WITHOUT PREJUDICE CORRESPONDENCE IN FAMILY LAW MATTERS

By Minal Vohra SC

As family lawyers we are always communicating on behalf of our clients with the other side. We rightly pride ourselves on being able to settle matters and this generally requires the ability to communicate freely and openly in correspondence and discussions. So is marking correspondence at the top "without prejudice" enough? And if you forget to write "without prejudice" is this fatal? I hope explore these issues with you in this next hour.

What does "without prejudice" mean?

Let's start at the words themselves as it can assist in understanding the scope of the protections afforded when they are used. Matters put in without prejudice correspondence cannot if the protection is properly invoked be used to the prejudice of your client's case or to the prejudice of any legal right.

This stems from the ancient privilege afforded to genuine attempts to negotiate a dispute, the negotiation privilege. This was a right at common law that is now embodied in sec 131 of the Cth Evidence Act (EA). Sec 131 states that evidence is not to be adduced of a communication that is made in connection with an attempt to negotiate a settlement, including communications made with third parties. The section applies only to civil matters, and not in relation to negotiations concerning criminal charges.

Sec 131 states:

1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

A number of exceptions apply to this general statement and I will consider these further during this webinar. The exceptions are in sec131 (2) of the EA and were developed along similar lines to those established under the common law.

The primary rationale given for the protection was the public interest in encouraging settlement of disputes. But look carefully at the words of sec 131 as the standard that must be met to make correspondence truly considered to be without prejudice. It is communication that is made with an attempt to negotiate a settlement of a dispute. Case law establishes that the privilege extends to correspondence or communication made before any proceedings have issued. This makes sense, as the public interest in encouraging parties to freely negotiate must extend to attempts to avoid the issuing of proceedings in the first place. "Dispute" is defined in sec 131 (5) of the EA to mean:

> *(5) In this section:*
> *(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding;*

The EA is therefore concerned with matters which may be brought before Courts.

I'll explore now what all this means and the exceptions that may apply but as should already be obvious, marking correspondence "without prejudice" is a start, but not the end of the matter.

Must be in connection to the settlement of the dispute

So to be "without prejudice", that is to not be used in any way prejudicial to your case once in Court, correspondence whether marked "without prejudice" or not, has to be in connection to the settlement of a dispute.

In *GPI Leisure Corporation v Yuill* (1997) 42 NSWLR 225 the Court considered whether correspondence labelled “without prejudice” truly was an attempt to settle a dispute, or made in connection with such an attempt. Young J had before him an exhibit that was marked to be “without prejudice”. The dispute in the Court was whether one of the parties was eligible for indemnities and whether they were able apply for judgments of monetary sums. The defences were that certain conditions precedent had not been met. The exhibit stated by way of correspondence marked to be “without prejudice” that the party was willing to put in place a workable mechanism for the operation of claims made under the indemnity, and some other matters the party would be willing to consider for approval. Is this then an offer made in connection to the settlement of a dispute was the question Young J had to consider. He considers the narrow interpretation of the words *in connection to the settlement of a dispute*, that is, “directly connected” to such settlement and then also considers the possible wider interpretation of the words, that is, “in any way connected” to the settlement of a dispute. He opts for the narrow interpretation as better conforming to the sensible interpretation of the legislation and its purpose. He held:

When faced with such a choice, a court reaches for the interpretation which produces a sensible operation of the statute conformable to the intention of the legislature and the purpose of the enactment; see ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*** *[1981] HCA 26; (1981) 147 CLR 297, 321. This rule was applied with respect to a kindred expression "relating to" in* ***R v Sheffield Crown Court, Ex parte Brownlow*** *[1980] 1 QB 530 (see particularly per Lord Denning at 539, though he dissented in the result).*
The scope of the "without prejudice" privilege under the common law was not consistently stated by the courts, some expressing it relatively widely and others narrowly; see ***McNicol, "Law of Privilege"*** *(LBC Sydney 1992) pp 435 et seq. In* ***Field v Commissioner for Railways (NSW)*** *[1957] HCA 92; (1957) 99 CLR 285, 292, the High Court said of the scope of the privilege, "It depends upon what formed part of the negotiations for the settlement of the action and what was reasonably incidental thereto". There needed to be a*

"proper connexion with any purpose connected with the settlement of the action" (p 293). In ***Trade Practices Commission v Arnotts Ltd*** *[1989] FCA 283; (1989) 88 ALR 69, 71-73, Beaumont, J reviewed and contrasted cases where the parties discussed a possible compromise on the one hand (privileged) and where they had discussions merely asserting their respective positions (not privileged). An example of the latter is* ***Buckingham County Council v Moran*** *[1990] Ch 623, 634-5.*
These considerations incline me to the view that the "connection" referred to in s 131 is a direct connection.

