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Case No: A3/2021/1052

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT
HHJ Hacon sitting as a Judge of the High Court
[2021] EWHC 1614 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE NUGEE

Between :

AUTOSTORE TECHNOLOGY AS
(a company incorporated under the laws of Norway)

Claimant and
Respondent

- and -

#

(1) OCADO GROUP PLC
(2) OCADO RETAIL LTD
(3) OCADO SOLUTIONS LTD
(4) OCADO INNOVATION LTD
(5) OCADO OPERATING LTD
(6) THARSUS GROUP LTD

Defendants and
Appellants

Mr Iain Purvis QC, Mr Alan Maclean QC and Mr Thomas Plewman QC (instructed by Powell Gilbert LLP) for the Appellants

Mr Vernon Flynn QC and Ms Kathryn Pickard (instructed by Kirkland & Ellis International LLP) for the Respondent

Hearing date: 1 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on
7 July 2021

Lord Justice Nugee:

Introduction

1. This appeal arises in the course of patent litigation. The Respondent, AutoStore Technology AS (“**AutoStore**”), is the Claimant in the substantive proceedings. It is a Norwegian company which specialises in automated warehousing technology. The Appellants are the Defendants in the substantive proceedings. The 1st to 5th Defendants are companies in the Ocado group of companies, which is involved in the development and use of automated systems for online retail businesses; the 6th Defendant is a manufacturer and supplier of certain robots to the Ocado group. It is not an Ocado group company, but for the purposes of the appeal there is no relevant distinction between the Appellants and I will refer to them collectively as “**Ocado**”. In the substantive proceedings AutoStore, which holds a number of patents, sues Ocado for infringement.
2. There is other patent litigation between the parties elsewhere in the world. In particular there are current proceedings before the US International Trade Commission (“**the ITC**”). Ocado’s lawyers became aware that AutoStore intended to deploy in that litigation certain information about the course of discussions between the parties that had taken place in London in 2018. Ocado therefore applied for an injunction restraining AutoStore from using or referring to any information arising from those discussions in any proceedings, including in particular proceedings before the ITC, on the grounds that it was protected by without prejudice privilege.
3. On 28 May 2021 HHJ Hacon, sitting as a Judge of the High Court, (“**the Judge**”) heard Ocado’s application on a without notice basis and granted such an injunction temporarily pending the return day. But after hearing from both parties on the return day (10 June 2021) he declined to continue the injunction for the reasons given in a judgment given by him the next day at [2021] EWHC 1614 (Pat) (“**the Judgment**” or “**Jmt**”) and by his Order dated 11 June 2021 he dismissed the application.
4. Ocado appeal with permission given by the Judge himself. The parties needed to know the position as soon as possible and we heard the appeal on an expedited basis on 1 July 2021, less than three weeks after the Judgment, and at the conclusion of the hearing announced our decision to dismiss the appeal.
5. That was the decision of the majority, consisting of the Master of the Rolls and Nicola Davies LJ. I have the misfortune to disagree with them, and would myself have allowed the appeal, and in this judgment I give the reasons why I would have taken this course.

Background

6. In the substantive proceedings AutoStore has sued Ocado for infringement of six patents relating to automated storage technology. Ocado denies infringement and has counterclaimed for invalidity. The details do not matter for present purposes, but in summary AutoStore has developed a system for automatic storage and retrieval of goods called the AutoStore system. This consists of a cubic structure where containers are stacked on top of each other in columns; robots move across a horizontal grid at the top of the column structure to retrieve containers and deliver

them to workstations. The system has the advantage of having a high storage density enabling the footprint of the facility to be greatly reduced as compared to that of a traditional warehouse where goods are stacked on shelves arranged in aisles. Ocado has developed an automatic storage and retrieval system called the Ocado Smart Platform which is also based on robots moving around a grid to retrieve and deliver goods. This system is the subject of the patent infringement claims. Three of the patents in suit are UK designated European patents concerning a central cavity in robots which is adapted to hold a storage bin.

7. As is not uncommon in patent disputes there is other litigation between the parties elsewhere in the world. There are proceedings in Germany, brought by Ocado, in Munich and Mannheim; there are opposition proceedings before the European Patent Office. In the US, there are proceedings brought by AutoStore in Virginia, and by Ocado in both Virginia and New Hampshire; and, most pertinently for the purposes of the present appeal, there are also proceedings brought by AutoStore in the ITC. The ITC is a quasi-judicial federal agency that has the power to prohibit importation into the US of articles that constitute unfair competition, including articles found to infringe a valid US patent. Patent infringement proceedings are heard in a formal judicial process by specialist judges called Administrative Law Judges. The evidence is that due to its nature and expertise, the ITC has been the forum of choice for many patent suits between competitors.
8. AutoStore (and, among other Complainants, its US subsidiary) brought proceedings in the ITC in October 2020 relying on five US patents, and seeking injunctions against the importation and use of Ocado's allegedly infringing products. Three of the patents relied on were central cavity patents corresponding to the central cavity patents relied on in the English proceedings.
9. Among other defences in the ITC proceedings Ocado has pleaded an equitable estoppel defence. We were not shown the details of this defence, which again do not matter for present purposes, but in broad terms the nature of the defence is that AutoStore made certain statements regarding the scope of the invention (and in particular as I understand it the scope of the central cavity patents), and that Ocado relied on those statements in the design and manufacture of robots first imported to the US market in 2020, such that AutoStore is estopped in equity from asserting infringement of those patents.
10. In order to rebut this defence, AutoStore wishes to deploy in the ITC proceedings evidence in relation to discussions which took place between the parties in London in 2018 ("**the London discussions**"). It is that which Ocado is trying to prevent.

