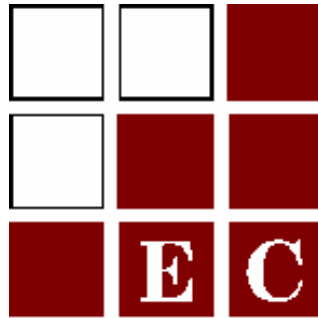


# Zia Bhaloo QC

## Enterprise Chambers



Zia was called in 1990 and took silk in 2010. She specialises in property and landlord and tenant litigation.

She is highly recommended in the legal directories:

*Extremely meticulous and outstandingly clever.*

*Highly intelligent and tremendously down to earth.*

*Property guru.*

*Personable, assertive and decisive.*

*Bhaloo's tactical advice is excellent. (Chambers & Partners 2010)*

*Solicitors place considerable faith in her all-round abilities, and she is a great example of honey being more deadly than vinegar (Chambers & Partners 2010)*

*Zia Bhaloo is a delight to deal with (Legal 500 2009)*

*One of the best things about her is that she is a genuine team player.*

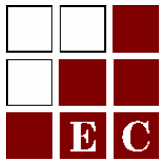
*She gives her all to a case.*

*Fantastic on landlord and tenant issues (Chambers & Partners 2009)*

*Solicitors would row out into the ocean for her (Legal 500 2008)*

*...particularly adept at becoming part of the team.*

*Worth her weight in gold, approachable and produces cross-examinations that are deserving of applause (Chambers & Partners 2008)*



## LOOSE WORDS COST CLIENTS

Without prejudice privilege

by

ZIA BHALOO QC

ENTERPRISE CHAMBERS

### Introduction

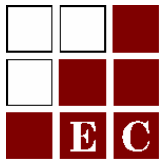
1. The purpose of this paper is to consider the circumstances in which communications attract without prejudice privilege and the extent of that privilege, including the ambit of the protection and the circumstances in which a court will admit communications even though they are without prejudice.
2. The use of the words “without prejudice” will not of themselves mean that the without prejudice privilege applies. If the communications are not truly without prejudice, in the sense described below, then to the surprise of the client who thought he was making a “protected” offer or admission, the offer or admission will be disclosable and admissible (assuming of course that it has any probative value).

### The basis of the rule

3. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence [see *Rush & Tompkins v Greater London Council [1989] AC 1280*]. The basic rule is that evidence to prove admissions made by parties during such negotiations is inadmissible in the same or any subsequent litigation between those parties (or other parties to the same litigation), whether settlement is reached in those negotiations or not. There are certain exceptions to the basic rule which are considered below.
4. The rule is founded partly upon public policy and partly upon an express or implied agreement<sup>1</sup> between the parties that communications in the course of negotiations should

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<sup>1</sup> The suggestion in *Matthews & Malek in Disclosure* (3<sup>rd</sup> ed) that an express agreement may extend to communications which would not otherwise be within the scope of the privilege seems to me to be wrong. In



not be admissible in evidence if a contested hearing ensues<sup>2</sup>. The public policy is the importance of encouraging litigants to settle their differences rather than litigate them to a finish. The policy underlying the rule was described by Oliver L.J in *Cutts v Head [1984] Ch 290* as follows:

*“...parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should...be encouraged fully and frankly to put their cards on the table...the public policy justification...rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court...as admissions on the question of liability.”*

### **The requirements**

5. In order for the privilege to attach the communication in question must have been made:
  - (1) in a genuine attempt to settle the dispute between the parties, and
  - (2) with the intention that it will not be admitted in evidence without the consent of the parties.

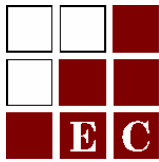
### **The first requirement: a genuine attempt to settle the dispute**

6. An important requirement, which is sometimes forgotten when labelling a communication “without prejudice”, is that there must be a dispute in existence between the parties. However, it is not sufficient that there is a dispute between the parties and that the communication concerns that dispute, the communication must also be a genuine attempt to settle the dispute.

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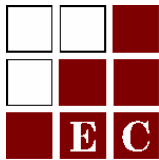
my view the parties cannot simply agree to exclude documents which would otherwise fall within standard disclosure and which are not protected by privilege.