The use of the words, ”without prejudice” on the top of the letter was not conclusive. There was no offer contained in the letter, in that it did not suggest anyway to compromise the underlying dispute. If a letter headed “without prejudice” does not contain an offer it could though still be privileged according to Young J, if it can be seen as an “opening shot” in a negotiation for compromise. The key to determining the issue is he says a question of nexus. In this case the letter although labelled “without prejudice” failed to establish a nexus between its contents and an attempt to negotiate a dispute. He states:

> *There may be many communications between parties, which one can read between the lines as saying that certain things may happen, and if those certain things happen, the dispute might be settled. I do not consider that generally such a communication would fall within the privilege in s 131(1)(a).*
> *The present letter seems to me merely to be a communication which indicates that if the litigation can be dealt with in some practical way, the writer is open to suggestions. Alternatively it indicates that if a claim arises in the future, a mechanism can be put in place to deal with it. The letter does not suggest a method of compromising the underlying dispute. I do not consider that it is sufficiently close to "an attempt to negotiate a settlement" of the dispute to come within privilege. Accordingly I will admit WEJ1.*

So firstly, whether labelled “without prejudice” or not, to fall within the privilege, there must be a sufficient nexus between the correspondence and an attempt to negotiate a dispute. If there is such a connection and the correspondence is an attempt at negotiation then it may still be used in evidence if it falls within an exception to the privilege under sec 131 (2) of the EA.

When do “without prejudice” settlement negotiations become admissible?

Sec 131 (2) sets out the exceptions to the negotiation privilege as follows:

(2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or document included a statement to the effect that it was not to be treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to

mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or

(h) the communication or document is relevant to determining liability for costs; or

(i) making the communication, or preparing the document, affects a right of a person; or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

I'll consider some cases that may make the issues and exceptions clearer.

Sec 131 (2)(g) - the Court would be otherwise misled

Cottard & Crichton [2016] FamCA 819 is an interesting example of the attempt by the Wife to introduce without prejudice correspondence into evidence. It is a decision of Watts J reserved from a matter he heard in the Duty List. In that matter the defacto Wife was seeking maintenance and a property adjustment after a short relationship of some 4 years. The defacto Husband argued the relationship was even shorter than that, he had bought in all the assets and made ample provision for the Wife during the relationship and she should receive no maintenance having retained her capacity to work and no property adjustment. It was conceded by the Wife's Counsel that the communications he sought to introduce into evidence did constitute genuine without prejudice communications and fell within sec 131 (1) of the Evidence Act. However he sought to rely upon the exception in sec 131 (2)(g) that without adducing the evidence the Court would be misled by the evidence the Husband was otherwise relying upon. In the correspondence the Husband had made number of offers to settle the property and spousal maintenance applications. It was argued that without knowing of those offers and having

them in evidence the Court would be misled as to what the Husband now said in evidence as to the contributions of the Wife and her entitlement to spousal maintenance or a property adjustment.

Consideration was again given to whether the text of the EA should be interpreted in a broad or narrow sense. The Wife's Counsel argued it should be broadly construed, that is any evidence in privileged communications which qualifies or contradicts the evidence otherwise given, ought be admissible. The example used is if in without prejudice material it is conceded money from a parent to a spouse is a gift, but in court it is alleged to be a loan, then the without prejudice correspondence is admissible under the exception as to do otherwise would likely mislead the Court.

The Husband's Senior Counsel argued a narrow interpretation of the exception ought be adopted. Under the narrow interpretation, the without prejudice letter stating the advance was a gift in the above example, would not be admissible as it merely contradicts evidence before the Court, not necessarily causing the Court to be misled. Watts J considers a number of cases and notes that the argument has not really been resolved at appellate level. Ultimately he determines he ought not read down the plain language of the EA and if Parliament had intended to narrowly construe the exception then different language may have been used. Watts J states:

> 53. *However, had Parliament wished to confine the exception in the narrow terms of those cases, the subsection could have been written in narrower language. The language used in the subsection, on its face, allows for the court to address a mischief which in my view the statute intended to remedy, namely a circumstance where a party could hide behind privileged communications to avoid being tested about the fact they said something was white in a privileged communication in circumstances where now in sworn evidence they say it was black.*

