THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0109

In the Matter of the Liquidation of
The Home Insurance Company

SECOND AFFIDAVIT OF RICHARD DANIEL HACKER Q.C.
IN OPPOSITION TO THE LIQUIDATOR'S MOTION FOR APPROVAL
OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

I, RICHARD DANIEL HACKER, one of Her Majesty's Counsel, of 3-4 South Square, Gray's Inn, London, England , hereby depose and say :-

1. I am a member of the English Bar admitted to practice law in England. I received an Honours Degree in Law from the University of Cambridge in 1976 and a License Speciale en Droit Europeen (with Distinction) from the University of Brussels in 1978. I was admitted to the English Bar in 1977 and have been continuously in practice as a Barrister since 1980. As a member of the Bar, I am qualified to advise and deliver opinions on matters of English law.

2. I specialise in business law with a heavy emphasis on insolvency matters and have been involved in many of the contentious insolvencies which have come before the English courts since I began to practice. A true and correct copy of my Summary Curriculum Vitae setting out my professional qualifications and experience in greater detail is attached as Exhibit A. I have previously provided expert evidence of English law in

relation to a number of matters proceeding before the United States Bankruptcy Court for the Southern District of New York.

In order that the Court is best able to judge the weight to be attached to the expert evidence which I give, I propose to explain briefly the structure of the English legal profession. In the interests of simplicity I deal here in generalisations to which there are, of course, exceptions. There are two types of practising lawyer in England. The Solicitor and the Barrister. The former deals directly with clients and will very often provide all the advice required by the client. Where more specialist advice is required (or advocacy skills are involved), the Solicitor will instruct a Barrister known to possess the necessary expertise. Until 2003, the Queen (on the advice of the Lord Chancellor) each year appointed a small number of practising lawyers to the rank of Queen's Counsel. Where a complex issue of law requires consideration and substantial sums are at stake it is normal for the advice of a Queen's Counsel to be sought. Only something over 1% of the practising legal profession currently hold the rank of Queen's Counsel. I was appointed a Queen's Counsel in 1998.

Materials which I have reviewed

4. I have reviewed and relied upon in preparing my Affidavit :-

(a) the Motion for 'Approval of Agreement and Compromise with AFIA Cedents' filed by the Liquidator of the Home Insurance Company (respectively "the Motion", "the Liquidator" and "Home");

(b) the Affidavit of Peter A Bengelsdorf sworn on 10th February 2004 in support of the Motion;

(c) an Insurance and Reinsurance Assumption Agreement dated 31st January 1984;

(d) an Order of the English High Court of Justice, Chancery Division, Companies Court ("the English court") dated 8th May 2003 appointing Joint Provisional Liquidators in respect of Home ("the English Order");

(e) the Liquidator's Offer of Proof dated 28th April 2005; and

(f) the Affidavit of Michael Durkin sworn on 9th May 2005 ("the Durkin Affidavit").

I have been asked by Counsel for Century Indemnity Company and ACE Property & Casualty Insurance Company (together "the ACE Companies") to assume the truth of the facts set out in the Durkin Affidavit (save that I am not asked to make any such assumption in respect of the matters set forth in paragraph 3 thereof). The facts and information set out below are either within my own knowledge gained through my involvement with this matter, in which case they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information and belief.

The subject matter of my evidence

5. The Liquidator's Offer of Proof refers to various communications between the ACE Companies on the one side and the Liquidator and the Joint Provisional Liquidators of Home (or their respective representatives) (together "the Officeholders") on the other. It refers also to documents and other material disclosed during the course of such communications and/or which record or evidence the communications.

6. The ACE Companies object to the disclosure of certain of those communications (and the documents and/or other materials disclosed during, or recording, the relevant communications) on the ground that their disclosure to the Court is precluded by the 'without prejudice' rule.

7. I have been asked to explain the nature and operation of the 'without prejudice' rule in England and the extent to which the rule would preclude disclosure of the communications and materials referred to in the Durkin Affidavit.

The without prejudice rule

8. The general rule can be simply stated. Oral communications made and documents and other materials brought into existence in the course of a dispute between two parties, which are made or created for the purpose of seeking a resolution of that dispute, and which are expressed or otherwise proved to have been made 'without' prejudice', are not admissible in evidence. I refer below to the principal recognised exceptions to this general rule.