The London discussions

11. It is necessary to give some account of the London discussions although I will try to avoid revealing the substance of them.
12. The discussions took place in the period up to November 2018. In particular three meetings took place in London on 6 June, 8 June and 25 July 2018. The first and third meetings took place at the offices of Ocado's London lawyers, Powell Gilbert LLP ("**Powell Gilbert**"), and were attended by Powell Gilbert and the London lawyers then acting for AutoStore, Bristows LLP ("**Bristows**"), as well as

representatives of the parties. The second, at Heathrow, was attended only by representatives of the parties. No US lawyers attended any of the meetings.

13. The purpose of the discussions was to discuss the merits of the parties' respective positions in the context of a possible negotiated settlement. The focus of the discussions was the UK patent infringement claims, but they also touched on the position elsewhere in the world.
14. Ocado's position is that all the London discussions were held on a without prejudice basis. The relevant material is as follows:
 - (1) The evidence of Mr Simon Ayrton, a partner at Powell Gilbert who attended the first and third meetings, is that at the outset of the first meeting it was expressly agreed that the discussions were confidential and would take place on a without prejudice basis; and that he had been informed that the same was true of the second meeting. None of that has been disputed.
 - (2) A series of e-mails passed between Bristows and Powell Gilbert in the run-up to the third meeting on 25 July 2018, each of which was headed "Confidential & Without Prejudice".
 - (3) In particular by e-mail sent on 3 July 2018 to Mr Ayrton (headed, like the others, "Confidential & Without Prejudice") Dr Myles Jelf of Bristows offered to provide Powell Gilbert with advance materials before the next meeting; that was followed up by an e-mail sent on 6 July 2018 (similarly headed) by Ms Rachael Cartwright of Bristows to Mr Ayrton which attached a number of documents, and referred to them as follows:

"Please find attached the advance[d] materials (provided for the purposes of settlement only), comprising..."

The third of the documents which were attached is the particular document which AutoStore wish to refer to in the ITC proceedings. I will refer to it as "**the Document**". It is unnecessary to say anything about its contents save that it concerned US matters. As sent by Ms Cartwright it is marked on each page:

"CONFIDENTIAL & WITHOUT PREJUDICE
PROVIDED FOR PURPOSES OF SETTLEMENT
NEGOTIATIONS ONLY"

- (4) The agenda for the third meeting (itself marked "Privileged & Confidential" and "Without Prejudice") included reference to the Document as an agenda item.
- (5) The third meeting took place on 25 July 2018 at Powell Gilbert's offices. Powell Gilbert's attendance note of the meeting records Mr Ayrton's opening remarks as follows:

"SA [Mr Ayrton] stated that this meeting was a continuation of the confidential and without prejudice discussions between Ocado and AutoStore (AS) **and that any US law discussions were to be**

governed by rule 408 of the rules of evidence. The parties agreed that there was no intention to waive privilege.” (emphasis added)

There is no suggestion that that is anything other than an accurate account of what was said. The attendance note also shows that the parties followed the agenda and duly discussed the Document. It is common ground that this part of the meeting would fall within the rubric of “US law discussions”.

- (6) There were further e-mails passing between Powell Gilbert and Bristows after the meeting and following up on matters discussed. In particular Ms Cartwright sent an e-mail dated 3 August 2018 to Powell Gilbert. That e-mail was not only headed “Confidential, without prejudice & for the purpose of settlement negotiations only”, but also included in the body of it the following:

“For the avoidance of doubt, all information in this email is provided on a confidential, without prejudice basis for the purpose of settlement negotiations only.”

Ms Cartwright then proceeded to set out AutoStore’s position both in relation to one of the European patents and in relation to the US matters which are the subject of the Document.

Rule 408

15. The reference in the attendance note of the third meeting to “Rule 408 of the rules of evidence” is a reference to Rule 408 of the US Federal Rules of Evidence (“**FRE 408**”). This applies to proceedings in the ITC, which is a federal agency. It reads as follows:

“Rule 408. Compromise Offers and Negotiations

(a) PROHIBITED USES. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) EXCEPTIONS. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”

It can be seen that it has some affinities with the scope of without prejudice privilege

in English law, but it is not identical.

The application

16. On 20 May 2021 Powell Gilbert became aware that AutoStore had referred to the London discussions in a document served in the ITC proceedings on 5 May 2021. Although that had not yet gone to the Administrative Law Judge hearing the ITC proceedings, it indicated an intention to refer to the discussions in evidence and submissions. Given the timetable for filing of witness statements and briefs in the ITC proceedings, that led Ocado on 25 May 2021 to make an application for an interim injunction restraining the use of information from the London discussions in any proceedings, including in particular the ITC proceedings.
17. The application was due to be heard on 9 June 2021, and Ocado applied for leave to serve the notice of application out of the jurisdiction and for a temporary injunction pending the hearing of the substantive application. That was heard by the Judge on a without notice basis on 28 May 2021, and he made an Order dated 28 May 2021 giving Ocado leave to serve out and a temporary injunction.
18. The substantive application was in the event heard by the Judge on 10 June 2021. He gave the Judgment the next day declining to continue the injunction.

