seem to have carried support from the other members of the court. It also appears, insofar as South African law is concerned, to be inconsistent with *Naidoo*.[3]

[51] In *Ofulue* four of the five Law Lords (all of whom delivered opinions, Lord Scott being in dissent) held that the claimants could not rely on an admission contained in without prejudice correspondence. The case concerned what we would call acquisitive prescription and turned on the question whether the defendants, who asserted a right to property by adverse possession, had acknowledged the claimants' title during the 12-year prescription period. The acknowledgment was said to be contained in without prejudice correspondence in which the defendants had offered to buy the property from the plaintiff. Lords Hope, Walker and Rodger, in addition to delivering their own opinions, concurred in the opinion of Lord Neuberger.

[52] Lord Neuberger said that courts should guard against invitations to dissect without prejudice communications into admissible and inadmissible components

[3] Mr la Grange referred me to the reference to Lord Hoffmann's opinion in Zeffertt & Paizes op cit p 702. That was in the course of a discussion as to whether, jurisprudentially, the without prejudice rule should be regarded as a form of 'privilege'. The authors do not express any decided opinion on the substantive question which arises in this case. The latest edition of their work predates *Ofulue*.

(para 89). Save perhaps for a statement 'wholly unconnected' with the issues between the parties, a statement in without prejudice negotiations should not be admissible other than in exceptional circumstances. He left open whether and to what extent a statement might be admissible if it were 'in no way connected' with the issues which were the subject of negotiations (paras 91-92).

[53] As to the argument that the defendants' offers were admissible as evidence of acknowledgments of the claimants' title even if they were inadmissible as admissions of fact, Lord Neuberger considered the distinction too subtle to apply in practice, noting that none of the other Lords in *Rashid* had concurred in Lord Hoffmann's suggestions to this effect (para 95). Importantly, Lord Neuberger added that to invoke a statement in without prejudice negotiations as an acknowledgment was as inconsistent with the protection afforded by such negotiations, and the policy behind it, as invoking such statement as an admission of the truth of what is stated (para 97). He did not consider that public policy justified a special exception to the without prejudice rule for acknowledgments interrupting prescription (para 101).

[54] The opinions of the three concurring Law Lords were consistent with these views (see in particular paras 11-12 per Lord Hope, paras 38 and 43 per Lord Rodger and para 57 per Lord Walker). Lord Walker said (para 54) that an acknowledgment under s 29 of the English Limitation Act (the equivalent of s 14 of our Prescription Act) was not a close parallel to an act of bankruptcy. Lord Rodger said (para 39) that the approach in the Scottish cases appeared to be inconsistent with the general approach endorsed by the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280.

[55] As far as I am aware, no decisions of the English courts as at 31 May 1961 recognised, by way of exception, that without prejudice communications could be used to prove an acknowledgment interrupting prescription. In *Ofulue* Lord Walker said that, apart from the recent dicta in *Rashid*, counsel's research had uncovered only one other English authority on the question, the judgment of Mellish LJ in *In re River Steamer Co; Mitchell's Claim* (1871) LR 6 Ch App 822 at 831-832 which was

against the recognition of such an exception.[4] The majority opinions in *Rashid* and *Ofulue*, which can be regarded as declaring the English law on the subject, are against there having been any such exception. The majority opinions appear to me to be entirely consistent with the law laid down in *Naidoo*.

[56] In *Kapeller* Viljoen J found that the defendant's agent, a loss adjuster, did not have authority to make an admission of liability (729D-731E). Strictly speaking, therefore, it was unnecessary to decide whether the supposed admission of liability was or was not covered by the without prejudice rule. The learned judge's discussion of that issue was relatively brief, which is perhaps unsurprising given the view he had formed on the agent's lack of authority. The basis of his conclusion that the admission did not enjoy protection was that liability was no longer on the table during the negotiations, the only question being the quantum of damages. Whether that conclusion was justified on the facts need not detain me. The effect of his conclusion, I may note, was that the supposed acknowledgment of liability would have been admissible for all purposes, not only as an interruption of prescription.

[57] In *Naidoo* Trollip JA said that *Kapeller* supported a view that the without prejudice rule does not extend to admissions 'quite unconnected with or irrelevant to the settlement negotiations' (678 in fine). He said Viljoen J had found that '… according to the parties' intention and discussions, the admission of liability… was made quite independently of and separately from the settlement negotiations and was therefore admissible' and that '[t]he question about the nature of the required connection between the two elements did not therefore arise' (at 680E - the 'two elements' being the admission sought to be adduced and the inadmissible settlement discussions).

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[4] In the passage in question Mellish LJ said this: 'As to the letter of 19 February, there is thus further objection, that it is stated to be without prejudice. I am strongly of opinion, although it is not necessary to decide it in this case, that a letter which is stated to be without prejudice cannot be relied upon to take a case out of the *Statute of Limitations*, for it cannot do so unless it can be relied upon as a new contract. Now, if a man says his letter is without prejudice, that is tantamount to saying, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all." It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted.'

[58] In *Ofulue* Lord Neuberger left open the question whether and to what extent a statement in without prejudice negotiations was admissible on the basis that it was 'in no way connected with' the issues under discussion (paras 92-93) but gave, as an example of a situation where this exception might apply, the old case of *Walridge*[5] where a without prejudice letter was admitted solely as evidence of the author's handwriting, being a factor 'wholly extraneous to the contents of the letter'. Lord Neuberger then quoted Lord Griffiths' caveat in *Rush & Tompkins* that *Walridge* was:

'… an exceptional case [which] should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.'