9. The basis and application of the general rule were explained and described in the leading House of Lords decision of *Rush & Tomkins Limited v. Greater London Council* [1989] A.C. 1280, by Lord Griffiths (at page 1299) in the following terms :-

> *The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:*
>
> > *"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 of such negotiations (and that includes, of 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 Clauson J. in Scott Paper Co. v. Drayton Paper Works Ltd.(1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their 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. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the even of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."*

10. In *Unilever Plc v. Procter & Gamble Co* [2000] 1 WLR 2436, the Court of Appeal recognised the general breadth and application of the rule in the following observation (at page 2443H) :-

> *"Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (Hoghton v Hoghton (1852) 15 Beav 278 at 321, 51 ER 545 at 561), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.*
>
> *At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities."*

11. In its decision in that case, the Court of Appeal explained that in addition to the public policy foundation described in *Rush & Tomkins Limited v. Greater London Council* (supra), there was a further basis of the rule; namely, an implied or express agreement between the parties that their communications should be 'without prejudice' i.e. inadmissible in evidence. Robert Walker L.J. observed that :-

> *"This well-known passage [i.e. that cited above] recognises the rule as being based 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 the negotiations, a contested hearing ensues."*

- see at page 2442D and also at pages 2448A – 2449B.

12. In *Unilever Plc v. Procter & Gamble Co* (supra), the Court of Appeal addressed specifically the possibility that communications which might not otherwise be protected by the application of the general rule, might nonetheless become so protected as result of an express agreement between the parties to extend the protection of the general rule to particular communications which would not otherwise fall to be protected. Robert Walker L.J. observed at page 2449 H that :-

> *"In my judgment the judge was right to conclude that it would be an abuse of process for Unilever to be allowed to plead anything that was said at the meeting either as a threat or as a claim of right. The circumstances were such that each side was entitled to expect to be able to speak freely, and their agreement to the meeting being arranged evinces that common intention. I would if necessary base my conclusion on the parties' agreement to extend the normal ambit of the rule based on public policy."*

13. The general rule does not require that the 'without prejudice' label be attached to a particular communication in order for the privilege against disclosure to apply. Even where there is no mention of a communication having been made 'without prejudice', the court will nonetheless treat the communication as protected by the privilege if the

surrounding circumstances make it clear that the communication took place as part of a process of seeking to resolve a dispute between the parties: see *Rush & Tomkins Limited v. Greater London Council* (supra) at page 1299 H.

14. The general rule applies not only to communications made after litigation has been commenced, but also and equally to communications made in order to avoid potential litigation. Once a potential dispute exists and a communication is made by one party to that dispute to the other party, which is intended to lead to a potential resolution of that dispute (and therefore comprises something more than a mere assertion of the rights of the communicating party) the communication will be privileged and inadmissible in evidence: see *Standrin v. Yenton Minster Homes Limited* (The Times 22nd July 1991).

15. The general rule applies also in a tri-partite situation. Thus, if A and B enter into without prejudice discussions with a view to compromising a dispute between them, the fact and content of those discussions is protected by the privilege and is not admissible in evidence, even in litigation between A (or B) and a third party, C: see *Rush & Tomkins Limited v. Greater London Council* (supra).

16. The exceptions to the general rule are those enumerated in *Unilever Plc v. Procter & Gamble Co* (supra): see the judgment of Robert Walker L.J. at pages 2444C to 2445G[1].

17. In addition to the exceptions referred to above, both parties may together waive the non-disclosure privilege, but it is not open to one party alone to do so.

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1 The exceptions to which Robert Walker L.J. refers have no apparent application to the present case and I refer to them, for the sake of completeness only

The application of the rule in the present case

18. I can, of course, only comment on the application of the rule viewed from an English law standpoint.

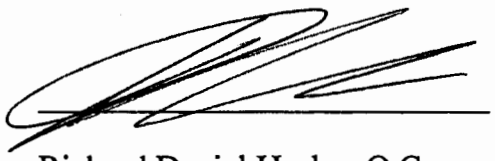
19. I have set out above the basis, parameters and limitations of the general rule, if it is derived from the application of the principles of public policy and/or from an implied agreement between the parties. It will always be a matter for the court before which the admissibility of a given communication is challenged, to determine whether the facts (whether undisputed or proved) support a claim that particular evidence is inadmissible based upon the application of the general without prejudice rule.

20. If the court were, for any reason, to conclude that the general rule did not protect a communication from disclosure, it would then, as the court did in *Unilever Plc v. Procter & Gamble Co* (supra), have to go on to consider whether the parties expressly agreed that the rule should apply.

21. I believe that if an English court (applying English law) was presented with uncontroverted evidence as set forth in the Durkin Affidavit, it would conclude that the statements and materials to which Mr Durkin refers in paragraph 7 of the Durkin Affidavit, are not admissible in evidence in any dispute or litigation to which the Ace Companies are parties.

Signed under the penalties of perjury this 10th day of May 2005.

Executed at London, England
on 10thMay 2005



Richard Daniel Hacker Q.C.

Subscribed and sworn to me before me this 10thday of May 2005 at London, England

Notary Public

Notary Public London, England
(Edward Gardiner)
My Commission Expires with Life