The Judgment

19. Having set out the background and the facts, the Judge began his discussion at Jmt [27]. At [28] he recorded that although Ocado had put their case in a draft pleading both on the basis of breach of contract and breach of confidence, the latter added nothing so that argument focussed on the breach of contract claim: the same was true before us.
20. At [29ff] he considered the question of what Ocado needed to show in terms of a sufficient case on the merits. Neither side contended that the relevant test was the ordinary one of “a serious issue to be tried” derived from *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (“*American Cyanamid*”). Ocado contended that as the grant or refusal of the interlocutory injunction would be likely to be decisive in practice it was appropriate to have regard to the strength of the parties’ respective cases on the merits; AutoStore contended either that the test was that found in s. 12(3) of the Human Rights Act 1998 (“**HRA**”) (under which where a Court is considering whether to grant relief that might affect the exercise of a person’s right to freedom of expression, no restraint on publication is to be granted unless the Court is satisfied that the applicant is “likely” to establish that publication should not be allowed – which in general means “more likely than not”), or that the application was akin to an anti-suit injunction, under which the relevant test is a “high degree of probability” that the applicant is right. At [33]-[36] the Judge considered Ocado’s contentions, and at [37]-[48] he rejected AutoStore’s contentions on s. 12(3) HRA, holding that s. 12(3) HRA was not engaged. At [49]-[54] he considered and accepted AutoStore’s contention that the application was akin to an anti-suit injunction, concluding at [54] that he should not grant the injunction unless satisfied that there was a high degree of probability that Ocado would succeed if there were a trial.
21. At [55]-[68] he considered Ocado’s case on the merits. At [61] he accepted that

insofar as the parties agreed in the meetings that their discussions should be without prejudice as governed by English law, it was likely that this created an implied agreement between the parties, likely to be governed by English law, that neither side could disclose any discussions governed by the without prejudice rule in the present or subsequent litigation, including litigation in the US. At [62] however he said that a central issue at any trial would be whether the parties did agree that the English without prejudice rule covered US law matters including the Document. At [64] he said that on a straightforward reading of the relevant passage in the attendance note of the third meeting:

“it was agreed that US law discussions were to be governed by FRE 408, not that they were to be governed by that rule *and* the English without prejudice rule.”

At [67]-[68] he gave his conclusion on this issue as follows:

“67. Mr. Maclean also argued that the Document in Issue was marked “without prejudice” so this could only have meant that it was protected by the English rule. I do not think that follows. The concept “without prejudice” is well-known outside English law, particularly in common law countries such as the United States. It is not in dispute that the Document in Issue is protected by at least one without prejudice rule. The question is which.

68. I have reached the view that if there were to be a trial, the issue as to what was decided at the meeting of 25th July 2018 regarding US matters, including the Document in Issue, is likely to be an open one, by which I mean that as of today there is no clear indication as to which side’s assertion will prove to be the more accurate. I am not able to say that there is a high degree of probability that Ocado would succeed at trial. In my view, Ocado’s case does not satisfy the threshold requirement for the grant of an interim injunction on the facts of this case and on the evidence before me.”

22. That was sufficient to justify refusing the injunction, but at [69]-[74] the Judge went on to consider the balance of irreparable harm and the balance of convenience. At [72] he accepted that if the injunction were granted and Ocado in fact had no claim, the damage to AutoStore would have been done as the trial in the ITC (which is due to take place in August 2021) would have taken place without AutoStore being able to deploy the evidence it wished to. At [73]-[74] he considered the position if an injunction were refused but Ocado did have a valid claim. He said at [73] that Ocado would still be able to challenge the admissibility of the Document before the ITC judge, and at [74] concluded as follows:

“74. It may be that if the ITC judge were to admit the Document in Issue, Ocado’s case before the ITC would suffer. But in my view, Ocado is not entitled to rely on damage caused to it by the prevention of a procedural injustice. I therefore take the view that the balance of irreparable harm falls clearly in favour of there being no grant of an interim injunction.”

23. By his Order dated 11 June 2021 he therefore dismissed the application. He did however give Ocado permission to appeal, and AutoStore gave an undertaking not to disclose to any judge of the ITC any information or documents from the London discussions before 7 July 2021 (subject to certain exceptions which it is not necessary to detail).

Grounds of Appeal

24. Ocado advance four Grounds of Appeal. In summary they are as follows:
- (1) The Judge was wrong to adopt the test of whether Ocado had a high probability of success.
 - (2) Even if the Judge was right to adopt that test, Ocado did have a high probability of success.
 - (3) The Judge erred in saying that the concept of “without prejudice” was well known outside English law.
 - (4) The Judge erred in finding that the balance of irreparable harm favoured AutoStore.
25. AutoStore has served a Respondent’s Notice seeking to uphold the Judge’s decision on a number of alternative grounds.

