# BARBADOS

[Unreported]

## IN THE SUPREME COURT OF JUDICATURE

**HIGHCOURT**

**CIVIL DIVISION**

**Suit No: 1681 of 2012**

**BETWEEN:**

**JOYANNMAPP NEE CALLENDAR**

***Claimant***

**And**

**SHERITAPILE**

***First Defendant***

**CAROLYNSPRINGER**

***Second Defendant***

**Before:**

The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of theHigh Court

**Appearances:**

Ms. Anya S. Kirton, Attorney-at-Law for the Claimant

Ms.Marguerite Woodstock-Riley, QC Attorney-at-Law for the First and SecondDefendants

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2013: June 25

2014: January 16

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## DECISION

[1] **CorneliusJ:** This is an application for an interim payment by Miss Mapp, theClaimant, against the Defendants, Miss Pile and Miss Springer. An important issue arises as to the use of'without prejudice' communications in trials for personal injury.

**Background**

[2] Early on the morning of October 12, 2009, the Claimant wasstanding at a bus stop on the left of Hindsbury Road, St. Michael facing in thedirection of Weymouth when she was struck from behind by a motor vehicle bearingregistration number XE 700. The accidentcaused her to immediately lose consciousness. She also sustained a fracture to her pelvis, lacerations and contusionsto her limbs, extensive damage to her left leg, a fractured jaw andparticularly extensive damage to her teeth, gums and mouth.

[3] She now applies to this Court for an interim payment in the sum of$6,430.00 relying on representations made by the insurers of the vehicle of thesecond defendant in 'without prejudice' correspondence in order to do so. Those insurers, Trident Insurance CompanyLimited, formerly the Third Defendant, were struck out on the 23 May 2013 as aparty to these proceedings.

[4] The correspondence in question is firstly a letter dated November19, 2009 from Mr. Dwayne R. Nurse, the Claims and Risk Controller of theinsurers to Mrs. Angela Mitchell-Gittens, the then attorney-at-law for theClaimant (hereinafter called "the first letter"). The letter is exhibited to the Claimant'saffidavit as "Exhibit JCM 1" and is captioned "*Motor vehicle accident on 12th October 2009/Our insured:Carolyn Springer/Your Client: Joyann Callendar/Our Ref: MPV-09/10/0241*" andin it the insurers state the following:

> "Weacknowledge receipt of your letter dated 6th of November 2009 inconnection with the captioned matter and have noted the contents therein.
>
> Wewish to advise that we are willing to provide interim payments to anyreasonable medical procedures which relate to the accident underconsideration. Such requests should beaccompanied with the relevant supporting documentation.
>
> Shouldyou have any queries, please do not hesitate to contact the undersigned."

[5] The insurers did in fact subsequently on August 26, 2010 forward acheque to the amount of $1,970.00 to Mrs. Mitchell-Gittens as payment for someof the cost of the medical treatment provided by Dr. Wendy Maynard, one of thedoctors who had treated the Claimant for

her injuries. The cheque was forwarded throughcommunication that was not marked 'without prejudice'. Aside from that cheque of $1,970.00, theinsurers have made no further payments but the Claimant has continued to incurcosts on medical treatment provided by the same Doctor Maynard.

[6] Further correspondence compounded the issue. The Claimant's doctor, Dr. Maynard indicatedby letter dated August 27, 2012 that all outstanding invoices (which currentlyamount to $4,430.00) had to be satisfied before the Medical Report, whichitself would cost $2,000.00 to be paid in advance, would be provided. The Claimant's attorney-at-law wrote to theDefendants' attorney-at-law by letter dated October 1, 2012 enquiring whetherthe insurers would be willing to pay these costs so that the matter could beexpeditiously resolved.

[7] By letter dated October 3, 2012 and marked "*without prejudice save as to costs*" and exhibited to the Claimant'saffidavit as "Exhibit JCM 5" (hereinafter called "the second letter"), theThird Defendant through its attorney-at-law indicated that it would be willingto pay only for the Medical Report and would not be willing "*at this time…to make any other payments*". The writer of the letter was careful tostress that the Defendant's readiness to pay for the Medical Report was "*in no way an admission of liability*".

[8] The Defendants' position is this: they do not deny that it was theFirst Defendant's motor vehicle bearing the registration number XE 700 thatstruck the Claimant on October 12, 2009. Neither do they deny that the First Defendant was driving the saidvehicle at the time that it did so. Theycontend, however, that the accident was caused not by the negligence of theFirst Defendant but by the negligence of an unknown driver of an unknown motorvehicle who came on to the First Defendant's side of the road causing her toswerve from the road and strike the Claimant so as to avoid a head on collisionwith that unknown vehicle. Relying onthe defence of inevitable accident, the Defendants posit that they have noclaim to answer.