<sup>2</sup> In common with other forms of privilege it is a privilege from production and renders the communication inadmissible in evidence in court.



### **What will amount to a dispute?**

7. What then will be sufficient to amount to a dispute? Commercial negotiations will obviously not do. Further, it cannot apply to materials prepared before any dispute arises, for example a report prepared for a corporate tenant's or landlord's board by the company's surveyor in relation to a forthcoming rent review which has not yet been the subject of negotiations between the parties. Similarly, the first schedule of dilapidations which is sometimes served "without prejudice" is unlikely to attract the privilege. In most cases there will at that stage be no extant dispute, but, as importantly, it would be difficult to argue that the schedule was part of a negotiation rather than an assertion of the relevant party's case. Such a document is generally served "without prejudice" in a different sense, namely without prejudice to the serving party's ability to add to or amend it.
  
8. In *South Shropshire DC v Amos [1986] 1 WLR 1271* the Court of Appeal considered a Lands Tribunal case which concerned negotiations in a dispute that arose long before reference to the tribunal as to the amount of compensation payable in respect of a discontinuance of business use order. The relevant documents were labelled "without prejudice" but contained nothing more than assertions of rights and entitlements (although the second at least suggested the assertions be reviewed in order to be discussed with a view to settlement). The Court of Appeal upheld the ruling that the documents were indeed without prejudice. It was held that the rule covers not only documents which constitute offers but also documents which form part of discussions on offers i.e. negotiations. The court gave some weight to the fact that the first disputed document was headed "without prejudice" and held that, bearing in mind that there was an original expressed intention to negotiate, the fact that there was a dispute in existence and the fact that it is common practice for such claims to be the subject of negotiation before parties resort to a reference to the Lands Tribunal, the heading "without prejudice" should be given their ordinary effect. The position in respect of the second disputed document was somewhat clearer in that it was clearly written in the course of negotiations and was accompanied by a letter headed without prejudice suggesting a negotiated settlement. Although this case has not been disapproved it should, in my view, be treated with some caution. Further, it is often characterised as an



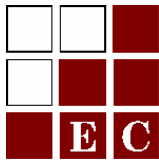
“opening shot” case, but it may be better analysed as a case where the privilege applies because the document in question forms part of a chain of without prejudice negotiations.

9. In *Buckinghamshire CC v Moran* [1990] Ch 623 the defendant was claiming title by adverse possession. At first instance it was held that the defendant’s “opening shot”, which was headed “without prejudice” was protected by without prejudice privilege even though he was not putting forward any immediate compromise terms, but was seeking to persuade the other side that he was right. The Court of Appeal took a different view, holding as follows:

*“I think that the judge was right to regard the relevant question as being whether or not the letter...could properly be regarded as a negotiating document. But I respectfully disagree with his conclusion that it could. As the judge himself said, and as the letter itself indicated, the defendant was writing the letter in an attempt to persuade the council that his case was well founded. As I read the letter, it amounted not to an offer to negotiate, but to an assertion of the defendant’s rights, coupled with an intimation that he contemplated taking his solicitor’s advice unless the council replied in terms recognising his asserted rights. I cannot derive from the letter any indication, or at least any clear indication, of any willingness whatever to negotiate”*

10. *Standrin v Yenton Minster Homes Ltd* [1991] WL 838514, *The Times* July 22 1991 was similarly decided. The claimants’ house suffered major structural damage as a result of subsidence. They made a claim against their insurers which was settled in due course. In the meantime the claimants issued proceedings against the builders and the National House Building Council. Specific discovery was sought of correspondence between the claimants’ solicitors and the insurers and between the claimants’ solicitors and the loss adjusters. The claimants claimed, inter alia, without prejudice privilege, whether or not the documents were marked “without prejudice”. The relevant correspondence for our purposes was correspondence prior to the settlement of the insurance claim and before any claim to legal professional privilege could arise by reason of the insurers having taken over the conduct of the claim. Lloyd J considered the point at which negotiations start between the initial claim being put forward and the final settlement of that claim. He decided that:

*“[t]he principle to be derived from these authorities, if it can be called a principle, is that the opening shot in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take*



*something less in settlement, or...where a person offers to accept a sum in settlement of an as yet unquantified claim. But where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie it is not protected."*

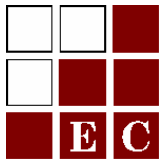
Lloyd J went on to hold that there was nothing in the early documents which could properly be called a negotiating document.

