IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PROPRIETARY LIMITED "A.C.N. NO. 004 209 410", a company duly incorporated under the laws of Australia, having its registered office at 501 Swanston Road, Melbourne, Victoria 3,000.00, Australia

Plaintiff

A N D: POLYNESIAN AIRLINES (HOLDINGS) LIMITED, a duly incorporated company having its registered office at Apia

Defendant

Counsel: R. Drake for applicant
L.S. Kamu for respondent

Hearing: 14th July 1994

Judgment: 22nd July 1994

JUDGMENT OF SAPOLU, CJ

The applicant in this case had filed a claim against the respondent. The claim includes claims for possession of a twin otter aircraft used by the respondent, rent for the use of that aircraft, costs and various heads of interest. The respondent has decided to defend the applicant's claim and has filed a statement of defence. The present motion has been filed by the applicant seeking orders to strike out paragraphs 26 to 39 of the statement of defence and for the defendant to furnish further and better particulars in respect of paragraphs 23 and 24 of the statement of defence.

There is no express provision in the Supreme Court (Civil Procedure) Rules 1980 or the Judicature Ordinance 1961 which applies to the present motion. However, I am of the clear view that rule 206 of the aforesaid Rules gives the Court jurisdiction to entertain the present motion. Rule 206 provides :

> "If any case arises for which no form of procedure has been
> "provided by the Judicature Ordinance 1961 or these rules,
> "the Court shall dispose of the case in such manner as the
> "Court deems best calculated to promote the ends of justice".

I will now proceed to deal with the present motion pursuant to rule 206.

In essence the applicant says that in relation to the first part of its motion, the matters pleaded in paragraphs 26 to 39 of the statement of defence are irrelevant and were also the subject of without prejudice discussions and negotiations between the applicant and the respondent. It further says that many of the matters contained in paragraphs 26 to 39 of the statement of defence had been the subject of a previous decision by this Court when the respondent sought to strike out the applicant's statement of claim; therefore those matters must now be res judicata.

Dealing first with paragraphs 26 and 27 of the statement of defence, what those paragraphs allege is that the plaintiff is indebted to the defendant in the sum of $14 million tala pursuant to certain management agreements between the applicant and the respondent and that the applicant is aware of the particulars of that amount. Counsel for the respondent submits that what is contained in paragraphs 26 and 27 is a set off by the respondent. While the respondent may plead a set off by way of a defence,

under rule 108 of the Supreme Court (Civil Procedure) Rules 1980, to the applicant's claim, there are certain matters to be said about the present set off by way of a defence. A set off must be specially pleaded with sufficient particulars to inform not only the other party as to the nature or basis of the set off but also the Court. In this case paragraphs 26 and 27 appear to be somewhat vague to the Court and they do not contain sufficient particulars to show the nature or basis of the set off. The respondent is ordered to furnish further and better particulars of its set off defence in paragraphs 26 and 27 not later than 8 August 1994. I will not strike out those two paragraphs. The other matter concerning paragraphs 26 and 27 which sould perhaps be dealt with now is this. The amount of $14 million tala claimed in the set off appears to me to exceed the total amount claimed by the applicant in its statement of claim. So if the respondent succeeds in its set off defence what will happen is that the claim by the applicant will be extinguished leaving hanging in the air the balance of the amount by which the set off exceeds the total amount in the statement of claim. It will be appropriate that all matters relating to this case be dealt with once and for all. If the respondent files a counterclaim to cover any sum of money by which its set off exceeds the total amount of the claim, that will avoid any further and unnecessary proceedings to recover any balance on the set off if that defence succeeds at the substantive hearing.

Turning now to paragraph 28 of the statement of defence, the matters pleaded therein had already been decided on by this Court when delivering its decision on 17 February 1994 on the respondent's motion to strike out the applicant's statement of claim. Paragraph 28 of the statement of defence is therefore struck out.

