THE HIGH COURT

[2022] IEHC 498

Record no. 2022/27 COS

IN THE MATTER OF QRD DEVELOPMENT COMPANY NO.3 DESIGNATED ACTIVITY COMPANY

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Ms Justice Eileen Roberts delivered on 12 day of August 2022

Introduction

1. This application comes before the Court by way of motion on behalf of CW O'Brien Architects (the **Petitioner**) seeking an Order pursuant to the inherent jurisdiction of this Court directing that the affidavit of Mr Arthur O' Brien sworn on 6 April 2022 (or in the alternative paragraphs 12-23 and Exhibit AOB10 thereto) in response to the Petition to this Court dated 15 February 2022 to wind up QRD Development Company No. 3 DAC (the **Company**) pursuant to s569(1)(d) of the Companies Act 2014, be struck out and/or removed and/or deleted and /or redacted on the grounds that it (or the relevant provisions) contains substantial material which is the subject of without prejudice privilege and/or that its filing constitutes an abuse of the process of this Court.

2. Counsel for the Petitioner accepted at the hearing that the disputed material is confined to paragraphs 12-23 and Exhibit AOB10 of Mr O Brien's affidavit (the **Relevant Content**). On the basis that this is agreed and that this Court has formed the view that the remaining provisions of Mr O'Brien's affidavit are correctly included as matters relevant to the Petition, this judgment will be confined to a review of the Relevant Content.

Background

3. The Petition dated 15 February 2022 (the **Petition**) follows on from a statutory 21-day demand dated 8 December 2021 delivered to the Company on that date and issued pursuant to Section 570 of the Companies Act 2014.

4. The Petitioner alleges that the Company is indebted to it in the total sum of €299,393.47 arising out of 5 invoices dated between October 2019 and March 2020 for architectural services provided by the Petitioner in respect of a development site at Cookstown Industrial Estate, Dublin 24 (the **Site**).

5. The Company denies that it is indebted to the Petitioner in the amount claimed or at all. In brief terms the debt is said to be disputed on the basis that the services were not rendered at the request of the Company or at all; that the Petitioner's contract was with another party to whom some invoices are addressed and/or that the Company is entitled to set off against the claimed debt its own losses sustained as a result of the Petitioner's negligence regarding a Declaration of Identity furnished in respect of the Site. These matters are briefly referenced by way of background but it forms no part of this Court's function on this motion to determine the validity or otherwise of the Company's claimed defences.

6. The parties engaged unsuccessfully with each other for some time regarding payment of the debt claimed by the Petitioner. On 5 May 2021, the Petitioner issued a Section 570 Notice to the Company – this is not the same Section 570 Notice as the Notice dated 8 December 2021 on which the Petition is based, although the debt claimed in each Notice is the same.

7. Following service of the Section 570 Notice on the 5 May 2021 the parties began to engage more meaningfully with each other. At that time the Company was in the course of negotiating the sale of the Site to a third party purchaser. Mr Curtis on behalf of the

Company averred on affidavit that the threat of winding up proceedings at that time was a very serious matter for the Company and had the potential to disrupt or even derail the sale of the Site. He avers (at paragraph 9 of his affidavit sworn 22 April 2022) that "*for this reason, initial without prejudice discussions took place by way of telephone calls between me and Arthur O'Brien, wherein a proposal was discussed whereby the dispute could be resolved by way of the payment of an agreed amount from the proceeds of sale of the Site*."

8. Mr Curtis acknowledges that further without prejudice discussions took place between the respective solicitors for the parties on 26 May 2021. The outcome of those discussions was a proposal that in return for the Petitioner not proceeding with a winding up petition, an undertaking would be provided by the Company's solicitors to pay an agreed sum to the Petitioner from the proceeds of the sale of the Site in full and final settlement of the Petitioner's claim. All parties agree that the 26 May discussions were without prejudice.

9. By way of email on Thursday 27 May 2021 at 16.01, the Petitioners solicitors wrote to the Company's solicitors in the following terms which email was headed "Without Prejudice":

> "*Please see attached draft form of undertaking wording for your consideration. I trust this will assist in narrowing and concluding our discussion, following on from yesterday's call*."

There is no disagreement that this was correctly a without prejudice communication being correspondence exchanged for the purposes of trying to resolve a dispute.

10. Shortly following receipt of this email, the Company's solicitors responded at 17.02 on the 27 May 2021 by email which was not headed without prejudice saying:

> "*See attached clean and compare draft undertaking. Just to be clear we will only be providing this undertaking once unconditional binding contract is in place and we have clarity on the various pay aways. In this regard our primary concern will be the funder redemption.*

Can we get confirmation that you are not proceeding with the petition please?"