So it may seem given this interpretation is adopted by Watts J that the Wife could adduce evidence of the without prejudice settlement offers. If that were

so, then making any sort of without prejudice offer would be dangerous if a different case was then run before the Court. Watts J still concludes the Wife cannot rely on the without prejudice correspondence as she seeks to do. This is because he states:

> 57. *Having determined to adopt a broader approach, in the circumstances of this case, the wife's tender of without prejudice communication must still fail. The fact that a litigant makes an offer (generous or otherwise) to end litigation may be motivated by a number of considerations, particularly in this jurisdiction. For evidence to be admissible it has to be relevant (s 56 of the Evidence Act). Relevant evidence is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of a probability of the existence of a fact in issue in the proceedings (s 55(1) of the Evidence Act). Relevance can go to issues of credit (s 55(2)). The question however is can evidence that somebody makes a particular offer to end litigation rationally affect (directly or indirectly) the assessment of the probability of evidence a party gives about a factual matter relating to contributions under s 90SM(4) (including s 90SF(3) considerations). The wife has not established any rational connection in this case.*
> 58. *The evidence objected to does not attract the provisions of s 131(2)(g) of the Evidence Act and accordingly attracts the confidentiality accorded by s 131(1). For that reason I upheld the objections.*

In *Warren & Horodecki* [2016] FamCA 875, correspondence that was labelled without prejudice was admitted into evidence under the exception in sec 131 (2)(g). In that case the Wife sought to litigate the parties' property matter even though the parties' only property was in Poland and they both still lived in Poland. The Wife was Australian by birth but had not lived here for a number of years. Due to a Financial Agreement she had signed in Poland (and in Polish which was not a language she understood although it had been interpreted to her) she had probably little entitlement to any property orders over there. The case was a preliminary determination as to forum with the

Husband arguing successfully that Australia was a clearly inappropriate forum to determine the dispute. Sec 131 (2) (k) was also argued by the husband, that is that the correspondence was prepared in furtherance of a deliberate misuse of power.

In the correspondence that was marked ”without prejudice save as to costs” the Wife’s lawyer wrote that if the Husband swore a Financial Statement and provided discovery of his Polish assets, and the parties then attended a mediation the court proceedings could be adjourned sine die and later discontinued. They wrote further that one of the primary reasons the Wife had issued proceedings in Australia was to force proper disclosure which the Husband had thus far resisted. The Wife in her material had complained about her lack of knowledge of the parties’ financial circumstances and she had sought disclosure in her Initiating Application. There was also evidence from the Wife’s Polish lawyer that the Court there would not compel full and frank disclosure as part of its proceedings. The Wife had however also deposed that she did not want to litigate in Poland for other reasons such as language issues, delay and of course the Financial Agreement.

The letter was introduced into evidence, although in the end little turned on it in the ultimate decision as to forum. Stevenson J held:

37. *In my view the Mills Oakley letter of 29 July 2016 (“the letter”) should be admitted into evidence pursuant to section 131(2)(g) of the Evidence Act. Both of the affidavits sworn by the wife give the impression that she wishes to litigate her issues with the husband in Australia and is opposed to engagement with the Polish legal system. As noted, a large amount of the material which the wife offered in support of her opposition to engaging in the Polish legal process was struck out from her affidavits. Nonetheless, the clear import of the wife's affidavits was that she objects to engagement with the Polish legal system.*
38. *As noted, the letter gives the opposite impression and indicates a willingness and intention on the part of the wife to resolve issues*

arising from the breakdown of the marriage in Poland. The letter stated specifically that the wife commenced the Australian proceedings primarily to obtain full and frank financial disclosure from the husband. The letter stated clearly that the wife would discontinue the Australian proceedings upon the husband's provision to her of a sworn Financial Statement.