[9] Further, the Defendants object to the making of the interimpayment sought by the Claimant through her Application dated May 22, 2013. This application is supported by an Affidavitdeposed by the Claimant and filed contemporaneously with her application inwhich the Claimant exhibits and seeks to rely upon 'without prejudice'correspondence. Because thecorrespondence is clearly marked "Without Prejudice" the Defendants made an *in limine* submission in which theystrongly objected to its admission and use in these proceedings, requestinginstead that the 'without prejudice' letters be struck out from the Claimant'sAffidavit.

[10] It is against this background that the Claimant now applies to theCourt for interim payment pursuant to *Part17* of the *Supreme Court (CivilProcedure) Rules, 2008*.

**ISSUES**

[11] Before the Court considers whether, on the facts of this case, itshould order interim payment pursuant to *Part17*, it is asked to first consider the preliminary point of whether theletters marked 'without prejudice' that are exhibited to the Claimant'saffidavit are admissible as evidence and can therefore be relied upon by theClaimant in her application for interim payment or whether they should insteadbe struck out.

**LEGALSUBMISSIONS**

[12] Counsel for both parties addressed me, orally and in writing, onthe issue identified above.

[13] In her submissions, Ms. Kirton who appeared for the Claimant didnot dispute the existence of the 'without prejudice' rule. She argued, however, that this rule was arule based on custom and popular usage and not a legal principle originatingfrom either statue or the common law.

[14] Directing the Court to the dictum of Oliver LJ in ***Cuttsv Head and Another [1984] Ch. 290 at 306***, Ms. Kirton insisted that notonly was the 'without prejudice' rule grounded in public policy but it was notabsolute. She drew the Court's attentionto the judgment of Lord Griffith in ***Rush and Tompkins Ltd. v Greater LondonCouncil and Another [1988] 3 All ER 737*** where the learned judgeasserted that a Court could have regard to 'without prejudice' material wherethe justice of the case required it to do so.

[15] Counsel argued that the exceptions to which the rule was subjectincluded one which permitted the Court to examine documents labelled 'withoutprejudice' to determine whether an agreement had been concluded between theparties. According to Ms. Kirton, the'without prejudice' material could be examined in such an instance as thematerial became relevant not for the facts that may have been admitted thereinbut because they were evidence of the offer and that acceptance forming part ofa contract. This particular submissionwas buttressed with the English cases of ***Muller v Linsley & Mortimer [1996] 1PNLR 74*** and ***Tomlin v Standard Telephone and Cables Ltd [1969] 3 All ER 201***. Unsurprisingly, Ms. Kirton's submissions didnot find favour with Counsel for the Defendants.

[16] Learned Queens Counsel for the Defendants, Mrs. Woodstock-Riley,maintained that the Claimant could not rely on any exception to the 'withoutprejudice' rule to enter the disputed correspondence into evidence and urgedthe Court to strike out any reference to that correspondence contained in theaffidavit evidence. She contended thatthe Claimant was seeking to rely on the facts contained within the 'withoutprejudice' letters rather than the evidence of the correspondence itself andsubmitted that despite the Claimant's assertions to the contrary reliance onthe disputed correspondence was being used to show that the Defendants hadaccepted liability.

[17] In the course of her submissions, Mrs. Woodstock-Riley, QCdirected the Court to chapter 48 of **BlackstoneCivil Practice 2013**, **Halsbury'sLaws of England (Fourth edition) Volume 17 at para 212** and the Englishcases of ***Ofulue and another (FC) v Bossert (FC) [2009] 1 AC 990, Galliford TryConstruction Ltd v Mott MacDonald Ltd [2008] EWHC 603 (TCC), Berg v IML London[2002] 1 WLR 3271, Forster et al v Friedland et al (Unreported) Court of Appealof England, Decision of November 10, 1992, Rush & Tompkins Ltd. v GreaterLondon Council and Another (supra)*** and ***Cutts v Head and another (supra)***. She used these authorities to discuss thenature of the 'without prejudice' rule and its underlying purpose, contendinglike Counsel for the Claimant before her that the rule was grounded in publicpolicy, more specifically the public policy of encouraging settlement ratherthan litigation. Mrs. Woodstock-Rileyargued that permitting the admission of the disputed documents into evidencewould not only be very clearly contrary to this policy but would establish aprecedent that would compound the litigious culture that already existed anddiscourage parties from resolving their disputes in amicable and cost-effectivepre-litigation negotiations.