11. That email attached a revised version of the draft undertaking which had been furnished by the Petitioner's solicitors earlier that day. The changes to the previous draft were redlined and a clean new version was also attached. The revised version remained headed "Draft undertaking" and it remained intended to be given on "[DWF Letterhead]" but the Company's solicitors also added a new execution block intending the undertaking to be signed by a "*Partner*" of that firm "*For and on behalf of DWF (Ireland) LLP*". The new version included the following additional wording inserted by the Company's solicitors; "*We understand that a settlement has been reached between CW O'Brien Architects Limited ("**CW**") and QRD whereby CW have agreed to accept €200,000 (inclusive of Vat) in full and final settlement of all and any monies due and owing to CW (the **Settlement Amount")***." Other changes proposed by the Company's solicitors envisaged that the undertaking to pay the Settlement Amount would become operative once there was a "*binding unconditional*" contract for sale of the Site which had been "*executed, exchanged and that a non-refundable deposit has been paid to CBRE*." The contract completion date was stated to be *"[12 July 2021] or such later date as provided for in the Contract for Sale ("the **Completion Date***")". Other changes made by the Company's solicitors limited their confirmation of the sufficiency of the Sale Proceeds to "*the best of our knowledge (after payment of the secured creditors)"*. The draft undertaking obligations were expressly made subject to *receipt* by the Company's solicitors of the sale proceeds "*in cleared funds sufficient to pay the Settlement Amount (having first discharged all payments in priority)."* As with the earlier draft version provided by the Petitioner's solicitors, the revised version from the Company's solicitors referred to them having "*received our client's irrevocable instructions and authority*" to give the undertaking. The undertaking, subject to compliance with its terms, obliged the Company's solicitors to pay the Settlement Amount to the

Petitioner's Solicitor's client account within seven days of the Completion Date of the contract for sale. Further, additional wording inserted by the Company's solicitors confirmed that they would not be liable for any delay or failure in receiving or executing any instructions given to them or any error in implementing such instructions. The draft undertaking ended with confirmation (inserted by the Company's solicitors) that "*Immediately and automatically upon the transfer of the Settlement Amount we shall be fully and irrevocably released and discharged from all undertakings and obligations hereunder*".

12. The Petitioner says that this revised proposed undertaking constituted a counter-offer by the Company and that this counter-offer was accepted by the Petitioner the following day (28 May 2021) by open email from its solicitors to the Company's solicitors at 12.24 which stated:

> "*In reliance on and in consideration of your commitment – based on your client's irrevocable instructions – to issue that undertaking (signed) to us immediately upon the sale being in contract, I can confirm on behalf of our client that the petition will not issue or be advertised prior to 14 June*."

13. At that point it appears to this Court that the parties had agreed the wording of the undertaking that would issue by the Company's solicitors when and if a binding unconditional contract was exchanged for the sale of the Site. The Petitioner did not advance its winding up petition at that time and says this was in consideration for and in reliance on the agreement it had reached with the Company.

14. The Company argues that the revised form of undertaking was contingent on and required a separate settlement agreement to be reached and documented between the Company and the Petitioner. The Petitioner disagrees.

15. The contract for the Site ran into some difficulty and delay. The Petitioner's solicitors continued to make regular enquiries about the status of the contract and received responses from the Company's solicitors with updates where they could provide them and, initially at least, assurances that they expected to have the contract signed shortly and that there was *simply the standard due diligence process* ongoing. As matters were still ongoing without confirmation that a binding unconditional contract had been executed, on 3 August 2021, the Petitioner's solicitors emailed the Company's solicitors stating that if they could provide "*something to vouch the position it would assuage my client's concerns at the delays with the contract being executed and the delivery of the agreed undertaking*". The Company's solicitors advised by email on 4 August 2021 that a copy instrument was awaited from the Land Registry "*to answer the last remaining query on title*". These letters were not headed "without prejudice" by either party. They form the bulk of the material exhibited at AOB10 the subject of this motion.

16. On 24 September 2021, a letter was sent by the Petitioner's solicitors to the Company's solicitors. It was headed "*Without Prejudice*". The letter highlighted the ongoing delays with the execution of the contract for sale; the emergence of a *fresh and relatively significant issue* in the form of a deficient land registry folio which did not accurately reflect the existence of a water mains wayleave; the concern that demolition works had commenced on site and that they suspected something was afoot designed to either delay or frustrate "*the agreed payment to our client of €200,000 out of the sales proceeds*".