11. In *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 the House of Lords held that the without prejudice privilege did not apply to correspondence which was not marked "without prejudice", which treated the mortgage debt as an undisputed liability and which dealt only with whether and to what extent the debtor could meet that liability.

*"The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded...The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)"*

A detailed consideration of this case demonstrates the not inconsiderable difficulties in advising whether a communication is likely to be held to be covered by without prejudice privilege when the correspondence is not actually headed "without prejudice".

12. In *Stax Claimants v Bank of Nova Scotia Channel Islands Ltd* [2007] EWHC 1153 (Ch) the claimants had brought separate claims against the defendants. The defendants had brought Part 20 claims against third parties seeking a contribution. No claimant had brought a direct claim against the third parties. In the course of the litigation the claimants' lawyers had a meeting with lawyers representing some of the third parties. The purpose of the meeting was to discuss the strengths and weaknesses of potential claims, legal tactics and case management issues. The defendants sought disclosure of certain documents relating to the meeting. The claimants invited the court to extend the without prejudice privilege to cover a situation where those who are in dispute (with a common enemy) engage in frank discussions to attempt to progress the litigation so as ultimately to achieve a resolution of it. Warren J declined that invitation holding that the privilege *"is clearly directed at avoiding litigation by settling disputes"* and that to extend the privilege thus *"would not achieve any*



*objective which might be perceived as in the public interest. Rather it would simply allow litigants to conduct their cases more privately”.*<sup>3</sup>

13. In *Barnetson v Framlington Group Ltd [2007] EWCA Civ 502* the Court of Appeal held that the rule could be engaged in a dispute in which litigation had not begun. The court considered whether there must be an express or implied threat of litigation underlying the negotiations or some proximity in time to the litigation eventually begun. In answering that question the court considered the public policy interest behind the rule of encouraging parties to settle their disputes without resort to litigation or without continuing it until the needless and bitter end.

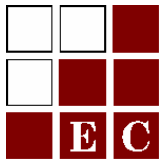
*“If the privilege were confined to settlement communications once litigation has been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their disputes with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation – hardly the encouragement to settle their disputes without resort to litigation that Oliver LJ had in mind in *Cutts v Head*...*

*On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases...do not provide any precise pointers...*

*...the claim to privilege cannot...turn on purely temporal considerations. The critical feature of proximity...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. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so they would avoid the need to go to court over the very same dispute ...the crucial*

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<sup>3</sup> He went on to hold that it was highly likely that the documents were either privileged or were not disclosable at all because they would not have any probative value and would not fall within standard disclosure.



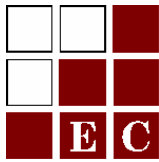
*consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree”.*

In this case the amount of money in issue and the manner and content of the negotiations meant that the parties were clearly conscious, at the time of the disputed exchanges, of the potential for litigation in the event of failure to agree. It followed that the without prejudice privilege attached to the exchanges.

14. Thus, it appears from the cases that in order for there to be a dispute falling within the rule litigation need not have commenced or be threatened, rather:
- (1) the parties must have contemplated (or might reasonably have contemplated) litigation if they could not agree, and
  - (2) there must actually be a dispute as to liability (rather than an attempt to avoid a dispute arising or an attempt to obtain time to pay).

**The second requirement: an intention that the negotiations will not be admitted without the consent of the parties**

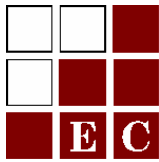
15. The requirements for claiming without prejudice privilege are as set out in paragraph 5 above. We all know that the heading, or absence of it, is not determinative and that what matters is the substance of the communication. However, it is easier to state that principle than to apply it. The question of whether a document which is not headed “without prejudice” should be excluded is a difficult one in practice.
16. According to the cases, the absence or presence of the magic words is not determinative. However, given that correspondence aimed at genuine compromise can be intended to be open, how will a court determine whether it should be admitted or not? The parties, or one party, may positively want the court to see the correspondence and intend that it should be open. The best course is obviously to make it clear when offers of settlement are intended to be open. If this is not done then in the event of a dispute there is no easy rule, it seems that the Court will have to consider whether the communication was intended to be open or not [see *Bradford & Bingley v Rashid (supra)*].