**LAW**

[18] The legal principles governing the admissibility of withoutprejudice communications are, according to Counsel who appeared before me,undisputed and easily rehearsed. BothCounsel accept the relevant principles as being those set out in the Englishcases of ***Muller v Linsley & Mortimer [1996] PNLR 74***, ***Tomlinv Standard Telephones and Cables Ltd [1969] 3 All ER 301*** and ***GallifordTry Construction Ltd. v Mott MacDonald Ltd [2008] EWHC 603 (TCC),*** copiesof which have been helpfully provided to the Court.

[19] While the legal principles arising from English common law in thecited cases are accepted by both parties, the application of those principlesto the two 'without prejudice' letters in the instant case has been robustlycontested by Counsel for the Claimant and Counsel for the Defendants in theiroral and written submissions before the Court.

**The "Without Prejudice" ruleunder the Common Law**

[20] The Court has always possessed the power to control both theevidence adduced by parties appearing before it and the manner in which thisevidence is admitted. It has exercisedthis power to exclude from admissibility into evidence communication that it isregarded as privileged because of its nature, including the confidentialcommunication between lawyer and client, as well as 'without prejudice'communication between the parties to a dispute. It is the latter communication with which this case is concerned.

[21] "Without prejudice" communication means, according to Lindley LJ,communication that is intended to be "*withoutprejudice to the position of the writer of the letter if the terms he proposesare not accepted*": ***Walker v Wilsher (1889) 23 Q.B.D. 335 at 337***.

[22] The 'without prejudice' rule developed under common law providesthat communication made with the genuine intent of seeking the settlement of adispute between two or more parties is, as a general rule, privileged from disclosureand cannot be adduced into evidence in subsequent litigation relating to thesame subject matter except in certain specific instances: See, for example, ***Rush& Tompkins v GLC [1989] 1 AC 1280, per Lord Griffiths***. Settlement does not mean the resolution ofall disputed legal issues but has been defined as the "*avoidance of litigation*"; the negotiations in question must begenuinely aimed at avoiding litigation: ***Foster v Friedland (CA) 1992 WL 1351421, per Lord Hoffman***.

[23] The legal principle of excluding admission into evidence of"without prejudice" communication is grounded primarily in public policy. It is aimed at facilitating the settlement ofdisputes without resorting to litigation by encouraging parties to "*fully and frankly…put their cards on thetable*" without having to fear any statements or offers made during thecourse of negotiations being adduced at trial as admissions of liability: ***Cuttsv Head [1984] Ch. 290 at 306, per Oliver LJ***. Its most practical effect is the protectionof admissions against interest made during the course of negotiations:***Unilever plc v Procter and Gamble Co [2000] F.S.R. 344 at 357*** perWalker LJ. It does not protect documentscontaining facts which are not common ground between the parties: ***Ofulueand another (FC) v Bossert (FC) 2009 UKHL 16***.

[24] The without prejudice rule sometimes rests on another basis, thatbeing "*the intentions of the parties":* ***Cutts v. Head [1984] 2 Ch. 290 at 314, perFox LJ***. Lord Hoffman in ***Mullerv Linsley and Mortimer*** (***supra p 77 at para 13***) explained theunderlying rationale of the rule in the following way:

> "Firstly,the public policy of encouraging parties to negotiate and settle their disputesout of court and, secondly, an implied agreement arising out of what iscommonly said to be the consequences of offering and agreeing to negotiatewithout prejudice. In some cases both ofthese justifications are present; in others, only one or the other."

[25] Chadwick LJ of the English Court of Appeal explained in ***Prudential Assurance Co Ltd v PrudentialInsurance Co of America (No. 2) [2003] EWCA Civ 1154 at para 23***that:

> "…itis important to keep in mind that the rule in England--in so far as it is basedon public policy-- has evolved in response to the need to balance two differentpublic interests, "namely the public interest in promoting settlements and thepublic interest in full discovery between parties to litigation"--see theobservation of Lord Griffiths in Rush & Tompkins ([1989] A.C. 1280,1300A-B). The latter interest is a reflection of the principle that trialsshould be conducted on the basis of a full understanding, by both parties andthe court, of the facts relevant to the issues in dispute. The "withoutprejudice" rule has to be seen as encroaching upon that principle. The justificationfor such encroachment, in the eyes of the English courts, has been the greaterpublic interest in promoting settlements."