17. The letter confirmed that the Petitioner's "*patience is now exhausted*". It confirmed that given the lack of progress coupled with the on-site developments "*our client is now minded to draw an end to this without prejudice engagement and instead instruct counsel to prepare the Petition as threatened in our client's Section 570 Notice*." A final period of 7 days was offered to the Company to "*mend its hand*" and provide further information and

vouchers. The letter concluded by confirming that the Petitioner's solicitors had "*peremptory instructions to proceed with the Petition absent a satisfactory response from you*".

18. The Company says that the without prejudice engagement regarding the provision of an undertaking did not proceed further and that the Petitioner's solicitors' letter dated 24 September 2021 clearly confirms that the parties remained in without prejudice discussions at that time. Mr Saarsteiner on behalf of the Petitioner avers (at paragraph 16 of his Affidavit sworn 11 May 2022) that the without prejudice engagement referred to in his letter dated 24 September 2021, was intended to refer to the negotiations which had culminated in the agreement on or about 27 May 2021 and that it was not a reference to the communications between that date and 24 September, all of which he says were clearly and substantively in the nature of open correspondence.

19. No response was received by the Petitioner's solicitors to their letter dated 24 September 2021. In paragraph 9 of Mr Saarsteiner's affidavit on behalf of the Petitioner he states that "*The Company reneged on this agreement and it is no longer being relied upon as a matter of enforcement*."

20. A new Section 570 Notice issued on 8 December 2021 which grounds the Petition in this case.

21. It appears from averments in the affidavit of Chris Curtis sworn 28 March 2022 (paragraph 29) on behalf of the Company that heads of terms were issued and agreed in respect of the sale of the Site on 10 May 2021 but that there was a delay in closing the sale – which did not happen until 22 December 2021. It was not clearly stated by either party when the unconditional binding contracts for the Site were executed and exchanged and the non-refundable deposit paid by the purchaser but it is not disputed by either side that there was no binding unconditional contract for the sale of the Site in place by 24 September 2021

when the Petitioner issued its letter. There is also no evidence before this Court that the binding unconditional contract was exchanged prior to the 8 December 2021 when the new section 570 Notice grounding the Petition was issued by the Petitioner. The Company alleges that it has a cross claim for negligence against the Petitioner relating to the preparation of a Declaration of Identity for the Site which it says caused the delay in completing the sale.

The matters in dispute

22. The Company alleges that all the Relevant Content comprises privileged material which should not be allowed to be used or referred to by the Petitioner in the Petition hearing. In particular, it says the Relevant Content should not be deployed to gain a perceived strategic advantage in these proceedings - in this case for the purposes of arguing that as the Company had previously discussed a compromise of the claimed debt, its defence to the Petition is not credible.

23. The Petitioner argues that an agreement was reached between the parties on or about the 27 May 2021. It says that the Relevant Content only includes open correspondence which post-dates that agreement being reached. It says the Relevant Content is probative and is not subject to privilege. It says that the correspondence in question was entered into openly on behalf of the Petitioner in order to ensure that the parties were bound by the agreement entered into by them and that it is admissible as:

(i) It discloses the existence of an agreement and where an agreement is reached no privilege attaches to same;

(ii) The Company is estopped from denying the existence of the commitment by reason of its failure to provide the written undertaking as agreed in exchange for the Petitioner's forbearance; and

(iii) The justice of the case requires the admissibility of the evidence in question.

The Law applicable to the matters in dispute

24. I propose to consider firstly the general scope of without prejudice privilege and this Court's jurisdiction on this motion to exclude the Relevant Content from Mr O'Brien's affidavit should the Relevant Content be found to be subject to without prejudice protection and not otherwise disclosable by virtue of an exception to the general rule of non-disclosure of without prejudice material. I will then consider on the facts of this case whether the Relevant Content is in fact protected by without prejudice privilege.

Without Prejudice Privilege

25. There is no doubt that the law recognises and protects without prejudice privilege. The "without prejudice" rule is a rule governing the admissibility of evidence but it is not simply a technical rule of evidence. Privilege is a substantive legal right. The without prejudice rule confers a privilege which, unlike legal professional privilege, is a joint privilege and cannot be waived unilaterally by only one party to the negotiations.

26. The following (non-exhaustive) general principles can be derived from the well-known authorities on the point:

1. Material subject to without prejudice privilege (either oral or documentary) is not admissible in evidence and may only be disclosed to the court with the consent of the parties. *Marron v Louth County Council* [1938] 72 ILTR 101.

2. The without prejudice rule is founded partly in public policy and partly in the agreement of the parties. The fundamental rationale for without prejudice privilege is to encourage parties so far as possible to settle their disputes without resort to litigation. The rule is designed to support the policy of encouraging parties to negotiate and to discuss the relative strengths and weaknesses of their cases with candour, secure in the knowledge that any concession made in the without

prejudice discussions cannot be used against them in the course of the proceedings. If litigants could not explore these matters on a without prejudice basis the potential for settlement and compromise would be greatly undermined. *Purcell v Central Bank of Ireland* [2016] IECA 50. *Unilever Plc v Procter & Gamble* [2000] 1 WLR 2436.