39. *In these circumstances, I find that the wife's affidavit evidence as to her opposition to engaging with the Polish legal system would be misleading unless the letter is admitted into evidence. I will admit the letter and the reply into evidence pursuant to section 131(2)(g).*
40. *I am not satisfied that the wife's commencement of the Australian proceedings is "a deliberate abuse of power" for the purposes of section 131(2)(k) of the Evidence Act. The wife had a legal right to institute proceedings in Australia for relief pursuant to Part VIII of the Family Law Act 1975 (Cth). The Australian proceedings clearly are a "matrimonial cause" within the definition contained in section 4(ca) of the Family Law Act, being "with respect to the property of the parties to the marriage" and "arising out of the marital relationship". Section 39(4) enables "an Australian citizen" to commence proceedings pursuant to the Family Law Act in relation to "a matrimonial cause". The wife is an Australian citizen and, accordingly, had a right to initiate proceedings in this country.*
41. *As noted, it seems that the wife's principal motivation in commencing the Australian proceedings was to procure full and frank financial disclosure from the husband. I am not persuaded that this motivation takes the wife's commencement of the Australian proceedings into the realm of "a deliberate abuse of power" for the purposes of section 131(2)(k) of the Evidence Act. As noted, further, I am satisfied that the wife holds genuine and validly-based concerns that the husband will decline to make full and frank financial disclosure unless and until he is compelled to do so. In any event, the letter will be admitted into evidence pursuant to section 131(2)(g). The question whether Australia is an appropriate forum is a separate issue.*

Sec 131(2)(f) - Trying to enforce an agreement when the making of the agreement is in issue

In *Phillips & Phillips* [2012] FamCAfam 707, Scarlett FM was asked by the Wife to accept evidence in her affidavit as to discussions she and the Husband had directly with one another and in which they reached agreement as to their property matter. The Husband objected under sec 131 (1) of the EA as these were he argued privileged negotiations. The Wife however sought to rely upon the exception in sec 131 (2) (f) that her application was to in effect enforce an agreement they had reached and evidence of the making of the agreement was in issue. She could then lead evidence she argued, to show a concluded agreement had been reached that she should be able to enforce. After the conversation the parties' respective solicitors had confirmed the agreement had been reached in writing and then commenced preparing an Application for Consent Orders and a Binding Child Support Agreement. The Husband then changed his mind and the Wife issued proceedings. The letter confirming the agreement reached sent by the Husband's then solicitors was not marked "without prejudice". The Wife's solicitors wrote back to accept the offer and then documents were prepared. The Husband deposed that the earlier agreement was no longer acceptable to him because of parenting issues that had since arisen and because he had since paid money to the Wife that she was no longer admitting had occurred. The Wife relied upon Rule 10.01 of the Family Law Rules which states a party may make accept an offer to settle by notice in writing at any time before it is withdrawn and before the Court has disposed of the matter and if it is accepted then the parties must lodge a draft consent order. The Husband made a number of submissions in response including that the offer had been made before any proceedings had commenced and therefore the Rules did not apply. Even if they did, under Rule 10.18 an affidavit supporting consent orders must be filed within 90 days or the agreement expires and none had been.

Scarlett FM states that sec 131 (1) applies to settlement negotiations even if proceedings have not been commenced, as was the case here. He held the material the Wife sought to rely upon was admissible under both the

exception in sec 131 (2)(f) as evidence of an agreement when the existence of the agreement was in dispute, and under sec 131 (2)(c) – that is, the substance of the evidence had already been disclosed or partly disclosed by the consent of the parties and it was necessary to adduce the evidence to enable there to be a full understanding of it. The preparation of the Consent Orders and the procedural steps both parties had taken supported this finding. Despite this, given the Husband clearly no longer consented to the original agreement and given Rule 10.18 had not been complied with and the offer and acceptance under the Rules had elapsed, there was no longer any agreement the Court could enforce. The Wife instead had to proceed with a sec 79 application.

Parenting proceedings and the consideration of best interests

Parenting proceedings also involve best interests considerations which may make settlement offers admissible. The case which establishes this propositions but which predates the Cth EA, is *Hutchings v Clarke* (1993) FLC 92-373. Although it pre dates the EA, the conclusion would likely be the same applying its provisions. It shows that the balance between negotiation privilege and the consideration of the best interests of the child is also relevant and best interests overrides privilege.

The without prejudice communication was a discussion between the Mother and the Father in which the trial judge found he did state if the Mother signed a piece of paper giving him custody, he would send the child back to her. He just wanted her not to be able make a child support claim against him. It was held that ordinarily such a conversation would be privileged as part of the attempts to negotiate or settle the dispute. However, the Full Court held, in agreeing with the trial Judge:

The point raised is a novel one. There is no authority which illustrates the conflict between the privilege arising out of negotiations for a settlement of a custody dispute and the requirement that the welfare of the child is the paramount consideration. His Honour is, in our view, right in concluding that

the requirement of s. 64(1)(a) is not confined to the actual determination of custody but extends to issues of admissibility of evidence. The principle that concern for the welfare and interest of the child may modify the rules of evidence, such as the rule against hearsay, is well established: see the decision of the Full Court in S and P (1990) FLC ¶92-159 at p 78,108; 14 Fam LR 251 at 260, 261.

