SUPREME COURT OF QUEENSLAND

CITATION:	*Liu v Chan & Ors* [2020] QCA 25
PARTIES:	**CHENG BIN LIU** (appellant) **v** **STANLEY KIN CHAN** (first respondent) **AMY SIU MAN SHUM** (second respondent) **AE DEVELOPMENTS PTY LTD** ACN 136 649 502 (third respondent) **LC INTERNATIONAL CORPORATION PTY LTD** ACN 136 885 704 (fourth respondent) **CMO HOLDINGS PTY LTD** ACN 139 314 060 (fifth respondent)
FILE NO/S:	Appeal No 13017 of 2019 SC No 7428 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 20 November 2019 (Bradley J)
DELIVERED ON:	21 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2020
JUDGES:	Fraser and Morrison JJA and Boddice J
ORDERS:	**1. Allow the appeal to the extent only of varying the orders made in the Trial Division by adding an order that orders 1 – 6 do not preclude the plaintiff from adducing evidence at the trial (including by way of the addition to the list of agreed facts for the trial of an agreed fact) that the plaintiff and first defendant conducted without prejudice negotiations in an attempt to resolve their disputes between dates in October and November 2014 which may be specified or otherwise identified, including by reference to the time of any other event.** **2. Otherwise the appeal is dismissed.** **3. The appellant is to pay the respondents' costs of the appeal.**

CATCHWORDS: EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – PUBLIC INTEREST PRIVILEGE – SETTLEMENT NEGOTIATIONS – where the plaintiff transferred large sums of money to the first defendant – where the plaintiff demanded the return of that money because he alleged the first defendant had not applied it for the specified purposes – where the defendants allege that the parties agreed in January 2014 that the first defendant would transfer $300,000 to the plaintiff in full and final satisfaction of all claims between the parties – where the plaintiff alleges no such agreement was reached in January 2014 – where the plaintiff and the first defendant conducted negotiations in October and November 2014 in an unsuccessful attempt to resolve their disputes – whether evidence of the negotiations in October and November 2014 is subject to without prejudice privilege – whether the defendants waived the privilege by pleading that the parties had compromised the plaintiff's claims against the defendants in January 2014 – whether the court would be misled if the communications were not permitted to be adduced in evidence at the trial – whether the use of the communications was permissible to ascertain whether a binding agreement was reached in January 2014

Barrier Wharfs Ltd v W Scott Fell & Co Ltd (1908) 5 CLR 647; [1908] HCA 88, cited
Field v Commissioner for Railways (NSW) (1957) 99 CLR 285; [1957] HCA 92, cited
Harrington v Lowe (1996) 190 CLR 311; [1996] HCA 8, cited
Hoefler v Tomlinson (1995) 60 FCR 452; [1995] FCA 1650, cited
Howard Smith & Co Ltd v Varawa (1907) 5 CLR 68; [1907] HCA 38, cited
Knapp v Metropolitan Permanent Building Association (1889) 9 LR (NSW) 468; [1888] NSWLawRp 75, considered
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66, cited
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276, considered
Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd [2003] WASCA 11, considered
Tomlin v Standard Telephones and Cables Ltd [1969] 1 WLR 1378, considered
Unilever Plc v The Procter & Gamble Co [2000] 1 WLR 2436; [1999] EWCA Civ 3027, cited
Yokogawa Australia Pty Ltd v Alstom Power Ltd (2009) 262 ALR 738; [2009] SASC 377, considered

COUNSEL: M Steele, with M Walker, for the appellant
D Keane, with D Tay, for the respondents

SOLICITORS: Rapport Lawyers for the appellant
Bartley Cohen for the respondents

[1] **FRASER JA:** This is an appeal from orders made by Bradley J ("the primary judge") which preclude the appellant/plaintiff from adducing certain evidence at a trial which is part heard before a different judge. The order was made upon the ground that the evidence was subject to "without prejudice" privilege.