3. In order for without prejudice privilege to apply, there must have been a *bona fide* attempt to settle a dispute – the critical feature of proximity for this purpose is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. In that regard, the crucial consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree – per Auld LJ in *Barnetson v AXA Framlington Group Ltd* [2007] EWCA 502.

4. While labels or headings such as "without prejudice" can be of assistance to the Court's analysis, these labels are not determinative – the test is one of substance rather than form. Where negotiations have commenced on a without prejudice basis, the courts will generally find that any subsequent communications were intended to be privileged also unless they find very clear evidence of an intention to change the character of the negotiations to open negotiations. If the status of negotiations is intended to change at any point, the party who changes the basis of such negotiations should spell out the change with clarity. *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 4 All ER 942 .

5. Once it has concluded that a chain of correspondence relates to negotiations directed at a settlement, a court should be reluctant to dissect the correspondence by admitting some sections and not others. Moreover, the protection of without

prejudice privilege is not limited to admissions made in the course of negotiations; the entirety of the negotiations are privileged. - *Unilever Plc v Procter & Gamble* [2000] 1 WLR 2436. *Moorview Developments v First Active Plc* [2009] 2 IR 788.

6. If without prejudice negotiations succeed, the fact of the successful compromise is admissible evidence in any subsequent proceedings between the same parties. The logic is that once the offer is accepted, the reason for non-disclosure ceases and the fact of the compromise is admissible in evidence. *Moorview Developments v First Active Plc* [2009] 2 IR 788. *Quinlivan v Tuohy* (unreported High Court 29 July 1992).

7. The "without prejudice" rule is not absolute, and exceptions exist which confirm that certain without prejudice material may nonetheless be admissible. Evidence relating to any aspect of negotiations necessary to determine whether a concluded agreement was reached is excluded from the scope of without prejudice privilege. Likewise, without prejudice material may be admissible in an action for rectification as part of the factual matrix to aid contractual construction. *Oceanbulk Shipping S.A v TMT Ltd* [2011] 1 AC 662*; Moorview Developments v First Active Plc* [2009] 2 IR 788*; Tomlin v Standard Telephones & Cables Ltd.* [1969] 1 WLR 1378.

8. Evidence of negotiations is also admissible to show that an agreement apparently concluded between the parties should be set aside on the ground of misrepresentation, fraud or undue influence. *Unilever Plc v Proctor & Gamble* [2000] 1 WLR 2436.

9. Evidence of without prejudice negotiations may be given in order to explain delay or apparent acquiescence – for example in an application to strike out proceedings for want of prosecution.

10. Another exception to the non-disclosure of without prejudice material may arise where a clear statement was made by one party to the other in without prejudice negotiations on which the other party is intended to rely or act and does in fact rely on to their detriment (even where no concluded settlement arises). This is an estoppel type exception and was recognised in the case of *Hodgkinson & Corby Ltd v Wards Mobility Services* [1997] FSR 178.

11. One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" – although this exception should be applied only in the clearest cases of abuse of a privileged occasion. *Unilever Plc v Proctor & Gamble* [2000] 1 WLR 2436.

12. Offers made "without prejudice save as to costs" may be considered a further exception to the rule against admissibility of without prejudice negotiations but they arise only where a court, having made its determination, then needs to address whether there are costs implications arising from the refusal of previous without prejudice offers. This exception is based on an express or implied agreement between the parties and its use is well understood by parties engaged in without prejudice discussions. *Rush & Tompkins Ltd v Greater London* Council [1989] A.C. 1280.

Jurisdiction of the Court to exclude without prejudice material in affidavits before it.

27. S.I. No 127/2021 – Rules of the Superior Courts (Affidavits) 2021 came into operation on 31 March 2021. The Rules of the Superior Courts (**RSC**) were amended by the substitution for Order 40 of the Order set out in S.I No 127/2021. This is mentioned here as the references below to Order 40 and rules thereof are not consistent in terms of rule numbers with the previous Order 40 which is discussed and analysed in the caselaw below.

28. Order 40, rule 12 of the Rules of the Superior Courts [now Order 40, rule 16] provides that this Court "*may order to be struck out from an affidavit any matter which is scandalous.*.". In *Goode Concrete v CRH plc* [2011] IEHC 310 Cooke J. noted that for the purposes of Order 40, rule 12 of the RSC "*scandalous*" allegations include allegations not only irrelevant but also "*so gratuitous and vexatious in relation to the subject matter of the cause as to amount to an abuse by a party of the privilege that attaches to evidence given in the course of litigation*."