17. Conversely, the use of the “without prejudice” heading does not automatically attract the privilege. In *Bradford & Bingley* Lord Mance considered the situation where the magic words are used:

*“If they are used in the context of an attempt to compromise a dispute, then the “without prejudice” rule...applies...Even where there is a dispute, not every offer of compromise is necessarily intended to be without prejudice, and the express use of the phrase not only puts the matter beyond doubt in a situation where there is an offer to compromise an existing dispute but is also capable of throwing some light on the answer to the objective question whether the situation existed. But it is by no means conclusive. Neither a dispute nor a concession or offer to compromise can be conjured out of mere words “*

18. Thus there must be not only an offer to compromise an existing dispute, but also the required intention.
19. How then have the courts approached the question of intention?
20. In *Schering Corp v Cipla and Neolab Ltd [2004] EWHC 2587* Laddie J posed the question “*what on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient*”.
21. In *South Shropshire DC v Amos (supra)* Parker L.J. suggested that evidence from the writer of the letter would be relevant and admissible in relation to the issue of whether the letter was without prejudice.
22. However, it seems wrong in principle that the question should be approached in this way. Admitting subjective intention would lead to uncertainty and would not fit with the principles applied in relation to the construction of contracts. Although the without prejudice privilege is only partly based on an implied contract, the better view must be that the party receiving the communication should be able to determine whether the document is without prejudice without having to delve into the subjective intention of the writer. The question of whether the communication is without prejudice should therefore be determined objectively, applying the same principles as are applied in construing a contract. This approach was confirmed as correct by Crane J in *Pearson Education Ltd v Prentice Hall India Private Ltd [2005] EWHC 636*.



### **The ambit of the protection**

23. How much of the communications fall within the rule? If the requirements set out in paragraph 5 above are satisfied then the better view is probably that the privilege will extend to all communications which form part of the negotiation process (see *Unilever v Procter & Gamble* [2001] 1 All E.R. 783).
24. In that case it was said that the protection of admissions against interest is the most important practical effect of the rule:

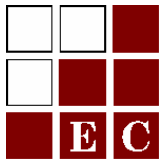
*“But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in Rush & Tomkins...: “to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.” Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders”.*

*“One party’s advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions”*

25. Where the privilege exists it covers not only the communication itself, but also all subsequent parts of the same correspondence on both sides whether or not they are expressed to be without prejudice. In order to change the basis of the communications, there must be a clear break in the chain of correspondence and the party wishing to change without prejudice negotiations to open ones must bring the change to the attention of the other party [see *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 4 All ER 942.]

### **When will the communications be admitted even though they are without prejudice?**

26. Unlike other forms of privilege, which may be waived by one party, waiver of without prejudice privilege requires the consent of both the parties.

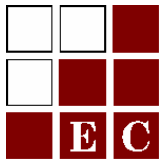


27. Some of the main circumstances in which without prejudice communications will be admitted in evidence were considered by Robert Walker LJ in *Unilever v Procter & Gamble* (*supra*) as follows:

- (1) When the issue is whether the without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. (The relevance of these communications has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute [see the judgment of Hoffman L.J. in *Muller v Linsley & Mortimer* [1996] PNLR 74 at 77]).
- (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence<sup>4</sup>.
- (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel.
- (4) Apart from any concluded contract or estoppel, 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". However, the Court of Appeal has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (1993) *Times*, 19 March, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.
- (5) Evidence of negotiations may be given in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, noted this exception but regarded it as limited to "the fact that such letters have been written and the dates at which they were written". However, occasionally fuller evidence is needed in order to give the court a fairer picture of the rights and wrongs of the delay.

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<sup>4</sup> Evidence to support a claim of rectification should also be admissible. However, in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] EWCA Civ 79 the Court of Appeal held that without prejudice discussions could not be adduced in evidence in support of arguments about construction even if they arguably established part of the background to or the factual matrix of the contractual agreement.