[2] It is not necessary in this appeal to describe the full scope of the privilege or to identify all of the exceptional cases in which the privilege does not attach. It is sufficient to observe that, subject to recognised exceptions, without prejudice privilege precludes a party to litigation from adducing as an admission evidence of negotiations and statements in negotiations conducted in an attempt to avoid or compromise litigation.[1]

[3] The appellant acknowledges that the excluded evidence was subject to without prejudice privilege unless it fell within one of the recognised exceptions. The appellant contends that at least one of three exceptions apply: (appeal ground (b)) the defendants waived privilege by pleading that the parties had compromised the plaintiff's claims against the defendants in January 2014; (appeal ground (c)) the court would be misled if the communications were not permitted to be adduced in evidence at the trial; and (appeal ground (d)) the use of the communications was permissible to ascertain whether a binding agreement was reached in January 2014.

[4] Before addressing those grounds I will briefly summarise the most relevant parts of the parties' cases at trial and the primary judge's reasons.

[5] The plaintiff's second further amended statement of claim includes allegations that the plaintiff transferred large sums of money to the first defendant to be used by him to buy land for the plaintiff. It is alleged that the money was instead used to buy land in the name of the second or third defendants. The statement of claim alleges that in or about December 2013 or January 2014 the plaintiff demanded the return of his money because the first defendant had not applied it for the specified purposes. The first defendant is alleged to have agreed to repay the money. The first defendant thereafter transferred $300,000 to the plaintiff's wife's bank account but he made no further payments and failed to account to the plaintiff for the outstanding balance of his money.

[6] In the fourth further amended defence the defendants deny that the money was to be used to buy land for the plaintiff. They allege that the first defendant and the plaintiff agreed that the money would be deposited into the first defendant's bank account for different purposes, including to pay for work on projects in China between companies owned by the plaintiff and the first defendant. The defendants also deny the plaintiff's version of the conversation between the plaintiff and the first defendant in or about December 2013 or January 2014. Paragraph 41(c) of the defence pleads that the first defendant and the plaintiff instead agreed that the plaintiff would set off a debt owed by the plaintiff on one of the projects in China against the monies the plaintiff alleged were owing and the plaintiff would accept $300,000 from the first defendant in full and final satisfaction of all claims between the parties. (I will describe that alleged agreement as "the January compromise"). The defendants allege that the first defendant subsequently transferred $300,000 to the plaintiff in performance of the January compromise.

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1 *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285 at 291.

[7] In the third further amended reply and answer, the plaintiff denies that he or an associated company owed any money to the first defendant or an associated company for any project as alleged by the first defendant. The plaintiff denies the defendants' allegations about the January compromise. The plaintiff specifically denies the January compromise "because in or about October 2014, the plaintiff and the first defendant … agreed that, subject to the execution of a settlement deed prepared by the first defendant's solicitors, the first defendant would pay to the plaintiff a further $3.8 million …".

[8] There is evidence in the plaintiff's case that at a meeting at a café in October 2014 the first defendant admitted that he owed the plaintiff $3.8 million. The plaintiff demanded repayment of that amount and, after the first defendant said he was unable to pay the whole amount at once, they agreed upon a plan for repayment by instalments. The first defendant's evidence about that conversation is to the effect that he insisted upon the plaintiff honouring the January compromise but the plaintiff refused to do so. The statements made at the café meeting are not said to be protected by without prejudice privilege.

[9] After the meeting at the café the plaintiff and the first defendant conducted negotiations from mid-October 2014 to 13 November 2014 ("the October/November negotiations") in an unsuccessful attempt to resolve their disputes. Those negotiations were conducted upon the express basis that they were without prejudice. I have examined the details of the negotiations and considered the parties' submissions about that detail, but because I conclude that the content of the negotiations is protected by without prejudice privilege I will not describe that content. It is sufficient for present purposes merely to give a broad summary of the parties' arguments about the effect of the negotiations. The plaintiff argued that evidence of the negotiations would support findings that are inconsistent with the central planks of the defendants' case. In particular, the plaintiff argued that the October/November negotiations were for a compromise to be concluded upon the premise that the first defendant would admit that the money was transferred to him for the purposes alleged by the plaintiff and that, inconsistently with the set off pleaded by the first defendant, he owed the outstanding balance claimed by the plaintiff. The defendant argued to the contrary, that any proposed settlement differed from the plaintiff's claim and that a without prejudice negotiation for a proposed settlement to be concluded on a particular premise in any event does not involve an admission that the premise is correct. Without deciding the point, it is convenient to assume for the purposes of this appeal that if without prejudice privilege did not apply to the negotiations, evidence of them could be adduced as admissions by the defendants of the kind for which the plaintiff contended.