[59] It is clear from both *Naidoo* and the leading English cases that the courts will not readily exclude from protection an admission made during the course of without prejudice negotiations.[6] In *Naidoo* the apparent acceptance by the insurer's representative that it had been on risk at the relevant time appears to me to have been no more an issue 'on the table' in the settlement discussions than the admission of liability in *Kapeller* yet the Appellate Division did not regard it as wholly unconnected to the without prejudice discussions. In *Ofulue* the admission of the claimants' title had been made during the course of settlement discussions in earlier litigation between the same parties where the claimants' title had not only been uncontentious but had actually been admitted on the pleadings; yet Lord Neuberger said that the admission of title was not sufficiently remote from the matters then in issue as to be outside the protection of the rule (para 91).[7]

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[5] *Walridge v Kennison* (1794) 1 Esp 143. See also *Naidoo* at 679A-C.

[6] *Standard Bank of South Africa v A-Team Africa Trading CC* [2015] ZAKZPHC 43 is an illustration of the kind of case where an admission might stand independently of settlement negotiations. In response to a demand sent to the respondent, the latter's attorney acknowledged receipt and made certain settlement proposals. The acknowledgment of receipt was held to be admissible to establish that the respondent had received the demand (this having been placed in issue).

[7] The admission in the earlier proceedings was naturally admissible as evidence in the later proceedings but the date on which the pleading in question was filed was too early in time to assist the claimants in warding off the limitation defence in the later proceedings, hence their reliance on without prejudice negotiations which took place while the earlier proceedings were pending but after the pleading in question was filed.

[60] Finally I should perhaps make clear that I do not regard the absence of recognition in English law of the exception on which Mr la Grange relies, either as at 1961 or now, as decisive. The English without prejudice rule which we have inherited is a rule which recognises exceptions where public policy so dictates. Public policy is not immutable and the list of recognised exceptions is not a numerus clausus (as *Hammerle* shows). My conclusion is, however, that there are no compelling reasons of public policy to limit without prejudice protection in the manner for which Mr la Grange contends and I am fortified in that view by the fact that no such exception has been recognised in English law.

Conclusion in the present case

[61] As I said earlier, Mr la Grange accepted that the Webber Wentzel letter qualified for without prejudice protection. He did not contend that only part of the letter so qualified. KLD's case on prescription is that without prejudice protection does not apply where the communication is relied upon as an interruption of prescription. My conclusion is that the law does not recognise such an exception.

[62] I nevertheless add the following. KLD had not issued summons at the time the Webber Wentzel letter was written. There is no evidence in the stated case that KLD had as yet asserted a claim to commission. This does not mean that the Webber Wentzel letter could not be a without prejudice endeavour to settle a commission claim which Empire expected KLD to assert. There was already pending litigation between Empire and KLD regarding the former's claims arising from the mandate. The concluding paragraph of the letter expressly stated that the offer was in full and final settlement not only of Empire's claims against KLD but the latter's claims against Empire.

[63] The letter undoubtedly contains an acknowledgment of liability. The acknowledgment cannot, however, in my view be regarded as wholly unconnected to the settlement proposal. The acknowledgment in para 4 was not an independent admission because it is clear from what follows that Empire did not, despite the way in which KLD framed its replication, admit that it had a present liability to pay commissions in the amount there recorded (R2 105 960). The letter continued by

asserting various deductions which reduced that amount by way of set-off. Certain of the amounts so deducted would almost certainly not have qualified in law to be deducted by way of set-off since they were not liquidated (the estimated legal costs of R284 666,71 and expenses totalling R35 889) but this does not detract from the stance Empire was adopting. Empire also left out of account, for settlement purposes, its further claim, which was still advanced on the pleadings, for damages exceeding R15 million. Be that is it may, if Empire 'admitted' anything, it was a residual liability of R1 082 334,55, being the amount offered in full and final settlement. One can only know this, however, by having regard to the asserted deductions and the actual settlement offer. And the manner in which the settlement offer was arrived at cannot be understood if one excludes from consideration the opening amount of R2 105 960 referred to in para 4.

[64] Mr Howie correctly accepted in argument that an admission of part of a liability is sufficient to interrupt prescription (*Roestorf & Another v Johannesburg Municipal Pension Fund & Others* 2012 (6) SA 184 (SCA) para 19). But before a creditor can rely on an acknowledgment of part of the liability as an interruption of prescription there must be admissible evidence of the partial acknowledgment. The rule that a partial acknowledgment suffices naturally does not mean that one can cherry-pick parts of a without prejudice communication.

[65] It follows that the first issue raised in the stated case (the admissibility of the Webber Wentzel letter) must be determined in Empire's favour. The second issue thus falls away. The result of this determination is that the special plea of prescription succeeds. Costs should follow the result. As to the wasted costs of 11 June 2015, these were occasioned by Empire's belated attempt to resile from the stated case. Empire should thus pay the wasted costs. The postponement of 20 April 2016 was not either party's fault; the unavailability of a judge seems to have been brought about by a misunderstanding on the part of the Judge-President's secretary. The wasted costs should thus be costs in the cause.

[66] I make the following order:

(a) The issue identified in para 3.1 of the stated case is determined in favour of the defendant.

(b) The special plea of prescription thus succeeds and the plaintiff's claims for commission, save in the amount of R18 240 relating to the sale to Werner Grift (Erf 884 on the schedule to the plaintiff's particulars of claim), are dismissed with costs, including the reserved costs of 20 April 2016.

(c) The defendant is to pay the wasted costs of 11 June 2015.

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ROGERS J

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