29. In *Dublin City Council v Marble and Granite Tiles Ltd* [2009] IEHC 455 Laffoy J. struck out two paragraphs in an affidavit sworn in response to an application by the petitioner to wind up the respondent company which she was satisfied "*was deliberately calculated to embarrass and cause offence*".

30. Whether the Court has a jurisdiction to strike out from an affidavit material that is not scandalous but is irrelevant or inadmissible is a more difficult question on which there have been different approaches adopted to date by the Courts. In *Bula Ltd v Tara Mines Ltd* (unreported HC 17 September 1990) 1990 WJSC-HC 1450, Murphy J. noted the provisions of the English Rules allowed the English Courts to strike out material not only on the basis that it was scandalous but also where it was irrelevant or otherwise oppressive. Murphy J. in considering Order 49, rule 12 stated that:

> "*Even allowing, however, that the particular rule itself would not justify the striking out of an affidavit solely on the grounds of irrelevancy I have no doubt but that the ....Court does have an inherent jurisdiction to strike out an affidavit which would constitute an abuse of the process of the Court and in that context the prolixity of a document, the extent to which the material therein contained was irrelevant or inadmissible, the intention of the deponent in filing the affidavit and the consequences for the other party in dealing with the irrelevant matters would*

be material considerations but perhaps the primary and decisive consideration will be the relevance of the document however voluminous and however embarrassing".

31. In *Director of Corporate Enforcement v Bailey* [2008] 2 ILRM 13, Irvine J. ordered the exclusion of certain paragraphs from affidavits that contained references to the findings in a tribunal of inquiry report on the basis that the report was inadmissible in evidence, being hearsay evidence. She accepted that the evidence in question could not be described as scandalous within the meaning of Order 40, rule 12, but she invoked Order 40, rule 4 and Order 19, rule 27 RSC as twin bases for making the orders sought. Irvine J. said that Order 40, rule 4 was intended to ensure compliance with the rules of evidence in affidavits of a non-interlocutory nature and thereby to provide an efficient and fair mechanism for the disposal of the dispute between the parties. Excluding the relevant paragraphs she said :

"*It is clear that evidence supporting any alleged wrongdoing at a hearing which is dealt with on affidavit must be just as admissible as evidence which would be given to a court by a witness at an oral hearing*".

32. The Supreme Court upheld the decision of Irvine J. on appeal ([2011] 3 IR 278), although different views were taken by members of the Supreme Court on the question of whether inadmissible material should be struck out of affidavits at a preliminary stage. Fennelly J. commented obiter than Order 40, rule 12 was confined to scandalous material; Order 19, rule 27 could not apply because it dealt with the striking out of material from pleadings and an affidavit was not a pleading. He went on to say that it did not inexorably follow from the fact that a party could only rely on admissible evidence at hearing that the court has power by way of preliminary application to excise parts of an affidavit. These views were not shared by Hardiman J. who pointed out that parts of the affidavits contained "clearly and manifestly inadmissible evidence". He went on to say that:

> "*I would be extremely sorry to think that a person against whom this inadmissible evidence was sought to be deployed could do nothing about it until the trial of the action. If this were so, I believe it would confer a wholly unmerited tactical advantage on the party deploying evidence which he knows to be inadmissible. Firstly, the evidence would be on the record of the Court publicly available. Secondly, the person against whom it was deployed would have no certainty until the trial as to how the issues of its admissibility would be resolved. From this it follows that he would have to make his tactical and evidential preparations for the trial on the basis that the evidence to which he objected might nonetheless be admitted. This in turn might easily (and in the present case in my view would probably) involve him in answering material not properly deployed against him and perhaps in committing himself on matters which do not properly arise at all. It would add to the length and therefore to the expense of the hearing*".

Hardiman J. went on to say:

> "*I consider it would be a considerable injustice to the respondents in the underlying action if there were no machinery for the excision of material which is clearly hearsay or otherwise clearly inadmissible, and I find sufficient warrant for the relief that this Court can entertain such an application in Order 40, rule 4."*

33. Order 40, rule 4, as it then was, is now mirrored in Order 40, rule 8 following the introduction of S.I 127/2021.

34. A different approach was adopted by Cooke J. in *Goode Concrete v CRH plc* [2011] IEHC 310 in relation to a request to strike out material from affidavits in a motion for security for costs where that material contained allegations of anti-competitive conduct that went beyond the period of the case pleaded in the statement of claim. Cooke J. was satisfied that

the material was irrelevant and inadmissible on the motion but did not believe it to be scandalous. Accordingly, he declined to strike out the affidavits but ruled instead that the court would disregard them when hearing the motion for security for costs so that there was no need for the defendants to reply to them.