[10] The primary judge rejected the plaintiff's argument that inconsistencies between the fact of, and admissions made in, the October/November negotiations and the defendants' pleaded allegations of the disputed January compromise resulted in without prejudice privilege being waived or that it should not attach because the exclusion of the evidence of the October/November negotiations would mislead the Court. In the primary judge's view, the maintenance of privilege for those negotiations was not inconsistent with the assertion that the disputes were settled in January 2014. Nor were the October/November negotiations about the basis upon which the dispute might be compromised inconsistent with the assertion of the privilege with respect to those negotiations or the assertion that the same dispute had been compromised earlier. The primary judge considered that the purpose of without

prejudice privilege to encourage parties to seek to compromise their disputes would be substantially undermined if engaging in negotiations prevented a party from maintaining that the dispute had been compromised on a different basis earlier or from asserting the privilege with respect to later negotiations. The Court would not relevantly be misled about whether the disputed January 2014 compromise was made by being denied evidence of any admission about that topic subsequently made on a without prejudice basis. Such an admission, being a means of avoiding the need to prove the matter admitted, would not be evidence of the matter itself. The purpose of the privilege, the primary judge considered, comprehended encouraging parties to engage with each other in a way that might include the admission of matters the subject of an inconsistent plea by the party against whom the admission was tendered. A conclusion that the Court might be misled in a way which justified rejection of a claim of privilege merely because a party's pleading was inconsistent with an admission made in the negotiations conducted on a without prejudice basis would be inconsistent with the purpose of the privilege and result in its intended benefit being greatly diminished or lost.

[11] The grounds of appeal are adverted to in [3] of these reasons. I will discuss ground (d) first. The plaintiff's argument that without prejudice privilege does not attach to the October/November negotiations relies in part upon the proposition that evidence of conduct occurring after a contract is allegedly concluded is admissible upon the question whether the contract was concluded.[2] That proposition concerns the question whether evidence is admissible in proof or disproof of an alleged contract, rather than the question whether without prejudice privilege attaches to negotiations for a compromise of a dispute where there is an issue whether the parties had compromised their dispute by much earlier and separate negotiations.

[12] I do not accept the plaintiff's argument that the October/November negotiations formed part of the bargaining for the January compromise. The plaintiff's case, both as pleaded and as litigated in the evidence for the plaintiff, is that in or about January 2014 the first defendant acquiesced in the plaintiff's request for repayment and there were no negotiations before October of the same year. The defendants' case is that the only negotiations for the January compromise occurred in the conversation by which that compromise was made. The defendants' case, like the plaintiff's case, does not refer to any relevant communications during the long period after the disputed January compromise until the café meeting in October. Contrary to the plaintiff's argument, his pleaded denial that his claim was compromised in January 2014 "because" of the alleged negotiations for a settlement in October 2014 does not justify treating the October/November negotiations as though they were a continuation of the discussions in January.

[13] It is established by many decisions that without prejudice privilege does not preclude the parties from adducing evidence of their negotiations to prove that a settlement was or was not concluded by those negotiations, where that is in issue: see, for example, *Knapp v Metropolitan Permanent Building Association*,[3] *Tomlin v Standard Telephones and Cables Ltd*,[4] *Harrington v Lowe*,[5] *Old Papa's Franchise*

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2 *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 78; *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 669.

3 (1888) 9 LR (NSW) 468.

4 [1969] 1 WLR 1378.

5 (1996) 190 CLR 311 at 326, 339.

Systems Pty Ltd v Camisa Nominees Pty Ltd,[6] and *Western Australia v Southern Equities Corporation Pty Ltd (in liq)*.[7] Applying those decisions, without prejudice privilege does not attach to evidence of the discussions in January. No party contends that the privilege does apply in relation to that evidence.

[14] The question is whether without prejudice privilege attaches to evidence of the separate October/November negotiations to resolve the parties' dispute. The cases upon which the plaintiff relies do not support his argument that the privilege does not attach in these circumstances.