It is also important to remember as the High Court said in M v. M (1988) 166 CLR 69 at 76: —

``Proceedings for custody or access are not disputes inter parties in the ordinary sense of that expression: Reynolds v. Reynolds [(1973) 47 ALJR 499; 1 ALR 318]; McKee v. McKee [[1951] AC 352 at pp 364-365]. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child."

It is this point which is most relevant to the issue before us. The parents are not the only persons whose interests are to be considered. If that were the case, as in property negotiations such as in Steel and Rodgers, the court should not concern itself with offers made without prejudice in the course of negotiations. If the welfare of the child is the subject of the enquiry, there comes a point when it must override any privilege which either parent may possess, as was the case in The Queen v. Bell; Ex parte Lees (1980) 146 CLR 141.

So overriding any without prejudice considerations in parenting proceedings may be best interest considerations. The Full Court goes onto say:

As counsel submitted for the mother this is a case of competing public interests. The public[79876] interest in encouraging parties to settle their differences is an important one. It is encouraged in provisions such as s. 62(1) of the Act and the need for confidentiality of those discussions is recognised in ss.18 and 19 of the Act. Hence, the court should be reluctant to override the privilege of parties engaged in such discussions, but as stated earlier, protection of the welfare of the child is another public interest recognised in s.

43(c) of the Act and declared to be the paramount consideration in s. 64(1)(a). This means that the court must give priority to considerations of the welfare of the child in a situation where non-disclosure of the relevant evidence ``might have the result that the child remained in conditions detrimental to his or her welfare" in the words of Gibbs J cited earlier. This balancing of interests can only be performed on a case by case basis and in most cases where negotiations cover details of custody and access issues such as times for access, mode of transportation and the like, the discussion should remain privileged.

However, in a case such as the present where the statement which his Honour found had been made by the father, indicated that he was not genuinely seeking custody of the child but only a formal custodial position which he, wrongly, thought to be to his financial advantage, a refusal to admit that evidence would have a direct adverse affect on the welfare of the child. In our view his Honour did not err in admitting that evidence in the circumstances of this case.

It also follows that his Honour, in our view, was correct in concluding on the whole of the evidence before him that the welfare of the child would be better served by the child being in the custody of his mother and in the company of his siblings notwithstanding the long period during which the father had been the principal carer of the child following separation. The finding by his Honour that the father placed financial considerations above those affecting the welfare of the child was, in our view, clearly justified not only by reference to discussions earlier referred to, but also by reference to his persistence in seeking shiftwork despite the limits this imposed on his contact with the child and his failure to expend the sum of between $500-$750 in building an extension to his parent's granny flat so the child could have separate sleeping quarters there.

Subsequent to the EA is a decision of Ryan FM in *D & W* [2002] FMCAfam 432. Ryan FM considers the EA provisions but makes her decision as to admissibility also considering her task when determining the child's best interests. In this case, the Mother sought a summary dismissal of the Father's application for contact with the child. The Mother's material contained

settlement correspondence the Father claimed was privileged under sec 131 (1) of the EA and even if admissible under one of the exceptions in sec 131 (2) of the EA ought nevertheless be excluded by virtue of sec 135 of the EA as evidence which was unfairly prejudicial to him. The Mother's evidence was the Father had said in discussions with her, that her partner ought to adopt the child, as he did not want to pay maintenance for a child he did not see. His lawyers then put in writing correspondence that was clearly intended to be "without prejudice" although not marked as such, in which two potential options were put. The first was that the Father would resume a relationship with the child and the Mother co-operate to allow this to occur and the second was that he cease the relationship and cease all financial obligations to the child. The Mother argued the current proceedings were being used by the Father to leverage the adoption by her current partner, and were therefore an abuse of the Court's process. Ryan FM cites authority that the use of a tactical advantage is not an abuse of the Court's process *simpliciter*. There needs to be something more than this. She found of the two options put in the correspondence that:

40. The abuse of process that is alleged highlights nothing other than the agonising decisions that some parents make concerning their children. It is the court's experience that parents, in the situation that both of these parents are in, can take into account matters that are apparently irrelevant in the sense of the manner in which the court may make its decision pursuant to s.68F(2) and s.65E of the Family Law Act 1975, but which are nonetheless, matters which are important to an individual. It is the court's common experience that parties find court processes daunting and can find the process of separation and re-partnering difficult. That a parent has considered at an earlier point in time abandoning litigation and relinquishing a relationship with their child could not, in a court concerned about children and delivering justice to families, bind the court later in time if the parent decides to proceed.