[26] As there is no indication that the parties before me agreedbetween them that their discussions were to be protected by the 'withoutprivilege' rule, the sole justification for the rule in this case is the publicpolicy element of promoting settlement out of court and this justification has,to my mind, obtained even greater force with the enactment, both here and inEngland, of new civil procedure rules which aim in their overriding objectiveto deal with cases justly by, in so far as practicable, resolving themexpeditiously and in a manner that saves expenses and allots them anappropriate share of judicial resources.

[27] It is clear that communication made with the genuine aim ofeffecting a settlement may be excluded from disclosure and admission intoevidence whether or not it is marked as or described to be "without prejudice":***ChocoladefabrikenLindt & Sprungli v Nestlé Co. Ltd [1978] RPC 287***. However, marking or describing communicationas "without prejudice" raises a *primafacie* inference that the communication in question was intended to be usedfor the purpose of negotiation and should therefore be privileged: ***SouthShropshire District Council v Amos [1986] 1 WLR 1271 at 1277, per Parker LJ;Schering Corp v Cipla Ltd [2005] FSR 25 paras 14-15, per Laddie J***.

[28] In order to determine whether the 'without prejudice' privilegeattaches to a particular document, the Court is entitled to examine it: ***SouthShropshire (ibid)***. The Courtmust then consider whether this communication can be regarded as a *bona fide* part of or attempt to promotenegotiations between the parties: ***Buckinghamshire County Council v Moran[1990] 1 Ch 623 at 625***.

[29] The test for determining whether the privilege applies is clearlyobjective; the subjective intent of the party responsible for the communicationin question is understandably of no concern (See ***Pearson Education Ltd v PrenticeHall India Private Ltd [2005] EWHC 636 (QB) D at para 20, per Crane J***). It is the communication itself and therelevant surrounding circumstances as examined by

the Court from theperspective of a reasonable recipient that are conclusive.

[30] Given the test above it is quite clear that the privilege willclearly not attach where (i) there is no dispute; or (ii) where thecommunication in question was not sent with the purpose of negotiating asettlement so as to avoid litigation.

[31] The protection given to communication made with the purpose ofsettling a dispute is, however, itself not absolute, being subject to a numberof exceptions. The principal exceptionsto the attraction of the privilege were set out by Walker J in ***Unilever plc v Procter & Gamble Co[2000] FSR 344 at pp 353/4***,but his list is far from exhaustive: The Civil Court Practice 2013(The Green Book) Part 32 (Evidence) at para 4.6. The exceptions include use ofthe communication to determine whether the parties have concluded an agreementor to assist in the interpretation of a completed agreement and Counsel for theClaimant has sought to admit the disputed letters under this exception. A similar exception and one that may berelevant to this case occurs where a clear statement is made during the courseof negotiations by one party on which the other party is intended to and doesin fact act upon. In such an instance,the communication may be admitted to give evidence of the existence of anestoppel.

[32] Estoppel was the exception by which the Court admitted privilegedcommunication in ***Wendy Newton v Barbados Transport Board (unreported) High Court ofBarbados Civil Suit No. 2297 of 2001, Decision dated December 6, 2002***. In ***Newton***, the Plaintiff had sought torely on a 'without prejudice' letter from the Defendant in which the Defendanthad accepted liability for the accident giving rise to her claim, as well asthe Defendant's subsequent conduct, to argue that the Defendant was estoppedfrom raising the limitation point at trial. Walrond J (acting) examined the contents of the 'without prejudice'letter and held that it was admissible. She appeared to do so on the basis that it contained a clear statementmade by one party that was intended to be and was in fact relied upon by theother and therefore operated as an estoppel, observing at para 14 that:

> "LordJustice Walker in the case of Unilever also cited the case of Tomlin v StandardTelephones and Cables Ltd [1969] 1 WLR 1378, which was relied on by thePlaintiff and bears close reading. The case of Tomlin was cited in Hodgkinson's case asauthority for the proposition that *"withoutprejudice"* communications could be looked at by the court to see if thenegotiations therein contained resulted in a settlement. The court went on to say that,"Although, of course, contract and estoppel are quite separate concepts, itappears to me logical and consistent that, if "without prejudice"correspondence can be looked at to see if it gives rise to a contract, thensuch correspondence can also be looked at to see if it gives rise to anestoppel. However, I do notsuggest that there is an absolute rule to that effect."