The remaining paragraphs 29 to 39 of the statement of defence (like paragraph 28 which has been struck out) all appear to relate to the defence of estopple advanced by the respondent. The relevance, if any, of paragraphs 29 to 35 to the defence of estopple mentioned in paragraph 39 is obscure. I will not strike out now paragraphs 29 to 35 and 39 but order the respondent to file further and better particulars in relation to those paragraphs to show their relevance, if any, to the defence of estopple, not later than 8 August 1994. Both counsel may also make submissions as to the propriety of raising in these proceedings the matters contained in paragraphs 29 to 33 in relation to the six management and operational agreements in view of the clause contained in paragraphs 34 that disputes arising in connection with those six agreements are to be determined under the Rules of Conciliation and Arbitration of the International Chamber of Commerce according to an agreed formula.

That brings me to paragraphs 36 to 38 of the statement of defence. Those paragraphs refer to settlement negotiations between the applicant and the respondent as well as correspondence leading up to those negotiations and discussions during those negotiations. Counsel for the applicant has argued that those paragraphs in the statement of defence relate to matters which were the subject of without prejudice settlement negotiations between the parties and must therefore be struck out.

It is clear law that statements made in correspondence or during discussions and negotiations between parties for the purpose of settling differences between them are not admissible in evidence without the consent of the parties. This is because of the without prejudice rule which is a rule of evidence. The underlying policy for this without prejudice rule is

the public interest in encouraging parties to settle their own differences and thereby keeping litigation to a minimum. It appears that the application of this rule is not to be finally determined by the use or omission of the phrase without prejudice. As long as it is clear from the intention of the parties and the surrounding circumstances that statements made, were made for the purpose of achieving a settlement of the parties differences, then those statements are covered by the without prejudice rule and are not admissible in evidence without the joint consent of the parties. The reason here is that the privilege is the joint privilege of the parties.

The rationale and scope of this rule of evidence has been authoritatively stated by the House of Lords in Rush and Tompkins Ltd v Greater London Council [1988] 3 All E.R 737, 739. Lord Griffiths in delivering a judgment with which the other Law Lords agreed said :

> "The 'without prejudice rule' is a rule governing the "admissibility of evidence and is founded on the public "policy of encouraging litigants to settle their diffe- "rences rather than litigate them to a finish. It is "nowhere more clearly expressed than in the judgment "of Oliver LJ in Cutts v Head [1984] 1 All E.R 597 at "605-606, [1984] Ch 290 at 306 :
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> "That the rule rests, at least in part, on 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 dis- "'couraged 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 RPC 151 at 157, be encouraged "'freely 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'".

Lord Griffiths then goes on to say at p.740 :

> "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 event "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 on 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 can- "not 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 settlement and the public interest "in full discovery between the parties".

Lord Griffiths continues on to refer to certain limitations to the application of the without prejudice rule by saying :

> "Nearly all cases in which the scope of the without prejudice "rule has been considered concern the admissibility of "evidence at trial after negotiations have failed. In such "circumstances no question of discovery arises because the "parties are well aware of what passed between them in the "negotiations. These cases show that the rule is not absolute "and resort may be had to the without prejudice material for a "variety of reasons when the justice of the case requires it. "It is unnecessary to make any deep examination of these "authorities to resolve the present appeal but they all illus- "trate the underlying purpose of the rule which is to protect "a litigant from being embarrassed by any admission made purely "in an attempt to achieve a settlement. Thus the without "prejudice material will be admissible if the issue is whether "or not the negotiations resulted in an agreed settlement, "which is the point Lindley LJ was making in **Walker v Wilsher** "(1889) 23 QBD 335 at 337 and which was applied in **Tomlin v** "**Standard Telephones and Cables Ltd (1969) 3 All E.R 201,** "[1969] 1 WLR 1378. The court will not permit the phrase to "be used to exclude an act of bankruptcy (see **Re Dointrey,** "**exparte Halt [1893] 2 QB 116, [1891-4] All E.R Rep.209**), or to

