

Without Prejudice Communications: The Unambiguous Impropriety Exception

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In our [Civil Litigation Review: 2020](#), we discussed the High Court’s decision in *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] EWHC 980 (Comm). In that decision, the Court held that claimants were permitted to rely on statements made by the defendants in a without prejudice context as evidence of there being a real risk of dissipation of assets in the context of an application for a freezing order. Though the defendants denied having made the relevant statements, the Court found that there was a “good arguable case” that the statements were made as alleged by the claimant.

The hearing of Hytera’s appeal of that decision took place on 15 December 2020, with judgment handed down by the Court of Appeal on 11 January 2021. The appeal was put on two grounds: that the statements made were not evidence of unambiguous impropriety, and that the Court was wrong to apply the “good arguable case” test which had been set out in *Dora v Simper*.¹

In relation to the test to be met for an “unambiguous impropriety”, the Court found that:

- the without prejudice rule must be “scrupulously protected”;
- even in a case where the “improper” interpretation of something said at a without prejudice meeting is “possible, or even probable... that is not sufficient to satisfy the demanding test that there is no ambiguity”; and
- evidence asserted to satisfy that test would need to be “rigorously scrutinised”.

The Court found that the approach of the Court in *Dora*, which was to consider whether, if proved, the claimant’s evidence about a statement made would amount to an unambiguous impropriety, was impossible to reconcile with the need for rigorous scrutiny, and was of “doubtful cogency”. It went on to conclude that the Courts have “consistently emphasised the importance of allowing parties to speak freely in the course of

¹ *Dora v Simper* (15th March 1999, unreported)

settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule and have carefully scrutinised evidence which is asserted to justify an exception to the rule". Whilst the Court did not "wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it....such cases [were] likely to be rare", with the decision in *Dora v Simper* being described as an "outlier".

The Court then considered whether the adoption of the *Dora v Simper* test was wrong in principle, by reference to the two factors considered by the High Court: (1) the need to counterbalance the risk of abuse of privilege, and (2) the test of "good arguable case" being applied in other contexts at an interim stage. The Court of Appeal found that neither consideration justified the "erosion of the without prejudice rule which a test of good arguable case undoubtedly represents". In the circumstances, the Court found, the Judge should simply have asked himself "whether the evidence before him established an unambiguous impropriety".

The Court of Appeal found that Hytera's evidence as to what had occurred at the mediation was "at least equally" as plausible as Motorola's evidence. There was therefore no possibility of establishing an unambiguous impropriety and the freezing order was set aside.

The decision should provide some comfort to parties as to the protection that English law will afford to statements made in the context of settlement discussions, confirming that the unambiguous propriety exception will only apply in cases where improper conduct can be proven.

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Please do not hesitate to contact us with any questions.



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