[33] In ***Muller v Linsley & Mortimer (supra)*** Hoffman LJ of theEnglish Court of Appeal, relying heavily on the judgment of Lord Griffiths in ***Rushand Tompkins***, found that as the 'without prejudice' rule was anexception to the general rule that the statement or conduct of a party wasalways admissible against him to prove any fact which is thereby expressly orimpliedly asserted or admitted. He,accordingly, held that statements which were relevant otherwise than asadmissions could be admitted where the justice of the case required it,observing that:

> "Manyof the alleged exceptions to the rule will be found on analysis to be cases inwhich the relevance of the communication lies not in the truth of any factwhich it asserts or admits, but simply in the fact that it was made."

[34] Lord Hoffman discussed a number of the exceptions to the ruleincluding that of a completed agreement, explaining that

> …whenthe issue is whether without prejudice letters have resulted in an agreedsettlement, the correspondence is admissible because the relevance of theletters has nothing to do with the truth of any facts which the writers mayhave expressly or impliedly admitted. They are relevant because they containthe offer and acceptance forming a contract which has replaced the cause ofaction previously in dispute…

[35] Despite the attractive simplicity of Hoffman LJ's analysis, whichgreatly restricts the scope of communications protected by the 'withoutprivilege' rule, subsequent decisions of the same court have not embraced hisposition. Walker LJ in ***Unilever(supra) at 2443*** expressed his doubt as to whether communicationsprotected by the privilege could be described as admissions unless "thatexpression is given an unusually wide meaning". Citing ***Unilever*** with approval, the Court of Appeal in ***Bradfordand Bingley Plc v Mohammed Rashid [2005] EWCA Civ 1080*** also indicatedthat it doubted whether the rule was as narrow as Hoffman LJ had described itin ***Mullerv Linsley***.

**<u>The Evidence Act, Cap 121 ofthe Laws of Barbados</u>**

[36] It is curious that the Court in ***Newton (supra)*** did nothave regard to the *Evidence Act*, *Cap 121 of the Laws of Barbados* (hereinaftercalled "the Act"). Sadly, in their oral submissionsto the Court both Counsel in this matter also failed to direct any attentiontowards the provisions of the Act, which are relevant to the determination ofthe preliminary objection raised. *Division 8 of Part IV* of the Act isentitled "*Privilege*" and is devotedto establishing rules that govern the admissibility into evidence ofcommunications considered to be privileged.

[37] The Act was enacted in 1994 "*toreform the law relating to evidence in proceedings courts in Barbados*". *Section110* of *Division 8* is captioned "*Exclusion of evidence of settlementnegotiations*" and subsection 1 provides as follows:

(1) Evidence may not be adduced of

(a) a communication made

(i) between persons in dispute, or

(ii) between one or more persons in dispute and a third party, being acommunication in connection with an attempt to negotiate a settlement of thedispute, or

(b) a document that has been prepared in connection with an attempt tonegotiate a settlement of a dispute, whether or not the document has beendelivered.

[38] *Section110(5)(a)* provides that a dispute to which *section 110* refers is "*adispute of a kind in respect of which relief may be given in*

*legal oradministrative proceedings*". *Section 110(2)* lists the circumstancesto which *section 110(1)* do not applyand these circumstances are where:

(a) the persons in dispute consent to the evidence being adduced or,if one of those persons has tendered the communication or document in evidencein some other administrative or legal proceedings, the all the other persons soconsent;

(b) the substance of the evidence has been disclosed with the expressor implied consent of all persons in dispute;

(c) the communication or document

(i) began an attempt to settle a dispute, and

(ii) included a statement to the effect that it was not to be treatedas confidential;

(d) the communication or document relates to an issue in dispute andthe dispute, so far as it relates to that issue, has been settled;

(e) the evidence tends to contradict or to qualify evidence that hasalready been admitted about the course of an attempt to settle the dispute; or

(f) the making of the communication, or the preparation of thedocument, affects a right of a person; or

(g) the communication was made, or the document prepared, infurtherance of the commission of

(i) an offence, or

(ii) an act that renders a person liable to a civil penalty; or

(h) a party to the dispute knew or ought reasonably to have known thatthe communication was made, or the document prepared, in furtherance of adeliberate abuse of a power conferred by or under an enactment.

[39] *Section110* is similar in content to *section131* of the *Australian UniformEvidence Act, 1995* and, indeed, would be identical to its Australiancounterpart had the latter not listed the following further exceptions,providing that communication that attracts privilege under section 131, maynonetheless be adduced where:

(i) the proceeding in which it is sought to adduce the evidence is aproceeding to enforce an agreement between the persons in dispute to settle thedispute, or a proceeding in which the making of such an agreement is in issue;

(ii) evidence that has been adduced in the proceeding, or an inferencefrom evidence that has been adduced in the proceeding, is likely to mislead thecourt unless evidence of the communication or document is adduced to contradictor to qualify that evidence; and

(iii) the communication or document is relevant to determining liabilityfor costs.