"suppress a threat if an offer is not accepted (see Kitcat v "Shoop (1882) 48 L.T 64). In certain circumstances the "without prejudice correspondence may be looked at to deter- "mine a question of costs after judgment has been given : "see Cutts v Head [1984] 1 All E.R 597, [1984] Ch 290. There "is also authority for the proposition that the admission of "an 'independent fact' in no way connected with the merits of "the case is admissible even if made in the course of negotia- "tions for a settlement. Thus an admission that a document "was in the handwriting of one of the parties was received in "evidence in Waldridge v Kennison (1794) 1 Esp 143, 170 E.R 306. "I regard this as an exceptional case and it 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 estab- "lishing a basis of compromise, admitting certain facts. If the "compromise fails the admission of the facts for the purpose of "the compromise should not be held against the maker of the "admission and should therefore not be received in evidence".

Lord Griffiths then refers to the question whether statements made by parties to a settlement negotiation can be admitted in evidence by a third p. in separate proceedings in connection with the same subject matter against e of the parties to the settlement proceedings. In this regard his Lordship says :

"I cannot accept the view of the Court of Appeal that Walker v "Wilsher is authority for the proposition that if the negotia- "tions succeed and a settlement is concluded the privilege "goes, having served its purpose.... There are may situations "when parties engaged on some great enterprise such as a large "building construction project must anticipate the risk of "being involved in disputes with others engaged on the same "project. Suppose the main contractor in an attempt to settle "a dispute with one sub-contractor made certain admissions, "it is clear law that those admissions cannot be used against "him if there is no settlement. The reason they are not to be "used is because it would discourage settlement if he believed "that the admissions might be held against him. But it would "surely be equally discouraging if the main contractor knew "that if he achieved a settlement those admissions could then "be used against him by any other sub-contractor with whom he "might also be in dispute. The main contractor might well be "prepared to make certain concessions to settle some modest "claim which he would never make in the face of another for "larger claim. It seems to me that if those admissions made

"to achieve settlement of a piece of minor litigation could "be held against him in a subsequent major litigation it "would actively discourage settlement of the minor litiga- "tion and run counter to the whole underlying purpose of "the without prejudice rule. I would therefore hold that "as a general rule the without prejudice rule renders "inadmissible in any subsequent litigation connected with "the same subject matter proof of any admission made in a "genuine attempt to reach a settlement. It of course goes "without saying that admissions made to reach settlement "with a different party within the same litigation are also "inadmissible whether or not settlement was reached with "that party".

I have quoted at length from Lord Griffiths judgment for two reasons. The first is the practical importance of the without prejudice rule to the legal profession. Every litigation involves some kind of dispute of varying magnitude depending on the nature of the case at hand. It is quite common that some attempt is made by the parties before a case comes to Court to settle the case out of Court. The relevance of the without prejudice rule to such an attempt at settlement is therefore of undoubted practical importance. The second reason is that Lord Griffiths judgment is the most comprehensive and authoritive statement of the law in this area up to now.

It is clear from paragraphs 36 to 38 of the statement of defence that the matters pleaded therein relate to and were the subject of settlement negotiations held in Sydney, Australia, in November 1993 between the applicant and the respondent. In the affidavit of Murray Drake filed in support of the present motion, it is also quite clear that the meeting held between the applicant and the respondent in Sydney, Australia, in November 1993 was for the purpose of exploring possibilities of a settlement between the parties. That meeting was also, according to Murray Drake, held specifically on a without prejudice basis. In my view, paragraphs 36 to 38

of the statement of defence will serve no useful purpose because to prove the allegations pleaded in those paragraphs will necessarily require the production of evidence which will infringe the without prejudice rule. Paragraphs 36 to 38 of the statement of defence are therefore struck out.

I will adjourn this matter to 8 August 1994 for the parties to comply with the orders made in this judgment and to consider the matters raised for the parties consideration. The question of costs is reserved.

T F M Sapolu

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CHIEF JUSTICE