This was a preliminary hearing and the Father's application was that the evidence as to the discussions he had with the Mother be removed from the

Mother's evidence lest it taint the view of any other judicial officer hearing the matter. Ryan FM found the exception under sec 131 (2)(g) applied and evidence of the conversations was an exception to the negotiation privilege. It was relevant to the attitudes towards parenting responsibilities displayed by the parties and the Court may be misled without it. She then had to consider whether under sec 135 of the EA the material should be excluded as unfairly prejudicial evidence against the Father's case. She did allow the material to remain and states:

48. Having made that decision [that sec 131 (2)(g) applies] I must then consider s.135 of the Commonwealth Evidence Act 1995. In essence, the issue is whether the material is unfairly prejudicial to the father. This general discretion is one that is routinely used in jury trials. It is less frequently used in judge alone trials. That is because the court's obligation when a judge sits alone is to rule on evidence and when material is ruled inadmissible it must be disregarded. That is fundamental to the operation of most civil courts.
49. This material could not be said to be so unfairly prejudicial to the father that its probative value is substantially outweighed by that prejudice. This material is potentially influential, as I have already indicated, in assisting the court to understand the length of time during which this child has not had contact with his father. As I have already indicated, the fact that at an earlier point in time a parent took the decision to relinquish a relationship with their child does not override the other factors that are relevant to s.68F(2). Parents have terrible and difficult decisions to make at different times in their lives as parents. Their circumstances change so too does their capacity to involve themselves in their child's life.
50. I am not satisfied that this material should be excluded by virtue of s.135. It follows from that, that even if I were satisfied that the court could amend it's record as proposed by the respondent, I am not satisfied that I should do so. The application made by the mother [for summary dismissal] is also dismissed.

Both Ryan FM and Watts J make the point that the consideration of whether material is privileged or not does not disqualify the judge from hearing the matter further. It is akin to a *voir dire* on the evidence.

Family Law Act and Rules

Relevant also to this issue is sec 117 (2) of the FLA which states:

(2) If:
(a) a party to proceedings to which this section applies makes an offer to the other party to the proceedings to settle the proceedings; and
(b) the offer is made in accordance with any applicable Rules of Court;
the fact that the offer has been made, or the terms of the offer, must not be disclosed to the court in which the proceedings are being heard except for the purposes of the consideration by the court of whether it should make an order as to costs under subsection 117(2) and the terms of any such order.

The relevant Rules are R 10.01 and 10.02 of the FLR which state:

Rule 10.01
How to make an offer
(1) A party may make an offer to another party to settle all or part of a case by serving on the other party an offer to settle at any time before the court makes an order disposing of the case.
Note: See also paragraph 117(2A)(f) and section 117C of the Act in relation to offers to settle.
...
(3) An offer to settle:
(a) must be in writing; and
(b) must not be filed.
...
Rule 10.02
Open and 'without prejudice' offer

*(1) An offer to settle is made without prejudice (a **without prejudice offer**) unless the offer states that it is an open offer.*
(2) A party must not mention the fact that a without prejudice offer has been made, or the terms of the offer:
(a) in any document filed; or
(b) at a hearing or trial.
...

In *Cottard & Crichton* referred to before, Watts J was not referred to the FLA or the FLR by Counsel before him. However he referred to both and determined that the Husband's offers to settle were made on a without prejudice basis and in conformity with the Rules and this was another reason to exclude them from evidence.

Conclusion

So as can be seen from the discussion, writing "without prejudice" on the top of a letter can be helpful, but it is not determinative of much. The contents of the letter, the context of the litigation, later evidence and developments in the case do expose all correspondence to the danger of being part of the evidence. It is best to make offers to settle therefore in separate letters and without allegations of facts or too many reasons as to why an offer is being put. It would likely be also prudent to say an offer was being made for the purpose of compromising the proceeding without further delay, uncertainty and cost. This gives a pragmatic and explicable basis to any offer made that potentially conflicts with a later position taken in Court, such as in *Cottard and Crichton*. Following Rule 10.01 and 10.02 is also advisable.