[15] In *Knapp v Metropolitan Permanent Building Association* the defendant pleaded an accord and satisfaction as a defence. "Without prejudice" correspondence had been exchanged by the parties' attorneys with a view to settlement. In one such letter the plaintiff offered to settle on payment of a specified sum. The defendants' attorney accepted the offer by a letter which enclosed a cheque for that sum. The plaintiff's attorney paid the cheque into the plaintiff's bank. The same attorney returned the amount of the cheque a week later, informing the defendants that no settlement could be made unless the defendants withdrew certain reflections upon the plaintiff's character. The defendants would not do that and sent back the money. The trial judge refused to allow the defendants to put in evidence of the plaintiff's letter and cheque in support of the defendants' plea of accord and satisfaction and gave a verdict for the plaintiff. On appeal Darley CJ (Windeyer and Innes JJ concurring) held that when the cheque was sent by the defendants the case was settled "and the letters which had passed between the parties thereupon lost their privilege, and were, therefore, admissible in evidence".[8] It is apparent that the issue about without prejudice privilege concerned only the conduct alleged to constitute the accord and satisfaction.

[16] The plaintiff also relies upon an observation by Danckwerts LJ in *Tomlin v Standard Telephones and Cables Ltd*[9] that letters exchanged between solicitors were not privileged "because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence". That observation does not refer to a negotiation to settle a dispute conducted after earlier correspondence by which a settlement was alleged to have been concluded. The plaintiff argues, however, that the claim in *Tomlin* was that a compromise of liability was made in December 1966, yet subsequent correspondence was admitted upon the ground that it was consistent with the alleged compromise. That is incorrect. The plaintiff in *Tomlin* did not allege that the compromise was made in December 1966 or at any time before the conclusion of the correspondence, and the defendant contended that all of the correspondence was "without prejudice" and therefore inadmissible.[10] Nor did Danckwerts LJ find that the partial compromise was concluded in December 1966. His reasons are consistent with an offer by the insurer to settle liability made at that time having implicitly been accepted by the plaintiff's failure to reject that offer in all of the subsequent correspondence. That the whole chain of correspondence

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6 [2003] WASCA 11 at [91] – [95].
7 (1996) 69 FCR 245 at 248 – 249.
8 (1888) 9 LR (NSW) 468 at 469.
9 [1969] 1 WLR 1378 at 1382.
10 [1969] 1 WLR 1378 at 1379H – 1380G.

constituted the negotiations for the settlement of liability was also the basis upon which the other member of the majority decided the appeal; Sir Gordon Willmer observed that the repeated recitals of the existence of an agreement upon liability "can be, and should be, construed as an acceptance of the plaintiff's counter-offer".[11]

[17] In *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd*, the appellant pleaded that a compromise was made by a letter of 27 April 1999 and the discontinuance of an action, whereas the respondents pleaded that a compromise was expressed or implied in a series of correspondence between solicitors.[12] McLure J (Murray and Parker JJ agreeing) observed that "without prejudice negotiations leading to an agreement can be considered where there is a dispute as to whether or not an agreement to settle was made"[13] and held that whether or not there was a compromise, and the content of its terms, could be resolved only by reference to a chain of correspondence, rather than by reference only to a single letter dated 27 April 1999 forming part of the correspondence.

[18] It is not necessary to multiply references to decisions upon this point. The cases upon which the plaintiff relies involve merely applications of the uncontroversial proposition in [13] of these reasons.

[19] There being no dispute that the October/November negotiations were conducted in an attempt to resolve the parties' dispute, to allow the plaintiff to adduce evidence of those negotiations in these circumstances would be inconsistent with the central purpose of without prejudice privilege of encouraging compromises "by sparing the parties the embarrassment which might be caused to them if the negotiations fail and later their communications are liable to be put in evidence".[14] In *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* Byrne J elaborated upon that rationale in terms which seem particularly apt in relation to appeal ground (d):[15]

> "If, however, the participants were left to anticipate that their negotiations might afterwards be used to their detriment, many would 'feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just resolution of a civil dispute'. And such an approach would often diminish the prospects of concluding a compromise, especially in complex disputes.
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> The plainest risk of detriment consequent upon a breach of the confidentiality of compromise negotiations is that statements adverse to the interests of a participant made to facilitate a compromise might, if the negotiations proved inconclusive, be put into evidence by the recipient of the information. This eventuality is so inimical to the

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11 [1969] 1 WLR 1378 at 1387.