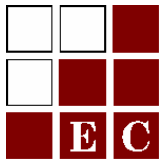


(6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffman LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made “without prejudice save as to costs” was clearly recognised by the Court of Appeal in *Cutts v Head*, and by the House of Lords in *Rush & Tompkins*, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which CPR Part 44 attaches to the conduct of the parties in deciding questions of costs). It was also said that there seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects either by extending or by limiting its reach. In *Cutts v Head* Fox LJ said: “...*what meaning is given to the words “without prejudice” is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after...*”. However, there must, in my view, be some doubt as to the parties’ ability to extend by agreement the reach of the principle so as to render documents which would not otherwise be without prejudice inadmissible or to take them outside the scope of standard disclosure.

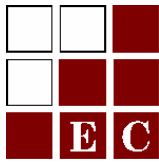
(8) In matrimonial cases where there is a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation.

28. An additional exception was formulated in *Pearson Education Ltd (supra)*. Crane J held that the duty of full and frank disclosure (arising for example on an application to serve outside the jurisdiction or for a freezing order) might require disclosure to the court of either the without prejudice document or some indication of its existence, if it was clear that without it the court might be misled. [See also *Linsen International Ltd v Humpuss Sea Transport PTE Ltd [2010] EWHC 3030 (QBD Comm.)*].



### Unambiguous impropriety

29. Although a detailed consideration of the circumstances in which without prejudice communications are admissible would require a paper or talk of its own, the “unambiguous impropriety” exception merits some further consideration.
30. The rule is that a party may be permitted to give evidence of without prejudice communications if the exclusion of the evidence would be a cloak for perjury, blackmail or other “unambiguous impropriety”. This exception should only apply in the clearest cases where the protection afforded by the without prejudice rule has been “*unequivocally abused*”. There will not be unambiguous impropriety merely because a party is putting forward an implausible or inconsistent case or facing an uphill struggle if the litigation continues.
31. A good starting point for a consideration of this issue is the decision of the Court of Appeal in *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630. In that case the claimant brought proceedings to recover a debt. The parties entered a deed of settlement in relation to the alleged indebtedness and a further supplemental deed. The defendant failed to fulfil a substantial part of his obligations under those deeds. The parties then entered into a third deed of settlement, expressed to be in full and final settlement of all claims and under which the defendant warranted that he had made full disclosure of his material assets in an earlier affidavit. The claimant discovered that the defendant owned property which he had not disclosed and commenced proceedings seeking rescission of the third deed of settlement. In an attempt to settle the proceedings a “without prejudice” meeting was arranged. At that meeting the defendant admitted to ownership of shares in a company. The claimant applied to re-amend its claim to add this and other non-disclosures on the ground that the matters revealed at the meeting fell within the “unambiguous impropriety” exception.
32. The judge at first instance allowed the application holding that the exception applied where a person unambiguously asserted the truth of a particular set of facts and in subsequent proceedings sought to deny it, and that the exclusion of such evidence by virtue of the without prejudice rule would act as a cloak for perjury.
33. The Court of Appeal allowed the appeal. An admission in without prejudice negotiations was not to be treated as tantamount to an impropriety unless the privilege afforded to such



discussions was itself abused. The public interest in the without prejudice rule was very great, and was not to be sacrificed save in truly exceptional and needy circumstances. Mere inconsistency between an admission and a pleaded case or stated position, with the mere possibility that such a case or position, if persisted in, might lead to perjury, did not lose the admitting party the protection of the privilege. It was the fact that the privilege itself was abused that did so. It was not an abuse of privilege to tell the truth, even where the truth was contrary to one's case. Accordingly, the instant case did not fall within the unambiguous impropriety exception.

34. It had also been argued that even if the mere possibility of future perjury does not destroy the privilege, the admission which demonstrates that perjury has been committed in the past, by reference to an existing affidavit, should be different. While accepting that *“the courts should not pass by such proof of perjury with indifference”*, it was held that the courts should not adopt such a position:

*“If they did, the very serious and criminal charge of perjury would fall to be debated, without the protection which should be available to the accused party, on an interlocutory outing ...or even at trial, with the potential of derailing the trial by exposure of without prejudice material to the trial judge”.*

ZIA BHALOO QC

ENTERPRISE CHAMBERS

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## **ADDENDUM**

After this paper was written but before the talk was given, the Supreme Court overturned the decision of the Court of Appeal in the *Oceanbulk Shipping* case referred to in footnote 4 above – see [2010] 3 W.L.R 1424