35. As noted in *Delaney and McGrath on Civil Procedure in the Superior Courts* 4th edition, at p 808 paragraph 21-98, the law in this area is not settled. However, the authors submit that "*the approach adopted by Irvine and Hardiman JJ in Bailey is to be preferred*". The authors proffer the view that "*Like the jurisdiction to strike out pleadings or proceedings, the exercise of this jurisdiction should be confined to clear cases where there is a risk of injustice but a court should be willing to take this step in an appropriate case, particularly where the inclusion of the material in the affidavit creates a risk of injustice*".

36. While a Court might rightly wish to be cautious in striking out material from affidavits at an early stage of proceedings purely on the grounds of it being alleged to be irrelevant, I am persuaded that this Court can, pursuant to its inherent jurisdiction, strike out from affidavits material which remains subject to without prejudice privilege and which is not otherwise exempted from the general rule of non-disclosure. As noted by Clarke J. in *Moorview Developments Ltd v First Active plc* [2009] 2 IR 788 *"the overriding principle is that a very heavy weight indeed needs to be attached to without prejudice privilege".* In my view it is better that issues of this nature be dealt with prior to the trial if possible. This avoids the need for parties to address these issues in replying affidavits or at the trial – with all the increased expense, complexity and risk that may arise in having such matters unresolved until trial. Without prejudice privilege is not merely a technical rule of evidence but rather a substantive right of the parties. The law presumes that there is no right without a remedy. I agree with the view expressed by Murphy J. in *Bula Ltd v Tara Mines Ltd (unreported HC 17 September 1990)* that this Court has an inherent jurisdiction to control

its own process which I am satisfied includes the jurisdiction to strike out or otherwise redact material from affidavits at preliminary stage on the ground that the matters dealt with therein are the subject of without prejudice privilege. The Court in exercising this jurisdiction should be satisfied that the striking out of without prejudice material in the affidavit does not create a risk of injustice.

37. Being satisfied that this Court can exclude without prejudice material from affidavits, I now move to consider if in the circumstances of the present dispute the Relevant Content is in fact subject to without prejudice privilege and, if so, what Order this court should make in relation to it.

Analysis of the without prejudice nature of the Relevant Content

38. The Petitioner argues that the Relevant Content only includes open correspondence which post-dates the agreement it says was reached between the parties on 27 May 2021. As of that date the Petitioner says all negotiations had concluded and all that remained was execution and exchange of the sale contract – a matter in respect of which the Petitioner had no role – and the remittance thereafter of an agreed- upon figure to the Petitioner in satisfaction of its debt.

39. The Company says that no agreement was reached between the parties such as would bring to an end the without prejudice protection of the Relevant Content. It also relies on the fact that the Petitioner itself referred to the ongoing "without prejudice negotiations" in its letter dated 24 September 2021 (long after the Petitioner claims an agreement was reached) and that the Petitioner is not now suing on the agreement it claims was put in place.

40. It is clear to this Court that the discussions between the parties prior to 28 May 2021 were correctly treated by the parties as subject to without prejudice privilege and there is in fact no dispute between the parties on that (although the Petitioner refers to the 27 May 2021). The issue is whether the parties in fact secured a settlement of their dispute on the 28 May

2021. If they did, then the Relevant Content which post-dates that time would not be subject to without prejudice privilege.

41. It is worth noting at this point two matters of some importance.

Firstly, the alleged settlement was one which referenced a solicitor's undertaking.

Secondly, there are, in the view of this Court, inconsistencies in the actions of both parties.

42. I will consider first the significance that the communications in this case involved the agreement to provide a solicitors undertaking.

43. The Guide to Professional Conduct of Solicitors in Ireland (3rd Ed), October 2013, gives a comprehensive definition of a solicitors undertaking in the following terms:-

> "*An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it which is made by a solicitor in the course of his practice, either personally or by a member of the solicitor's staff, whereby the solicitor, or in the case of a member of his staff, his employer, becomes personally bound* ."

44. As was noted by Murphy J. in *Daniel Coleman v Finn O 'Neill and others* [2012] IEHC 112*,* the elements of the definition are clear: any unequivocal declaration of intention; made by a solicitor in the course of his practice; either personally or by a member of the solicitor's staff; whereby the solicitor becomes personally bound.

45. The Guide to Professional Conduct specifically provides at paragraph 6.5, inter alia, that:-

- A solicitor will be required to honour the terms of a professional undertaking as a matter of conduct;
- An ambiguous undertaking is generally construed in favour of the recipient;
- An undertaking does not have to constitute a legal contract to be enforceable in conduct;

- A solicitor who gives an undertaking which is expressed to be dependent upon the happening of a future event should notify the recipient immediately if it becomes clear that the event will not occur.

