Ambiguity defrosted? Court of Appeal clarifies ‘unambiguous impropriety’ exception to without prejudice privilege in freezing injunction context (Motorola v Hytera and Shortway)

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Dispute Resolution analysis: Parties cannot abuse without prejudice privilege (WPP) to conceal their own ‘unambiguous impropriety’. Lord Justice Males held this exception to WPP had been misapplied at first instance. The proper test is narrow, being met only where rigorously scrutinised evidence shows nothing less than impropriety which is truly unambiguous. The ‘good arguable case’ standard has no place in that inquiry. Consequently, the critical evidence upon which the judge had granted a freezing order was inadmissible. The Chabra jurisdiction therefore could not apply as against Hytera’s subsidiary. The case is a timely reminder that WPP does not afford absolute protection. Legal advisers must be conscious of its limits and the consequences of exceeding the same. However, Males LJ’s strict confinement of the exception is staunchly pro-settlement. It offers encouragement for parties to negotiate in good faith, with confidence in the protective veil of privilege. Written by Rob Hammond, barrister, at Hardwicke.

Motorola Solutions, Inc and another company v Hytera Communications Corp Ltd and another company [2021] EWCA Civ 11

What are the practical implications of this case?

The court has ‘set its face against any erosion of the [WPP] rule’, at para [62]. The policy interests in narrowing the exception and allowing parties to speak openly in pursuit of settlement are obvious. Indeed, Males LJ was at pains to prevent parties who agree to negotiate from ending up in a worse position, if the exception is invoked, than if they had refused to negotiate at all. Advisers may now encourage their clients to negotiate with even greater confidence.

The judgment provides useful guidance for parties both seeking to invoke and resist the exception.

- it is now clear that unscripted, oral remarks made by advisers or clients in WPP negotiations are unlikely to support a successful application of the exception, at paras [45], [57]. Absent transcribed recordings of what was said (in English) it will be an unusual case in which oral comments can establish sufficiently ‘unambiguous’ impropriety. Where representations are made in writing, judicial findings of unambiguity will be more easily reached
- *Dora v Simper* (15 March 1999, unreported) is (if not expressly overruled) no longer persuasive authority. If it was ever really arguable, an applicant’s evidence can no longer be taken at face value in assessing the unambiguity of any alleged impropriety. Denials that any such comments were made can no longer be disregarded
- Males LJ also appears to endorse the view that impropriety in the form of perjury (arising from inconsistencies between WPP statements and pleadings) is ‘simply not the sort of case[…]falling within the exception’ to WPP, at para [45]

What was the background?

In the US, Motorola claimed against Hytera for theft and dishonest use of trade secrets, winning damages of $US 345m. In support of the US proceedings Motorola applied, under section 25 of the Civil Jurisdiction and Judgments Act 1982, for on-notice domestic freezing orders (inter alia) against Hytera and its UK subsidiary Shortway, under the *Chabra* jurisdiction (see *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231).

To evidence a risk of dissipation, Motorola relied on its in-house lawyers, who recalled that during a WPP settlement meeting, Hytera’s former CFO had stated that if Hytera lost, it would frustrate enforcement by concentrating assets in China and similar jurisdictions. Such steps had been phrased as Hytera’s ‘retreat to China’. Motorola argued this was sufficient evidence of dissipation and

constituted such unambiguous impropriety that Hytera had lost WPP over the statements. Whilst accepting the use of the phrase, Hytera denied it indicated an intention to frustrate enforcement. It merely reflected commercial reality: Hytera would now need to retreat to its core markets. Hytera therefore argued that the unambiguous impropriety exception did not arise, and the evidence remained inadmissible. Hytera further argued the phrase was insufficient to evidence dissipation.

Considering himself bound by *Dora v Simper*, Mr Justice Jacobs granted the applications. While citing other evidence of possible dissipation, he deemed the CFO's statements both admissible (on the basis of Motorola's 'good arguable case' that they were unambiguously improper) and 'critical' to his decision. Hytera and Shortway appealed on overlapping grounds—(i) the statements did not trigger the exception and remained inadmissible; and, (ii) Jacobs J had applied the wrong test for the exception.

What did the court decide?

Males LJ affirmed WPP must be 'scrupulously and jealously protected'—there must be no ambiguity in the words alleged to amount to impropriety; and evidence of impropriety must be rigorously scrutinised, at para [31]. Although threats to dissipate assets may amount to impropriety, disputes over what had been said contribute to ambiguity. Unambiguity should be found only cautiously, even where an applicant's evidence of impropriety is unchallenged. '[T]he need for caution is all the greater where it' is challenged (at para [51]). *Dora v Simper* was 'wrong in principle', at para [57], of 'doubtful cogency' and left no mark in subsequent authorities.

Males LJ emphasised that the exception applies only in the '*clearest of cases'* of abuse of WPP, at paras [41], [61]. Any wider application would encourage 'highly undesirable satellite litigation' to the detriment of the 'important public policy which [WPP] exists to promote', at para [47]. Further, more than mere inconsistency between oral WPP statements and pleadings is necessary—*Savings & Investment Bank Ltd v Fincken*, at para [57] ([2003] EWCA Civ 1630).

The 'good arguable case' test was therefore wrong in principle and on the authorities, at paras [60], [65]. Given both Jacobs J's finding of 'scope for misunderstanding what was said at the meeting' and Hytera's opposing evidence, the alleged impropriety remained ambiguous, at paras [66], [70], [71], [73], [75]. At first instance, Jacobs J had concluded that absent the now inadmissible evidence, the correct *Lakatamia Shipping* [2019] EWCA Civ 2203 test for freezing injunctions was unmet, at paras [78]–[79]. It was not for an Appeal Court to disturb that conclusion. No injunction could be granted and the *Chabra* jurisdiction could not be invoked against Shortway, at para [80].

Case details

- Court: Court of Appeal
- Judges: LJ Males, Lady Justice Rose and Lord Justice Lewison
- Date: 11 January 2021

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