[40] It is therefore toAustralian jurisprudence that the Court turns to obtain guidance on theinterpretation of *section 110* and itsrelationship with the English common law principles to which both Counsel havedirected the Court.

[41] Mansfield J in***Silver Fox Co Pty Ltd v Lenard's Pty Ltd(No 3) [2004] FCA 1570 at para 36*** hasexplained the purpose and policy of the statutory rule in the following manner:

"Section 131(1),subject to its exceptions, gives effect to the policy of ensuring the course ofnegotiations – whether private or by mediation – are not adduced into evidencefor the purpose of influencing the outcome on the primary matters in issue.Clearly, it is in the public interest that negotiations to explore resolutionof proceedings should not be inhibited by the risk of such negotiationsinfluencing the outcome on those primary issues. It is equally in the publicinterest that negotiations should be conducted genuinely and realistically."

[42] It is clear that the rationale underlying *section 110* and its Australian counterpart is no different fromthat underlying the common law rule concerning the admissibility into evidenceof without prejudice documents.

[43] While the purpose and policy of the statutory rule may be similarto that of the common law rule, the Australian Court has quite sensibly heldthat the statutory position overrides the common law: See, for example, ***OptusNetworks Pty Ltd v Leighton Contractors Pty Ltd [2002] NSWSC 450 at para 46*** and ***Ann Street Mezzanine Pty Ltd v KPMG [2011] FCA 453 at para 20.*** This is a quite sensible approachto take (and probably the only approach that can logically be taken) as thelanguage of the Australian provision (and ours) appears to broaden the scope ofthe common law rule while limiting its application only to the admission ofevidence and not to discovery and inspection: Jill Anderson et al, The NewEvidence Law: Annotations and Commentary on the Uniform Evidence Acts (2002) atparas 131.05-131.10.

[44] This does not mean thatthe Australian courts have disregarded or that this Court should entirelydisregard English jurisprudence grounded on the common law, but that they havenot and we should not blindly apply the same. Accordingly, I have to be cautious in how and to what extent I use Englishcases such as those cited by Counsel to assist in interpreting *section 110*.

[45] It is clear, however,that whether or not the correspondence is protected by the privilege dependsnot upon whether either or both of the parties have labelled them as such butupon "*the intentions of the parties to beascertained from the nature of the discussions or negotiations between them*":***Quad Consulting Pty Ltd v David R.Bleakley and Associate Pty Ltd (1990) 27 FCR 86 at 89, per Hill J*** citedin ***Gibbins Investment Pty Ltd v SamuelSavage as Executor of the Estate of John Thomas Savage (Deceased) et al [2012]FCA 742 at para 13 per Marshall J***.

[46] *Section110(1)* stipulates that it is evidence of communication made betweenparties to a dispute "*in connection withan attempt to negotiate a settlement of the dispute*" that is excluded fromadmission. In ***GPI Leisure Corporation Ltd (inLiquidation) v Yuill (1997) 42 NSWLR 225 at 226***, Young J consideredwhat was mean by "*in connection*" inthis context. He observed that the word"*connection*" could have a variety ofconnotations and that the Court was required to find the most sensibleinterpretation "*conformable to theintention of the*

*legislature and the purpose of the enactment*". He noted that:

> "The scope of the"without prejudice" privilege under the common law was notconsistently stated by the courts, some expressing it relatively widely andothers narrowly; see ***McNicol,"Law of Privilege"*** (LBCSydney 1992) pp 435 et seq. In ***Fieldv Commissioner for Railways (NSW)*** [1957] HCA 92; (1957) 99 CLR 285,292, the High Court said of the scope of the privilege, "It depends uponwhat formed part of the negotiations for the settlement of the action and whatwas reasonably incidental thereto". There needed to be a "properconnexion with any purpose connected with the settlement of the action" (p293). In ***Trade PracticesCommission v Arnotts Ltd*** [1989] FCA 283; (1989) 88 ALR 69,71-73, Beaumont, J reviewed and contrasted cases where the parties discussed apossible compromise on the one hand (privileged) and where they had discussionsmerely asserting their respective positions (not privileged). An example of thelatter is ***Buckingham CountyCouncil v Moran*** [1990] Ch 623,634-5.
>
> These considerationsincline me to the view that the "connection" referred to in s 131 isa direct connection."