46. A Law Society practice note dated 2 July 2010 confirms that undertakings are binding even if they do not include the word "undertake". Consideration is not required for an undertaking. This practice note also confirms that the recipient of an undertaking is entitled to make reasonable enquiries as to the discharge of the undertaking.

47. In *I.P.L.G Ltd.. v. Fry Solicitors* (Unreported, High Court, 19 March, 1992), per Lardner J. the nature of the solicitors undertaking was described at p. 25 of the transcript as follows:-

> "*The solicitors undertaking is commonly understood as being one which can be safely relied upon. He is an officer of the court and it is long established that where a solicitor gives an undertaking, the court will compel him to carry it out, unless there is good reason for his not doing so. This jurisdiction is based on the court's right to require its officers to observe a high standard of conduct. It is exercised where a solicitor acting professionally for a client and in that character gives his personal undertaking whether to the client or to a third party or to the court in the course of proceedings*."

48. I do not suggest that there was any failure by the Company's solicitors to comply with an undertaking they gave – nor is that an issue before the Court. Although the Petitioner alleges that the Company "*reneged on this agreement*" as is alleged at paragraph 9 of Mr Saarsteiner's affidavit sworn 11 May 2022, no particulars at all to support such an averment were provided on affidavit nor were any particulars provided to support the contention at paragraph 18 of that same affidavit that the Company "*had actively decided to terminate the settlement*". Counsel for the Company disputed the accuracy of such averments at the hearing. No evidence was adduced to show that the preconditions required to be satisfied

in order for the agreed undertaking to become operative arose before 24 September 2021 nor indeed before the Petitioner served its new Section 570 Notice on 8 December 2021. I do not accept therefore the Petitioner's argument made in submissions that the Company is estopped from denying its commitment to provide the undertaking by reason of its failure to provide the written undertaking as agreed in exchange for the Petitioners forbearance. There is no evidence of such failure on the Company's part and it is not necessary to deal with estoppel here.

49. I highlight however the distinct nature of solicitors' undertakings because I believe this is important context in which to analyse what each side must have understood by the commitments they gave each other. This context also assists the Court to objectively determine whether or not an agreement was reached to settle the dispute on 28 May 2021. Solicitors must always be mindful of the need to avoid giving undertakings they cannot comply with. Indeed, the Company's solicitors in this case took very sensible precautions to ensure they could comply with their proposed undertaking by making their amendments to the initial draft. This illustrates well the risks for solicitors in giving solicitors undertakings. This is mirrored by the protection for parties who accept solicitors undertakings. It is why third parties and counterparties rely so frequently on the special status of a solicitors undertaking. The fact that there was an agreed form solicitors undertaking negotiated and accepted in this case shows that both sides intended clearly to rely on and be bound by it – even though it would only issue once the relevant contract for sale of the Site had been exchanged with a third party. There is nothing casual about solicitors undertakings and there is no necessary requirement that there be a separate settlement agreement for them to be enforceable. I believe the unequivocal commitment given by the Company's solicitors to hand over an agreed signed undertaking once a binding unconditional contract for the sale of the Site had been exchanged, which

arrangement was expressly accepted by the Petitioner's solicitors, secured an agreement to resolve the dispute on the terms and conditions stated in that agreed undertaking. In any event and furthermore, the essential elements of an agreement being offer, acceptance, intention to create legal relations and consideration (in the form of forbearance) all appear to have been satisfied with the exchange of correspondence between solicitors on the 27 and 28 May 2021.

50. On 28 May 2021, the Petitioner accepted the offer of the revised undertaking and confirmed forbearance in reliance on the Company's solicitors' commitment that a signed version would be provided once an unconditional contract had been exchanged for the Site. The promised signed undertaking of course could only be enforced if (and only if) an unconditional binding contract for the sale of the Site was executed by a third party and exchanged with the Company. The conditionality of the arrangement is clear from the terms of the draft undertaking itself which envisages *confirmation* by the Company's solicitors "*that a binding unconditional contract for sale of the Property has now been executed, exchanged and that a non-refundable deposit has been paid to CBRE*." The conditionality is also clear from the Company's solicitors email sending back the marked-up undertaking to the Petitioner's solicitors on the 27 May where they state "*Just to be clear we will only be providing this undertaking once unconditional binding contract is in place..*"