12 [2003] WASCA 11 at [96].

13 [2003] WASCA 11 at [93], citing *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378 and *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444.

14 *Harrington v Lowe* (1996) 190 CLR 311 at 323 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ), citing *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285 at 291 and *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1300.

15 [2001] 1 Qd R 276 at [28] – [29]. I have omitted internal citations.

> chances of concluding compromises that there has for years been a rule that 'without prejudice' communications – as a matter of right, not discretion – are not admissible to prove an admission. Such communications, if 'made in the course of genuine negotiations with intent to compromise an existing dispute', are protected by an 'evidentiary privilege'. The privilege is 'concerned with the admissibility of evidence at trial after the failure of negotiations'. It exists 'to encourage compromises by sparing the parties the embarrassment which might be caused to them if the negotiations fail and later their communications are liable to be put in evidence'."

[20] Ground (d) fails.

[21] As the plaintiff acknowledges, the contention in appeal ground (b) that the defendants waived privilege by pleading the disputed January compromise is closely related to the contention in ground (d). Waiver of a privilege may be implied where there is an "inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality" which the privilege is intended to protect.[16] In *Yokogawa Australia Pty Ltd v Alstom Power Ltd*[17] Duggan J (Sulan and Kourakis JJ agreeing) described the question as being whether "there is an inconsistency in raising an issue but attempting at the same time to prevent a proper examination of the issue by maintaining the privilege". The necessary inconsistency does not necessarily exist merely because issue is joined on a question of fact to which a privileged communication is relevant.[18]

[22] The plaintiff contends that waiver should be implied because of the conduct of the defendants in pleading the January compromise and adducing evidence about the conversation at the café in October 2014 in terms that are consistent with the first defendant's evidence about the January compromise. The plaintiff argues that this conduct should preclude the defendants from "shielding other parts of the same course of bargaining" from the Court.[19] That argument fails because, on any view of the content of the various discussions, the discussion in the café in October 2014 – like the subsequent October/November negotiations – was quite separate from the alleged negotiations for the January compromise.

[23] The remaining ground of appeal, ground (c), contends that the Court would be misled if the communications were not permitted to be adduced in evidence at the trial. This case is not analogous to the cases cited by the plaintiff, in which the misleading effect of concealing conduct in a negotiation was established by a patent contradiction between a party's conduct in the negotiation and the same party's conduct in the litigation.[20] That is not necessarily determinative of the result, but

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16 *Mann v Carnell* (1999) 201 CLR 1 at 13.

17 (2009) 262 ALR 738 at [107].

18 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at [115] (Allsop J), followed in *Yokogawa* at [58].

19 Outline of argument of the appellant, para 42.

20 *J A McBeath Nominees Pty Ltd v Jenkins Development Corporation Pty Ltd* [1992] 2 Qd R 121 at 134, lines 45 – 51 (Ryan J) (Macrossan CJ dissented on this point and Kelly SPJ decided the appeal upon different grounds, so Ryan J's reasons are not authoritative); *McFadden v Snow* (1951) 69 WN (NSW) 8 at 9 ("… and that he has received no reply thereto"), 10 ("… the statement in the affidavit … that the claimant had received no reply to his letter") (Kinsella J); *Pitts v Adney* [1961] NSWR 535 at 539, lines 20 – 25. See also *Galafassi v Kelly* (2014) 87 NSWLR 119 at [142] (Gleeson JA,

my conclusion is that the evidence upon which the appellant relies for the present argument does not justify a conclusion that the defendants' claim of privilege is apt to mislead the Court.

