instant cases, albeit that the Minister had not appreciated when making the orders (because *AF (No. 3)* had not been decided) how extensive the disclosure requirement would be – it should be unlawful "for the Secretary of State to begin to move towards the making of a control order".

The point remains, however, that circumstances may arise in which an order imposed at stage *(i)* may be legally effective unless and until it is revoked (*e.g.* due to inadequate disclosure) at stage *(ii)*. For example, the Home Secretary may impose the order at stage *(i)* intending subsequently to disclose the gist of the allegations; a later change of heart resulting in non-disclosure at stage *(ii)* would not engage any implied stage *(i)* prohibition upon imposing orders whilst intending not to disclose. In such circumstances, the administrative stage of the process would not be infected by any relevant illegality: the order would, as Mitting J. put it, be "lawful at inception" but would become unsustainable upon a stage *(ii)* refusal to disclose. This analysis does not call into question the general principle that unlawful administrative acts are void: it merely underlines the fact that Parliament may prescribe a decision-making structure in which certain legal obligations (such as the requirement to disclose the gist of allegations to controlees) crystallise only after the commission of the initial act, thereby preventing the breach of such obligations from depriving the relevant act of *ab initio* validity.

MARK ELLIOTT

NEGOTIATING THE BOUNDARIES OF ADMISSIBILITY

IN *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 (noted [2009] C.L.J. 510), the House of Lords affirmed the rule that pre-contractual negotiations are not to be included in the factual matrix relevant to interpreting a contract. However, this exclusionary rule is not absolute: for example, evidence of negotiations may be used to establish that a fact was, objectively, known to both parties, and this fact may be included in the matrix. But what if the pre-contractual negotiations were conducted "without prejudice"? Can such negotiations be used in order to establish relevant background facts which would assist the interpretative exercise? The Supreme Court has answered this question in the affirmative: *Oceanbulk Shipping & Trading SA* v. *TMT Asia Ltd* [2010] UKSC 44, [2010] 3 W.L.R. 1424.

Oceanbulk had entered into a series of forward freight agreements with TMT, under which the parties were essentially betting on the

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fluctuating daily rate of time charter hire for capsize bulk carriers. TMT accrued substantial liability under these contracts, and failed to pay Oceanbulk an instalment when due. This triggered a liquidated damages clause in the agreement. The parties then entered into "without prejudice" negotiations to resolve the matter, and ultimately reached a written settlement agreement. But the parties later disputed the correct interpretation of that contract. The preliminary question for the courts was whether TMT could rely upon the negotiations which led to the settlement in order to support its interpretation of that agreement.

Negotiations conducted "without prejudice" are generally inadmissible for reasons of public policy: settlement of disputes without recourse to the courts is to be encouraged, and parties are more likely to speak frankly, and therefore reach agreement, if nothing said in the course of negotiations can later be relied upon in court. Lord Clarke, with whom the other Justices agreed, recognised the importance of this principle, and thought that its boundaries should not lightly be eroded. However, he emphasised that "without prejudice" negotiations are admissible in order to establish whether a compromise agreement has been concluded, and considered that "no sensible line" can be drawn between this and admitting such evidence to establish the content of such an agreement (at [30]). He noted that "without prejudice" negotiations may be used in support of a claim for rectification, and that it should therefore follow that the same evidence might be admissible for the purpose of interpretation.

The conclusion that "without prejudice" negotiations can be used when interpreting the contract appears sensible. Indeed, Ward L.J., dissenting in the Court of Appeal, thought that any other conclusion would be "illogical" ([2010] EWCA Civ 79, [2010] 1 W.L.R. 1803, at [37]). The result does not represent a great inroad into the general principle that "without prejudice" negotiations are inadmissible: since parties already know that their negotiations may be used to prove the existence of an agreement, or that the agreement should be rectified, they are unlikely to be more reserved simply because their negotiations might be used to resolve matters of interpretation. Lord Clarke even suggested that the decision in *Oceanbulk* might encourage settlement, rather than the reverse, since parties may be reassured by the fact that previous communications can be relied upon to help the court reach an accurate interpretation of the agreement.