Ground 2

26. Although there is an undoubted logic in the way that Ocado’s Grounds are arranged, I prefer to start with Ground 2, which is the ground on which by far the majority of the oral argument was concentrated. Mr Iain Purvis QC, who appeared with Mr Alan Maclean QC and Mr Thomas Plewman QC for Ocado, submitted that this was a case that, unusually on an application for an interlocutory injunction, cried out for, if not a final determination on the merits, at least an evaluation of the merits. I agree. Ever since *American Cyanamid* the practice on an application for an interlocutory injunction has been that provided there is a serious issue to be tried, the Court should not usually attempt to resolve the underlying merits on disputed written evidence for the reasons there given by Lord Diplock; but it has long been recognised that that practice requires adaptation where the practical reality is that the grant or refusal of the injunction would in effect dispose of the dispute and there never will be a trial. Lord Diplock himself said so in *NWL Ltd v Woods* [1979] 1 WLR 1294 (see at 1306-7), and see also the decision of this Court in *Cambridge Nutrition Ltd v BBC* [1990] 3 AER 523. As a general principle that was not in dispute before us.
27. Moreover in the present case we are in an unusually good position to form a view of the merits. This is not a case of the type referred to by Lord Diplock in *American Cyanamid*, where he deprecated any attempt to try to resolve conflicts of evidence as to contested facts where the evidence available at the interlocutory stage is incomplete, given by affidavit, untested in cross-examination and different from that on which the actual trial will be conducted (see at 406C, 406F, 406H and 407G). In the present case the primary facts are largely documented and appear at this stage to be almost entirely undisputed.

28. Nor is this a case of the type also referred to by Lord Diplock where the Court is faced with deciding “difficult questions of law which call for detailed argument and mature considerations” (see at 407H). In essence what is in issue is the construction – or perhaps it would be more appropriate to say the true legal effect – of what was admittedly said by Mr Ayrton at the outset of the third meeting, as recorded in his firm’s attendance note. That almost entirely depends on how a reasonable objective observer would understand what he said in context. Mr Vernon Flynn QC, who appeared with Ms Kathryn Pickard for AutoStore, said that there might be matters of factual matrix that could affect the question, but although one cannot be sure that the evidence would be precisely the same at trial, there is at this stage no reason to think that the background set out in the witness statements before us (and which I have summarised above) would be significantly altered or added to were there to be a full-scale trial.
29. For the sake of convenience I will repeat the relevant passage in the attendance note (see paragraph 14(5) above). It records Mr Ayrton as stating that:

“this meeting was a continuation of the confidential and without prejudice discussions between Ocado and AutoStore (AS) **and that any US law discussions were to be governed by rule 408 of the rules of evidence.**”

The critical issue is the effect of the words which I have emboldened. There is no dispute that they mean that the parties agreed that FRE 408 would apply to any discussions of the US legal position, and that that included the discussion of the Document recorded in the attendance note. The question is whether, as Ocado contend, that had the effect that the protection of FRE 408 would apply *in addition to* the protection conferred by the “without prejudice” rule, or, as AutoStore contend, *in place of* the “without prejudice” protection.

30. This is ultimately a very short point. My own view is that Ocado has the better of the argument on the point and that there is nothing in the emboldened words which takes away the protection of the without prejudice cloak under which the parties agreed the London discussions should take place. But the Master of the Rolls and Nicola Davies LJ take a different view. In those circumstances there is little to be gained from setting out my views at great length, but I should indicate the reasons why I take the view I do.
31. First, there seems no reason to doubt that up until the third meeting the discussions were agreed to be without prejudice and confidential. These were discussions held in London between English lawyers seeking to negotiate a settlement of, among other things, an English patent dispute. The evidence, not disputed, is that at the two previous meetings it had been expressly stipulated and agreed at the beginning of each meeting that the discussions were confidential and without prejudice. That is no more than one would expect from competent English solicitors seeking to negotiate a settlement of pending litigation. Every e-mail communication between the parties relating to the discussions that we have seen repeats the mantra “Confidential & Without Prejudice”.
32. Second, there is no real dispute as to the general effect of such an agreement in English law. Without attempting to define it exhaustively, it is a contract under which the parties agree that what is said under the cloak of without prejudice protection

should not subsequently be relied on by either party in litigation. It may go further than that, and it is subject to certain well-recognised exceptions, but this is an adequate description of such an agreement for present purposes.

33. Before the Judge one argument advanced by Mr Flynn on behalf of AutoStore was that properly construed the parties' agreement that the discussions would be held on a without prejudice basis was an agreement that the *lex fori* would determine any issues concerning whether the contents of the discussions could be admitted into evidence in national proceedings – what Mr Purvis described as a distributed *lex fori* agreement. That was not in terms repeated by Mr Flynn in his written submissions for the appeal, but he said he was not abandoning that analysis. I do not think that can be right. It would mean that even before Mr Ayrton's reference to FRE 408 at the beginning of the third meeting the admissibility of evidence as to the negotiations in the ITC would be governed solely by US law, and not by the without prejudice protection that the parties had agreed. I see no basis in the evidence for that having been expressly agreed, and do not think there is anything which would support an implied agreement to that effect. It is neither necessary to make the contract work nor goes without saying.
34. Up until the third meeting, the position seems to me clear and to be on all fours with that considered by Lloyd J in *Instance v Denny Bros Printing Ltd* [2000] FSR 869 ("*Instance v Denny*"). That was a strikingly similar case in which there was English patent litigation between Mr Instance and certain Denny companies ("**Denny**"). There were without prejudice communications between the parties in an attempt to settle the English litigation, but the evidence was that the discussions were not limited to the settlement of that particular litigation but "included discussions relating to settlement of world-wide patent and other disputes, current and future ... and possible future world-wide disputes ... in relation to other patents" (see at 873). Correspondence was generally headed "without prejudice" and it was Mr Instance's practice at the beginning of each meeting to make clear that the meeting was to be on a without prejudice and confidential basis, which Denny agreed to without hesitation (ibid). The defendants now wished to deploy some of the material in US proceedings, and Mr Instance applied for an interlocutory injunction to prevent them from doing so. Lloyd J said (at 884):