51. If the agreed form of undertaking did (or was required to) issue (the relevant contract for sale having been executed and exchanged), the Petitioner could have called for the signed undertaking and/or sought to enforce it against the Company's solicitors requiring them to make the agreed payment of €200,000 from the sales proceeds (assuming that the other conditions of the undertaking such as adequacy of funds were complied with). I do not believe that a separate settlement agreement would have been essential in that case, as the Company argued – however prudent that might have been. All of the necessary terms were

agreed in the revised undertaking including the quantum of the Settlement Amount, what debt it was compromising and when and how the Settlement Amount would be paid. I do not find anything in the engagement of the parties to suggest that any further agreement was necessary to be put in place. I believe it was reasonable for the Petitioner to have assumed (and on its evidence it did in fact assume) that the commitment it had received from the Company's solicitors to furnish an agreed solicitors' undertaking was binding on both parties and indeed I believe that the Company fully intended that the Petitioner would treat the matter as resolved at that point and forbear on its petition and allow time for the sale to close.

52. However, the agreed pre-condition of a binding unconditional contract for sale did not occur before the Petitioner's *patience* was *exhausted* as referred to by the Petitioner's solicitors in their letter dated 24 September 2021 in which the Petitioner threatened *to withdraw from the without prejudice discussions* and indeed the Petitioner issued a new Section 570 Notice on 8 December 2021. At that time the Petitioner found itself in a situation where it had agreed the basis on which the dispute would resolve but it did not actually have a settlement it could then enforce. The agreed form undertaking was not going to issue unless and until there was an unconditional binding contract for sale executed and exchanged and a non-refundable deposit paid by a purchaser. There was no express time limit within which the undertaking had to be provided. There was no agreed Plan B for the Petitioner if there never was a binding unconditional contract for sale exchanged.

53. It appears that the Petitioner, faced with delay and uncertainty regarding the sale, decided to take a new approach from the 24 September 2021 when it confirmed through its solicitors that it was minded to "*draw an end to this without prejudice engagement and instead instruct counsel to prepare the Petition as threatened in our client's Section 570 Notice*" and when its solicitors confirmed their "*peremptory instructions to proceed with the*

Petition absent a satisfactory response" within 7 days of the date of their 24 September 2021 letter. They never received a response to this letter.

54. It is clear that the Petitioner, although adamant that an agreement was reached, is not relying on the agreed form undertaking or indeed on any agreement in this Petition. Instead, the Petitioner is looking for the full amount it claims is due to it under the invoices –and not the reduced amount it claims it previously agreed with the Company to settle this dispute.

55. This illustrates well the second point I previously referred to, namely the inconsistency in the positions advanced by each party in this application. The Petitioner alleges it had an agreement but it is the party who, after that agreement was reached, first re-introduced the concept of ongoing without prejudice discussions and is not now relying on any agreement. The Company says there was no agreement at any point but this ignores that its solicitors included the settlement wording in an agreed form solicitors undertaking (said to be given with the Company's irrevocable instructions) which was intended to secure and did in fact secure the Petitioner's forbearance necessary to get the sale closed. Both parties have inconsistently applied the label of "without prejudice" to correspondence they exchanged over the relevant periods.

Conclusion

56. I believe from an objective review of the materials that there was an agreement to settle the dispute reached by the parties on 28 May 2021 when the offer of the Company's solicitors' undertaking was accepted by the Petitioner's solicitors who confirmed they would rely on it. This brought to an end the without prejudice nature of their discussions from that time. Material exchanged between the parties prior to 28 May 2021 remains subject to without prejudice privilege. Therefore, the first email dated 26 May 2021 should be deleted from Exhibit AOB10 on the grounds that it is protected by without prejudice privilege and I do not believe this redaction creates a risk of injustice to the parties. There does not appear to

be any specific reference in Mr O'Brien's affidavit to that email and so no consequent change is needed to the affidavit as a result of the removal of this email from the exhibit AOB10.

57. I will refuse the relief sought of deleting paragraphs 12-23 of Mr O' Brien's affidavit sworn 6 April 2022 as I do not believe the agreement referred to is without prejudice. The Company will be free to comment on these paragraphs in its replying affidavit so that the Court will have the benefit of fully understanding the actual sequence of events between the parties when it comes to hearing the Petition and will then be best placed, knowing all this detail, to determine whether or not to make an Order on foot of the Petition.

58. This Court is furthermore of the view that the retention of the Relevant Material (subject to the redaction of the first email in exhibit AOB10 as set out above) in the affidavit of Mr O'Brien sworn 6 April 2022 and the ability of the Company to respond to it in further affidavit(s) is in the interests of justice and will enable this Court on the hearing of the Petition to be fully and appropriately appraised of all engagement between the parties up to the issue of the statutory demand grounding this Petition.

59. As this judgment is being delivered electronically, the parties will have six weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

60. The matter will be relisted for mention for the purpose of making final orders at 10:45 hours on 11th October, 2022.