However, the practical impact of *Oceanbulk* is uncertain. This is because pre-contractual negotiations, whether conducted "without prejudice" or not, are of limited utility in the interpretative process. Oceanbulk did not argue, at this interlocutory stage, that the

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negotiations did not form part of the admissible factual matrix, so the Supreme Court did not have to decide whether the pre-contractual negotiations would actually help TMT. At first instance, Andrew Smith J. thought that such evidence might be "crucial", but Longmore L.J. in the Court of Appeal had doubts on this point. The main difficulty lies in deciding whether evidence of pre-contractual negotiations is being adduced to prove a fact which is objectively known to the parties, or to establish what the contract means. Only the former is admissible as part of the relevant background used in the interpretative exercise. Lord Clarke acknowledged that it may not be easy to distinguish between the two, a point which might well continue to vex the courts. For example, Flaux J. has recently observed that the dividing line between admissibility and inadmissibility regarding pre-contractual negotiations is "so fine it almost vanishes" (*Excelsior Group Productions Ltd* v. *Yorkshire Television Ltd* [2009] EWHC 1751 (Comm) at [25]).

Of course, problems surrounding the boundary between the admissible and inadmissible would simply disappear were pre-contractual negotiations allowed to assist the court regarding all matters of interpretation. In *Oceanbulk*, Lord Phillips, in a short judgment, emphasised that evidence of facts within the parties' common knowledge is admissible for questions of interpretation, but the general principle remains that pre-contractual negotiations may not be included in the factual matrix used for interpretation. This limitation of the permissible factual matrix is somewhat artificial, and it may be that judges will seek to circumvent it by finding that the negotiations establish an objectively known fact which is part of the admissible background, applying the approach of *Oceanbulk*. However, this might undermine the exclusionary rule which received the support of the House of Lords in *Chartbrook*.

It might therefore be better for the courts simply not to have recourse to pre-contractual negotiations at all when considering the correct interpretation of a commercial contract. This might make the court's task easier, and help to avoid a deluge of material being introduced to support a particular interpretation. This would not render pre-contractual negotiations irrelevant: they may still be necessary to support a claim for rectification. Admittedly, the relationship between interpretation and rectification is growing ever closer, as Lord Clarke recognised in *Oceanbulk*, citing Sir Richard Buxton's strong critique of the functional overlap between the two doctrines at [2010] C.L.J. 253. If pre-contractual negotiations are to be increasingly used as regards interpretation, rectification may become virtually redundant. Conversely, restricting the use of such evidence in the interpretative exercise would lead parties to rely upon rectification. The relationship

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between interpretation and rectification is an important topic which deserves further clarification from the courts.

PAUL S. DAVIES

STACKING THE ODDS AGAINST VARIABLE EQUITABLE INTERESTS IN THE FAMILY HOME

Ms Jones and Mr Kernott were an unmarried couple whose purchase of a house in 1985 generated a dispute that has (thus far) reached the Court of Appeal. The parties acquired the property in joint names, apparently unaware of the legal consequences of doing so. Everybody agreed that the parties held the property beneficially in equal shares when they separated in 1993. That consensus is unsurprising given *Stack* v. *Dowden* [2007] UKHL 17, [2007] 2 A.C. 432, and its invocation of a presumption that equity follows the law where there is no express declaration of trust and a common intention constructive trust is asserted in a domestic context. The dispute in *Jones* v. *Kernott* was generated by Ms Jones's continued occupation of the property (with the couple's two children) after separation and her assumption of sole responsibility for the mortgage and other outgoings during that period. Only in 2006 did Mr Kernott formally seek payment of his half share. By the time he purported to sever the joint tenancy in 2008, Ms Jones had already instituted proceedings asserting the existence of an "ambulatory" constructive trust by virtue of an unarticulated agreement that the property was no longer held in equal shares by the date of the hearing, such that she now owned the entire beneficial interest.

There is ambiguity as regards the means by which a litigant can legitimately rebut the *Stack* presumption. One aspect of that question (confused by the majority's indiscriminate terminological usage in *Stack*) is whether a court can impute a common intention to the parties (rather than simply infer that such an intention existed). This would involve attributing to the parties an intention that they may not actually have held.

In the County Court, Judge Dedman decided that the property should be divided as to 90% for Ms Jones and 10% for Mr Kernott. While examining the whole course of dealings between the parties in relation to the property in order to establish their common intention regarding its ownership, purporting to apply both *Oxley* v. *Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 and *Stack*, the judge was influenced by the fact that Ms Jones had received no contribution from Mr Kernott towards the mortgage and little towards the children's upbringing for 14 years. Indeed, until 2006, he concluded, Mr Kernott

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