[24] The mere fact that the trial judge will be required to make findings about the issues concerning the discussions in January and at the café in October without the benefit of whatever findings might be made with reference to the excluded evidence does not of itself justify a conclusion that the Court will be misled such that without prejudice privilege does not apply. That kind of situation is the intended consequence of any claim of without prejudice privilege. Something more is required for the plaintiff to succeed on this point. In that respect, the plaintiff submits that the defendants might persuade the trial judge to draw untrue adverse inferences against the plaintiff by pleading the January compromise, leading evidence in support of that pleading, and cross-examining the plaintiff's wife upon the first defendant's version of events,[21] whilst at the same time maintaining a privilege which shuts out evidence that, the plaintiff argues, directly and comprehensively contradicts the defendants' case. In support of this submission the plaintiff refers to the first defendant's evidence that at the end of the meeting at the café the first defendant demanded compliance with the January compromise, whereas the plaintiff's evidence is that he requested that a document be drawn up to reflect what the plaintiff says was the agreement for repayment of his money. The plaintiff submits that the absence of evidence that a document to that effect[22]was drawn up would permit the trial judge to draw what is submitted to be an incorrect inference that the plaintiff's version of events is unreliable.

[25] Any such conclusion necessarily would be consequential upon the trial judge first drawing an inference in the defendants' favour about whether a document to the alleged effect was drawn up. It seems very unlikely that the trial judge would draw that inference in the absence of some additional factor, such as a proposition expressed or implied in cross-examination that no such document was drawn up or a submission for the defendants that such an inference should be drawn. (If an event of that kind occurred, or if in any way the circumstances at trial materially differ from the circumstances in which the primary judge made the interlocutory orders under appeal, the orders could be revisited in the Trial Division).[23]

[26] Furthermore, any risk that the trial judge would reason in the way feared by the plaintiff is obviated by my conclusion that for a different reason the trial judge should be informed of the fact that without prejudice negotiations commenced shortly after the café meeting. The defendants plead that it would be inequitable and unjust to grant the plaintiff the relief he seeks because of the plaintiff's "laches, acquiescence and delay". That plea is based upon allegations concerning what is submitted to be "inexcusable and inordinate" delay by the plaintiff in commencing

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Bathurst CJ (in this respect) and Ward JA agreeing) but that was a decision under a statutory provision rather than the common law.

21 It is not submitted that any particular question in cross-examination is of itself necessarily inconsistent with any identified statement or conduct in the October/November negotiations.

22 As to the defendants' argument about the effect of any proposed compromise, see [9] of these reasons.

23 See, by way of example, *Yokogawa Australia Pty Ltd & Others v Alstom Power Ltd* (2009) 262 ALR 738 at [109].

the proceedings, allegedly causing prejudice to the defendants, in circumstances in which the plaintiff did not commence the proceedings until 29 July 2015 although the alleged breaches by the defendants occurred between July 2009 and October 2010.[24] Understandably, the plaintiff wishes to adduce evidence that for part of the period of the alleged delay the plaintiff negotiated with the defendants with a view to resolving their disputes. In the written submissions for the defendants before the primary judge, the defendants conceded the point, submitting[25] that "the plaintiff may adduce evidence of the *fact of* the correspondence and not its contents", and that (as I would hold) this submission was supported by *Hoefler v Tomlinson*.[26] There was a brief and inconclusive discussion of the point during oral submissions before the primary judge.[27] The defendants did not seek to resile from their concession in their outline of submissions. In view of that concession it is unsurprising that the primary judge did not advert to this topic in his reasons.

[27] The conduct of the defendants in pleading that the plaintiff inexcusably delayed in litigating is inconsistent with the maintenance of confidentiality in the fact and period of the without prejudice negotiations. Maintenance of without prejudice privilege for those matters would be apt to mislead the trial judge into concluding that the plaintiff has no explanation for a material part of the period of delay in commencing the proceedings.

[28] The defendants' outline of submissions in the appeal upon this point merely referred to paragraphs of their written outline of submissions before the primary judge. In oral submissions, however, the defendants argued that the contention about laches is not within the grounds of appeal. That should not be accepted. Although the only order sought by the appellant would permit him to adduce evidence of the content of the negotiations, appeal ground (c) comprehends the contention about the laches defence, the plaintiff agitated the contention in his first outline of submissions in the appeal, and the defendants did not argue in their outline in response that it was outside the grounds of appeal.