"In my judgment it is very strongly arguable, and indeed probable, that the without prejudice communications are indeed governed by an implied agreement that they will not be used in the current or any subsequent litigation between the same or related parties."

He went on to hold that that included the US litigation, among other things because it seemed to him likely that the parties contemplated that there might be other future litigation even though they would not have foreseen the particular dispute which gave rise to the US proceedings (at 885). On the basis that a major concern, even if not the only concern, was the settlement of English litigation, he considered that it must at least be very strongly arguable that the question of whether such negotiations took place under the aegis of a contract limiting their disclosure was a question of English law (at 888); and that what was proposed to be done was at least "very likely to be found at any eventual trial to be a breach of one or more contractual obligations governed by English law" (at 888-9). He therefore granted an injunction to restrain the acts which would on that basis be a breach of contract (at 889).

35. That analysis was approved by Chadwick LJ in *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2003] EWCA Civ 1154 at [22] as follows:

“For my part I would accept that, in cases where a restraint on the use of “without prejudice” material can be justified on the basis of an implied contract—*a fortiori*, where that contract is governed by English law—and whether or not it could also be justified, independently of contract, on the basis of public policy, these courts can give extra-territorial effect to the restraint by an order enforcing the contract. *Instance v Denny Brothers* is an example of such a case—see, in particular, the observations of Lloyd J. at [2000] F.S.R. 869, 884, 888–9. What is required in such a case is a finding—or, on an application for an interim order, a real prospect that there will be a finding at trial—that the parties agreed, or must be taken to have agreed, that communications in the course of negotiation would not be used in the litigation then current or any subsequent litigation; or, more precisely, that they agreed, or must be taken to have agreed, to restrict the use of the communications in terms apt to cover the particular litigation in relation to which the restraint is sought.”

Chadwick LJ went on to say that the position was different where the only justification for restraining the use of without prejudice material was public policy, but that is not this case, where Ocado’s claim to restrain use of the material is firmly based on contract.

36. Quite apart from its approval by Chadwick LJ, the analysis of Lloyd J in *Instance v Denny* seems to me entirely right, and to justify the conclusions that there is at the least a strong case (i) that up until the beginning of the third meeting there was an agreement between Ocado and AutoStore that the London discussions should be without prejudice and confidential; (ii) that that agreement was governed by English law; (iii) that the effect of that agreement was that the parties agreed not to use or disclose the content of the London discussions in future litigation, including litigation in the US; and (iv) that the English Court could restrain the disclosure of such content as a breach of contract.
37. On that analysis, the question becomes what the effect of Mr Ayrton’s statement at the beginning of the third meeting was, and in particular whether the parties thereby agreed to vary the existing contract to take out of the scope of the without prejudice protection any discussions in relation to US law, and replace such protection with that afforded by FRE 408. One cannot overanalyse what is, as reported, a very short statement, so I will simply say that I do not think that is the way in which his statement would be understood by the reasonable objective observer. It is noticeable that he prefaced it with a statement that “the meeting” (not parts of the meeting) was a continuation of confidential and without prejudice discussions. He then introduces the reference to FRE 408. He does not use any words which expressly say that this is a derogation or carve-out from, or qualification to, the general without prejudice nature of the meeting. He does not even introduce this with the word “but” or “however” or “nevertheless”; he uses the word “and” and although one cannot place too much weight on this, that seems to me entirely consistent with this being an additional point that he is making, not an attempt to substitute a different regime. He does not ask AutoStore for any express agreement to a carve-out or derogation. The only express agreement recorded is that the parties agreed that they did not intend to

waive privilege. In context that must mean the privilege that attaches to without prejudice material, so this is consistent with the parties wishing to maintain the protection of the without prejudice rule. And the Document had of course been sent by Bristows to Powell Gilbert some days before the meeting, expressly marked “Confidential & Without Prejudice” so it seems odd to suggest that parties who had agreed that they were not waiving privilege are to be regarded as having (impliedly – as there is nothing express) agreed to replace that existing protection of the without prejudice privilege with the uncertain benefits of FRE 408. I say “uncertain benefits” as the negotiations were being conducted by English lawyers who can be assumed to have been very familiar with the effect in English law of conducting settlement negotiations under the protection of the without prejudice label, but are unlikely to have known what the precise effect of FRE 408 would be.

