



27 October 2010

## PRESS SUMMARY

**Oceanbulk Shipping & Trading SA (Respondent) v TMT Asia Limited & others (Appellants)**  
**[2010] UKSC 44**

*On appeal from the Court of Appeal [2010] EWCA Civ 79*

**JUSTICES:** Lord Phillips (President), Lord Rodger, Lord Walker, Lord Brown, Lord Mance, Lord Clarke, Sir John Dyson SCJ

### BACKGROUND TO THE APPEAL

This appeal concerns the scope of the exceptions to the principle that statements made in the course of ‘without prejudice’ negotiations are not admissible in evidence (“the without prejudice rule”). The issue is whether it is permissible to refer to anything written or said in the course of the without prejudice negotiations to help interpret any agreement which results from the negotiations.

The appellants, TMT Asia Limited and others, and the respondent, Oceanbulk Shipping & Trading SA, had entered into a number of forward freight agreements. When the appellants failed to pay a sum due under those agreements, the parties entered into settlement negotiations which were expressed to be without prejudice. The negotiations resulted in a written settlement agreement in respect of the sum due. The respondent brought a claim for damages against the appellants alleging breach of a clause of the settlement agreement. In their defence the appellants sought to rely on statements made during the without prejudice negotiations in support of their interpretation of the clause. The respondent contended that reliance on the statements was precluded by the without prejudice rule.

The High Court held that the evidence was admissible for the purpose of determining how the terms of the settlement agreement were to be construed notwithstanding the without prejudice rule. The majority of the Court of Appeal (Longmore and Stanley Burnton LJ), however, allowed Oceanbulk’s appeal, holding that the evidence was not admissible.

### JUDGMENT

The Supreme Court unanimously allowed the appeal. The substantive judgment was given by Lord Clarke, with whom the other Justices agreed.

### REASONS FOR THE JUDGMENT

Lord Clarke observed that the without prejudice rule was now very much wider than it had been historically and extended to admissions made with a genuine intention to reach a settlement, including any admissions made to reach a settlement with a different party within the same litigation, and applied whether or not settlement was reached with that party: [19]-[29]. The without prejudice rule was an important rule that founded upon the public policy of encouraging litigants to settle their differences, as well as the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence: [24]. Because of the importance of the without prejudice rule, its boundaries should not be lightly eroded. Nevertheless, the authorities

clearly established that resort might be had to without prejudice material by way of exception to the rule where the justice of the case required it: [30]-[33].

The central issue in the present case was whether one of the exceptions to the rule should be that facts which (a) are communicated between the parties in the course of without prejudice negotiations, (b) form part of the factual matrix or surrounding circumstances and (c) would, but for the without prejudice rule, be admissible as an aid to construction of a settlement agreement which results from the negotiations should be admissible in evidence by way of exception to the rule (“the interpretation exception”): [35].

Lord Clarke reached the conclusion that justice clearly demanded that the interpretation exception should be recognised as an exception to the without prejudice rule for two principal reasons: [36] and [46].

- Without recourse to the without prejudice material the agreement could not be properly construed in accordance with the well recognised principles identified in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 that objective facts which emerge during negotiations are admissible as part of the factual matrix in order to assist courts to interpret an agreement in accordance with the parties’ true intentions. The process of interpretation of a settlement agreement should in principle be the same, whether negotiations are without prejudice or not, and permitting recourse to the without prejudice material for this purpose was the only way in which the modern principles of contractual interpretation could be properly respected: [36]-[41].
- Any other approach would introduce an unprincipled distinction between this class of case and two other exceptions to the without prejudice rule. The first such exception, which has already been accepted, is that resort might be had to without prejudice material in order to resolve the issue whether negotiations had resulted in a concluded compromise agreement. The second such exception (which has not yet been accepted) followed from the first, namely that if a party could have resort to without prejudice material to see whether negotiations had resulted in a concluded settlement agreement, then a party could also rely on such material in order to show that a settlement agreement should be rectified. There was no sensible basis on which a line could be drawn between admitting without prejudice communications in order to consider a plea of rectification and admitting them as part of the factual matrix relevant to the true construction of a settlement agreement: [42]-[45].

Lord Clarke stressed that nothing in the judgment was intended to underplay the importance of the without prejudice rule or to encourage the admission of evidence of pre-contractual negotiations beyond that which is admissible in order to explain the factual matrix or surrounding circumstances: [46].

*References in square brackets are to paragraph numbers in the judgment.*

#### **NOTE**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)