[29] Otherwise the defendants submitted that no relevant issue about laches arose because the plaintiff had not pleaded in his reply a reference to the fact of the without prejudice negotiations. That point was not taken before the primary judge. The plaintiff submits that the orders of the primary judge now preclude him from adverting even to the fact that negotiations were conducted. That is not an unreasonable view of para 6 of the primary judge's orders, which precludes the plaintiff from adducing "any evidence whatsoever" of identified communications which comprise most of the October/November negotiations.

[30] With leave of the Court, the parties made submissions about the appropriate form of order if the plaintiff succeeded only upon his contention about the laches defence. The plaintiff argues that the primary judge's orders should be amended to permit the plaintiff to adduce evidence not only about the fact and period of the October/November negotiations but also about the venue and participants in part of the negotiation, the nature of the communications, and the content only of some communications which, the plaintiff submits, do not constitute admissions but show attempts by the plaintiff

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24 Fourth further amended defence, paras 46 and 47.
25 Submissions on behalf of the applicants/defendants, paras 38 – 41 and 48.
26 (1995) 60 FCR 452 at 453 – 455.
27 Transcript 20 November 2019 at pp 1-40 to 1-43.

to expedite negotiations. It is submitted that this additional evidence is necessary to give the Court "a fair picture of the rights and wrongs of the delay".[28]

[31] The defendants submit that if the plaintiff's argument about the plea of laches is upheld it would be appropriate to vary the orders made by the primary judge only by permitting the addition to the list of agreed facts to be tendered at the trial of the fact that the plaintiff and the first defendant conducted without prejudice negotiations from 14 October 2014[29] to 13 November 2014, but no agreement was reached.

[32] An exception to permit the plaintiff to adduce evidence upon that subject matter is justified to avoid the Court being misled in relation to the laches defence by the maintenance of the without prejudice privilege. In the absence of any suggestion that the plaintiff did not conduct the October/November negotiations efficiently with a view to resolving the disputes the plaintiff has not identified a sufficient basis for eroding the privilege to any greater degree.

[33] The primary judge ordered that the plaintiff pay the defendants' costs of the application. The plaintiff submits that the costs of the application before the primary judge and of the appeal should be costs in the proceeding. The defendants submit that they should have their costs of the appeal and the orders made by the primary judge should not be disturbed further.

[34] The focus of the plaintiff's argument both before the primary judge and on appeal was his contention that without prejudice privilege did not apply in the present case to preclude the plaintiff from adducing evidence of the content of the negotiations. I would hold that the plaintiff failed upon that central point. In my view the defendants should prima facie have their costs of appeal on the ground that they should succeed upon all of the grounds of appeal except in the one relatively minor respect I have identified. As I have mentioned, the defendants conceded before the primary judge that the plaintiff might adduce evidence of the fact of the October/November negotiations. Although order 6 reflected the same order sought in the defendants' application, in light of the concession before the primary judge it does not appear that the intention of the application or of the order was to preclude the plaintiff from pleading in reply or adducing evidence merely of the fact and period of the negotiations. In these circumstances the plaintiff's limited success does not justify depriving the defendants of their costs before the primary judge or of the appeal.

Proposed orders

[35] In my view the following orders are appropriate:

(a) Allow the appeal to the extent only of varying the orders made in the Trial Division by adding an order that orders 1 – 6 do not preclude the plaintiff from adducing evidence at the trial (including by way of the addition to the list of agreed facts for the trial of an agreed fact) that the plaintiff and first defendant conducted without prejudice negotiations in an attempt to resolve

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28 *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444 – 2445.

29 An affidavit sworn on 19 December 2016 by a solicitor acting for the defendants, Mr Steele, appears to identify 15 October 2014 as the commencement date of the October/November negotiations. I have been unable to find evidence in the appeal record that 14 October was the commencement date or that the parties have agreed upon a commencement date.

their disputes between dates in October and November 2014 which may be specified or otherwise identified, including by reference to the time of any other event.

(b) Otherwise the appeal is dismissed.

(c) The appellant is to pay the respondents' costs of the appeal.

[36] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[37] **BODDICE J:** I agree with Fraser JA.