38. Mr Flynn said that the effect of discussions being held without prejudice was that there was an implied contract, and that one could not imply a contract that was contrary to the express terms of the parties’ agreement, here that FRE 408 would apply to US law discussions. I do not think there is anything in this point. Ocado do not dispute that the parties agreed that FRE 408 would apply to the US law discussions. The question is whether that was in addition to the without prejudice protection or in place of it. I see nothing inconsistent with the application of FRE 408 that it should be in addition to the general without prejudice protection that the parties had agreed should apply to their meeting.
39. Mr Flynn said that if Ocado was right, then it was difficult to see that FRE 408 would ever apply. I do not think this is a strong point either. The English lawyers would not be conducting the US proceedings. They might not discover that AutoStore had sought to deploy material from the London discussions in the US until after it had happened. It seems to me entirely understandable that Ocado would want to be in a position not only to assert that such deployment would constitute a breach of contract in England, but would also attract the protection of FRE 408 in the US. That might be characterised as an excess of caution (or as Nicola Davies LJ put it in argument “belt and braces”), but if so Ocado’s lawyers would not be the first to seek to make assurance doubly sure.
40. Mr Flynn also had a point that the contract relied on by Ocado was not said to have contained anything conferring exclusive jurisdiction on the English Court. This was a point on which he placed some emphasis but I confess to not having understood it. Ocado do not suggest that the contract was one under which the parties agreed that the English Court should have exclusive jurisdiction over anything. But Ocado do suggest that there was a contract governed by English law; they have obtained leave to serve AutoStore out of the jurisdiction on the basis that the contract was an English-law contract (something that has not been appealed); and they ask the English Court to enforce the contract by granting an injunction, directed not at the ITC but at AutoStore, the other party to the contract. I do not see what exclusive jurisdiction, or the lack of it, has to do with this at all. If the Court can restrain a party to a contract who has agreed not to litigate abroad from doing so, I do not see why it cannot also restrain a party who has agreed not to use material in foreign litigation from doing so.
41. I have said enough to explain why I do not think the effect of Mr Ayrton’s statement was to abandon the without prejudice protection for the Document and US law discussions and replace it with FRE 408, but was merely a statement recognising that

the discussions would (as well as being without prejudice) attract the consequences of FRE 408 in US litigation, something that as Mr Purvis pointed out, is a mandatory rule of law, not dependent on agreement between the parties. I add two further short points. First it is apparent from Ms Cartwright's e-mail of 3 August 2018 (paragraph 14(6) above) that she did not understand the without prejudice nature of the discussions to have been partially replaced by FRE 408, but thought that it continued to apply both to the English and US parts of the discussions. Second, I am left unclear as to how Mr Flynn's suggested analysis is supposed to work. What would happen if AutoStore (or Ocado for that matter) threatened to refer to the US law discussions not in US proceedings but outside the scope of such proceedings? If such discussions do not enjoy the protection of being without prejudice and confidential, but only the protection of FRE 408, what is to stop them being published to the world? FRE 408 says nothing about documents being kept confidential, but only about what is admissible in US proceedings.

42. For these reasons I would have concluded that Mr Purvis was right (or at least very probably so) and that the US law discussions, and the Document, remained subject to a contractual agreement between the parties that they would be without prejudice and confidential.
43. Mr Flynn somewhat faintly suggested that even if the Document was subject to the without prejudice principle, it would be admissible under one of the exceptions to the principle. I do not think this is a point that is open to him on the appeal. There was some reference to it before the Judge, but it did not feature in the Judgment. In those circumstances if AutoStore wished to argue the point on appeal, I take the view that it was necessary for them to raise it in their Respondent's Notice as an alternative ground for the Judge's decision. Although a number of points were raised in their Respondent's Notice, this was not one of them. I propose to say no more about it.
44. I would therefore have allowed the appeal and granted the injunction. Since the other members of the Court take a different view however it follows that Ocado cannot establish a sufficiently strong case on the merits, and the appeal will fall to be dismissed.
45. It is not strictly necessary to say anything in those circumstances about the other grounds of appeal, as none of them can assist Ocado, but I will deal with them very briefly.

Ground 1

46. Ground 1 is that the Judge was wrong to apply the principles applicable to an anti-suit injunction to the present case. It is not disputed that where the Court is asked to grant an anti-suit injunction, the threshold test that the Court applies is that the applicant has to show a high degree of probability that there is a relevant arbitration agreement or exclusive jurisdiction agreement, or that the Court can point with confidence to an agreement not to litigate elsewhere: see *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 ("**Ecobank**") at [89], *Hamilton-Smith v CMS Cameron McKenna LLP* [2016] EWHC 1115 (Ch) at [18(1)]. The rationale for this cautious approach was given by Lord Scarman in *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 95D as being that such an injunction is, however disguised and indirect, an interference with the process of justice in that foreign court; see also *Ecobank* at [91]

per Christopher Clarke LJ referring to the English Court interfering, albeit indirectly, with the working or output of a foreign court.

47. I can see the argument that it is also an interference with the process of justice in, or the working of, the ITC to prevent it ruling on the admissibility of the Document in the ITC proceedings by restraining AutoStore from putting the Document before it. But I agree with Mr Purvis that the interference is of a lesser order: Ocado is not seeking to stop AutoStore from having recourse to the ITC, but only from using a document which it had (on Ocado's case) agreed it would not use. In those circumstances I am inclined to the view that the special threshold applicable to the grant of an anti-suit injunction does not apply, and that it is sufficient, in a case such as the present, for an applicant for an interlocutory injunction to establish a sufficient case on the merits, that being (other things being equal) the better of the argument. But it is not necessary to express a concluded view, and even if the test were a high probability, or the Court being confident, that Ocado were right, I would myself have held that the test were satisfied. As it is, the question does not arise.