[47] In considering whether the letter in ***Yuill*** was an attempt tonegotiate a settlement, Young J also asked himself what was meant by an attemptto negotiate a settlement and concluded that:

> "Again, I think really it is a question of nexus. There maybe many communications between parties, which one can read between the lines assaying that certain things may happen, and if those certain things happen, thedispute might be settled. I do not consider that generally such a communicationwould fall within the privilege in s 131(1)(a)."

[48] In ***Barrett Property Group Pty Limited v Dennis Family Homes Pty Ltd (No.2) [2001] FCA 276*** Bromberg J of the Federal Court of Australia alsoconsidered what was meant by the phrase "*negotiate a settlement*" in *section 131(1)* of the *Uniform Evidence Act* and concluded that:

> "Section 131(1) speaks of an attempt tonegotiate a settlement. It does not require an attempt to negotiate acompromise in which some middle ground is found. The applicants emphasise theword "negotiate", as though it necessarily connotes a willingness by everyparty to the dispute to compromise. In the context of the phrase "in connectionwith an attempt to negotiate the settlement of the dispute", the word"negotiate" simply means to arrange for or bring about a settlement: see *MacquarieDictionary* (5th ed, 2009).
>
> 35. That construction isconsistent with a number of authorities. In *Bhagat v Global Custodians Ltd* [2002] NSWCA 160, Spigelman CJ (with whom the other members of thecourt agreed) observed at [29], that a demand for surrender may constitute anattempt to negotiate a settlement. I n *KoreanAirlines Co. Ltd v Australian Competition and Consumer Commission (No.3)* [2008] FCA 701, Jacobson J at [73], relying upon the effect of theauthorities at common law, emphasized that it is not necessary that an offer tonegotiate include an offer capable of acceptance. In *South Shropshire District Council v*A*mos* [1987] 1 All ER 340, the English Court of Appeal held that thecommon law privilege was not limited to documents which are offers. Nor was it necessary for there to be aspecific proposal for compromise for the protection of the without prejudicerule to be attracted. As Hasluck J saidin *Chandler v Water Corporation* [2004] WASC 95 at [56]:
>
>> It is true that the Veersma letter does notcontain a specific proposal for compromise. However, the letter containsassertions bearing upon the strength of the plaintiffs' case and is clearlydirected to the plaintiffs' wish to settle along the lines adopted insettlement discussions with other plaintiffs. This gives a degree ofspecificity to the letter which is sufficient to attract the protection of thewithout prejudice rule."

[49] Young J in ***Yuill*** ultimately concluded that aletter that was marked 'without prejudice' but which indicated that the writerwas "*open to suggestions*" iflitigation could be conducted in a practical manner and, alternatively, that amechanism could be put in place to deal with any future claims that may arisebut did not actually suggest how the present underlying dispute could besettled was not sufficiently connected to an attempt to negotiate a settlementfor the privilege to apply.

[50] The Court reached the opposite conclusion in ***Barrett*** and extended theprotection of the section to a 'without privilege' letter where that letter notonly asserted the rights of the plaintiff but (i) also indicated itswillingness to negotiate; (ii) was followed with a letter that invited theother side to a meeting; and (iii) the meeting in question did actually occur.

[51] ***Yuill*** wasapplied by Austin J in ***Collins Thomson Pty Ltd (in liquidation) vClayton [2002] NSWC 366***, where the Court admitted into evidence aletter that it found had provided an analysis of the various proceedingspending between the parties and given a prediction as to their likelyoutcome. While the letter had been inresponse to offers to settle, it had rejected the offers in question and hadnot proposed any way in which the dispute could be settled. The Court therefore held that thecorrespondence was not connected with an attempt to negotiate a settlement andwas thus not protected by *section 131*.

[52] Similarly, where the email in ***Gibbins Investment (supra)*** hadrevealed a "*take it or leave it*"approach, the Court found that it was not protected by *section 131* of the Act.

**DISCUSSION**

[53] At the date of the writing of the impugned letters there existed adispute between the parties in which respect of which relief can be given andis likely to be sought through legal proceedings. Of that fact there is no dispute.