Ground 3

48. Ground 3 is to the effect that the Judge was wrong at Jmt [67] to say that the concept of without prejudice was well known outside English law, in particular in the US (see paragraph 21 above). It was scarcely argued. I think all the Judge meant was that FRE 408 was the US equivalent of the without prejudice rule, although I agree, for what it is worth, that marking the Document without prejudice can scarcely have been a reference to FRE 408 which had not been raised at the time that it was so marked. Nothing however would appear to turn on this.

Ground 4

49. Ground 4 is that the Judge was wrong to find that the balance of irreparable harm came down in favour of AutoStore. Again this does not now arise but I think Ocado was right about this. The hypothesis is that the injunction is refused but that Ocado did in fact have a contractual right to prevent the Document being deployed in the ITC. In that situation the Court, by refusing the injunction, will have deprived Ocado of the benefit of that contractual right by permitting AutoStore to put the document before the ITC. It may be that Ocado could argue before the ITC judge that it should still not be admitted (something on which there was very little evidence), but Ocado would inevitably be in a weaker position than if AutoStore had been restrained from deploying it at all. Putting it in that position seems to me not to be something that is capable of being measured, or compensated in damages, and I agree with Ocado that the Judge should have found that trying to predict whether granting or withholding the injunction is more or less likely to cause irremediable prejudice produced no clear answer.

The Respondent's Notice

50. The Respondent's Notice seeks to uphold the Judgment on a number of alternative grounds. Ground 1 is that the Judge should have held that s. 12(3) HRA was engaged, with the result that the threshold test was whether Ocado was more likely than not to succeed at trial. This is an interesting point but it makes no difference in the present case where Mr Purvis in effect accepted that unless he could show he had the better of

the argument on the underlying merits no injunction should be granted anyway. I do not think it necessary in those circumstances to consider the point, and I prefer to leave it to a case where it might make a difference.

51. Ground 2 raised some other reasons why the Court should not find that Ocado met the requisite threshold test. I have already taken account of these in expressing the views that I have.
52. Grounds 3, 4 and 5 raise respectively the questions whether Ocado delayed in making its application, whether it complied with the requirement to give full and frank disclosure at the without notice stage, and whether its conduct between the without notice and substantive hearings amounted to an abuse of process. Ocado denies acting in any way improperly. No points of general importance arise and I do not see that any useful purpose would be served in considering these issues.
53. For the reasons I have given I would myself have allowed the appeal, but it will be dismissed for the reasons given by the other members of the Court.

Lady Justice Nicola Davies:

54. I have read the judgments of Sir Geoffrey Vos, Master of the Rolls and Lord Justice Nugee. For the reasons given by Sir Geoffrey Vos, MR I would dismiss this appeal.

Sir Geoffrey Vos, the Master of the Rolls:

Introduction

55. Lord Justice Nugee has set out the factual and procedural background to this appeal, which I gratefully adopt. I also adopt the abbreviations he has used save where otherwise stated.
56. HH Judge Hacon decided at a contested interlocutory hearing that Ocado's application for an injunction to restrain AutoStore from using without prejudice information in any proceedings (whether in the UK or elsewhere) should be refused. The real question in dispute concerned a single confidential document (the Document) that AutoStore produced in without prejudice negotiations between it and Ocado in London. The details of that document are not important, save that it was headed on every page with the following rubric (the rubric):

CONFIDENTIAL & WITHOUT PREJUDICE
PROVIDED FOR PURPOSES OF SETTLEMENT
NEGOTIATIONS ONLY

57. AutoStore wishes to deploy the Document in US patent proceedings before the International Trade Commission (ITC) to rebut an equitable estoppel defence raised by Ocado in answer to AutoStore's patent claims in a trial commencing on 2 August 2021. AutoStore suggested in argument that it could rely on the "unambiguous impropriety" exception to the without prejudice rule (see Robert Walker LJ in *Unilever plc v. Proctor & Gamble Co* [2000] 1 WLR 2436 at page 2444G), but did not in fact raise the point by way of its Respondent's Notice. I agree with Nugee LJ that that point is not open to AutoStore.