[54] It is also clear, both from Australian and English jurisprudence,that marking a document with the clause "*withoutprejudice*" does not in itself make the letter privileged. As Ormrod LJ pointed out letters "*get headed 'without prejudice' in the mostabsurd circumstances*": ***Tomlin (supra) at 205***. Indeed, I am aware that it is often thepractice of counsel, whether they represent insurance companies or claimants,to head any letters sent in such a manner, seemingly out of an abundance ofcaution. However, it is important toremember that doing so will not in itself make the correspondenceprivileged. Attaching the clause doesnot operate to shield those documents from being adduced in litigation. While the Court may take note of anydesignation placed upon letters that are sought to be admitted into

evidence,it must examine the entire content and context of the letter to determinewhether it is privileged from admission in a particular case.

[55] The overarching context in which both the first and second letterswere written was apparent from the Statement of Claim and the affidavit filedin this matter, although the immediate context of the first letter was lessclear and it would have perhaps been useful to the Court to have had sight ofthe letter from Mrs. Angela Mitchell-Gittens to which the first letter had beenwritten in response.

[56] A close scrutiny of the contents of the first letter reveals thatit was not being used by the Defendants to propose any terms of settlement tothe Claimant. Rather, the Court findsthat in response to the Claimant's request for interim payment it merelyadvised the Claimant that the insurers were willing *"to provide interim payments to any reasonable medical procedures whichrelate to the accident under consideration*" once relevant supportingdocumentation had been provided.

[57] From the contents and context of that letter I would reasonablyassume that the insurers had, perhaps without legal advice, accepted liabilityfor the accident. The insurers did not in the first letter assert, as is oftenthe practice, that liability was denied. Further, the company did not express any indication that it wasinvestigating the circumstances of the accident subsequent to which a positionwould be taken on liability. All ofthese would have been advised by their competent senior counsel if they hadfirst sought legal advice. Instead, thefirst letter simply expressed the insurer's willingness to pay for theClaimant's medical expenses in a situation where given the undisputed facts ofthe accident, liability *prima facie*falls upon its client.

[58] It is clear that paying for the medical expenses could well beseen as a means of facilitating settlement between the parties as it wouldexpedite access to the medical evidence needed to prove any claim. It is similarly clear, however, that simplybecause the payment of medical expenses before the submission of a claim mayfacilitate settlement does not mean that the first letter by which the insurersagreed to take on any reasonable medical expenses was in fact a communicationsent in connection with a genuine attempt to negotiate the settlement of adispute.

[59] As the first letter does not indicate the Defendants' position onliability nor make any proposals as to how the matter may be settled, the Courtis unable to find that the first letter was directly part of the negotiationprocess and was therefore written in direct connection with a genuine attemptto settle the dispute between the parties. There was insufficient nexus between the acceptance of the offer to payinterim medical expenses and any attempts to obtain settlement of thedispute. The Court accordingly findsthat no privilege can attach to the letter under *section 110* of the *EvidenceAct*.

[60] In any event, given the rationale and reasoning underlying thepurpose behind the inadmissibility of "without prejudice" documentation, it isclear to the Court that the justice of the case requires that thiscorrespondence not be excluded on the sole ground of it being marked "withoutprejudice".

[61] Like the first letter, the second letter from Mrs.Woodstock-Riley, QC to the Claimant's attorney-at-law does not offer anyproposals as to how settlement of the dispute could be reached. Unlike the first letter, it does, however,express the Defendant's willingness to have the matter resolved as soon aspossible. The second letter is writtenin response to the Plaintiff's written request of October 1, 2012 for interimpayment and contains the Third Defendant's promise to pay for the cost of themedical report only, despite the fact that the Plaintiff would have informedthe Third Defendant that the medical report in question could only be obtainedfrom Dr. Maynard if all other outstanding expenses were first paid.

[62] In these circumstances, I am also reluctant to find that thesecond letter was written in direct connection with a genuine attempt to settlethe dispute between the parties but find that given the admissibility of thefirst letter and the other evidence presented, it is unnecessary for me to makeany finding on this point.

**CONCLUSION**

[63] Given the foregoing, I hold that the without prejudice letterexhibited to the Affidavit of the Claimant dated May 22, 2013 as Exhibit "JCM1" is admissible as evidence at this stage of the proceedings and may thereforebe relied upon by the Claimant to support her application for interim paymentfrom the Defendants.

[64] I should point out that even if the letter were to be foundinadmissible, the fact of the payment remains in evidence and would still behighly supportive of the Claimant's application for the interim payment.

[65] Accordingly, the Defendants' application to have the lettersstruck out is hereby dismissed. Arguments remain to be heard on the substantiveapplication and objection to the interim payment itself. The discretion of counsel will dictatewhether they still wish to pursue this course. Costs will be reserved until the conclusion of that application.

**JACQUELINEA.R. CORNELIUS**

Judge of the High Court