58. The Document was produced in an email from AutoStore’s English solicitors to Ocado’s English solicitors between the second and third settlement meetings, all of which were conducted according to the rubric. Indeed, the agenda for the third meeting (for which the Document was produced) also included the rubric. Mr Ayrton, Ocado’s English solicitor, produced an attendance note of the third meeting which recorded that it “was a continuation of the confidential and without prejudice discussions between Ocado and AutoStore ... and that any US law discussions were to be governed by rule 408 of the [US Federal] rules of evidence [FRE 408]. The parties agreed that there was no intention to waive privilege” (the minutes).
59. Section 12(1) and (3) of the Human Rights Act 1998 (section 12) provides that no relief which might affect the exercise of the Convention right to freedom of expression which restrains publication before trial is to be granted “unless the court is satisfied that the applicant is likely to establish that publication should not be allowed”. The Judge held that section 12 was not engaged in this case because it would not be made available in the ITC proceedings to the public in the wider sense and was not anyway of a literary or journalistic nature (see Butcher J in *Awbury Technical Solutions LLC v. Karson Management (Bermuda) Limited* [2019] EWHC 233 (Comm) at [25]-[42]). I agree with Nugee LJ that it is not necessary to decide whether section 12 is engaged in this case. Like him, I prefer to leave that question to a case where it really matters.
60. The Judge accepted that the agreement between the parties as to the basis of the settlement discussions (the agreement) did not provide for the exclusive jurisdiction of the English court. He did so presumably on the basis of the evidence that Ocado had said that “any US law discussions were to be governed by [FRE] 408”, concluding instead that the question of whether there had been a breach of the agreement could be heard either in the English court or in the ITC. In those circumstances, the Judge said that the injunction that Ocado sought would potentially interfere with, but not restrain, proceedings before the ITC, because the question of whether AutoStore was entitled to rely on the Document in the ITC would come before the ITC judge unless the English court granted the injunction.
61. For that reason, the Judge decided to approach Ocado’s application with circumspection, and held that it should not be granted unless he was “satisfied that there [was] a high degree of probability that Ocado would succeed” at a trial of the issue concerning the agreement not to deploy the Document in the ITC. The Judge relied on what he described as an inexact analogy with anti-suit injunctions and what Cockerill J had said in that connection at [38(vi)] in *Times Trading Corporation v. National Bank of Fujairah* [2020] EWHC 1078 (Comm) referring to Christopher Clarke LJ in *Ecobank* [2016] 1 WLR 2231 at 2250.
62. The Judge then relied on *Instance v. Denny* (Lloyd J at pages 884 and 888), as approved by the Court of Appeal in *Prudential Insurance Company of America v. Prudential Assurance Co Limited*, [2003] EWCA Civ 1154 (*Prudential*) at [14] and [22]. He concluded that, insofar as the parties agreed in the meetings that their discussions should be “without prejudice as governed by English law”, it was likely that there was “an implied agreement [governed by English law] ... that neither side could disclose any discussions governed by the without prejudice rule” in any existing or subsequent litigation, including US litigation. The central issue at any trial would be whether the English without prejudice rule covered the Document, when that had

been agreed to be subject to US law (on a straightforward reading of the attendance note). The Judge thought that was likely to be an “open one”, in respect of which there was “no clear indication as to which side’s assertion will prove to be the more accurate” and he was “not able to say that there is a high degree of probability that Ocado would succeed at trial”. In addition, the “balance of irreparable harm” was against an interim injunction. If the injunction were refused, Ocado could still challenge the admissibility of the Document in the ITC. The ITC judge was “better placed to decide what evidence should be admitted in his own court than is an English judge in an interim hearing”.

63. Ocado raised 4 grounds of appeal. First, the Judge applied too high a threshold test requiring Ocado to show that it had a high probability of success. Secondly, even if that was the correct test, Ocado had satisfied it. Thirdly and fourthly, the Judge had been wrong to say that the without prejudice concept applied in the USA, and that the balance of irreparable harm favoured Ocado. Mr Iain Purvis QC, leading counsel for Ocado, argued that AutoStore had agreed that the Document was provided without prejudice and for the purposes only of settlement negotiations and no other purposes. That meant, on any analysis, that AutoStore had agreed not to use the Document in any proceedings anywhere, so that an injunction should lie.
64. AutoStore argued, as it had before the Judge, that questions of comity and jurisdiction were central to the court’s decision. Ocado had suggested and agreed that “any US law discussions were to be governed by [FRE] 408”. The Document related specifically to US matters, and therefore was agreed to have been part of the “US law discussions” and governed by FRE 408 and US law. In these circumstances, it would be an impermissible breach of comity for the English court to assume jurisdiction for something, which the parties had agreed would be governed by US law, and was of peculiar importance to the arguments as to equitable estoppel that arose before the ITC. In effect, it was for the ITC to decide whether, under FRE 408, the Document could be referred to in its proceedings. The Judge had been right to apply the high degree of probability standard drawn from the anti-suit injunction cases. The English court was effectively interfering with matters directly before the ITC.
65. In these circumstances, the central issues for the court to decide are: (1) the correct analysis of the facts at this interlocutory stage, (2) the significance of comity, governing law and jurisdiction, (3) what legal test should, in the circumstances I have described, be applied to the facts, and (4) the application of that test.

The correct analysis of the facts

66. The Judge correctly acknowledged that he could not determine the facts relating to the alleged agreement at an interlocutory stage without a trial. That said, there were, as it seems to me, two essential (and agreed) facts that seem unlikely to be displaced by further evidence. The first is that relied upon by Ocado, namely that the Document and the subsequent emails referring to the discussions were expressed to be “without prejudice” and “provided for purposes of settlement negotiations only”. The second is that relied upon by AutoStore, namely that Ocado’s own solicitor’s attendance note recorded that the third meeting “was a continuation of the ... without prejudice discussions between Ocado and AutoStore ... and that any US law discussions were to be governed by [FRE] 408”.

67. I confess that, in the course of the initial argument on the appeal, I thought, like Nugee LJ, that the question of governing law could not affect a relatively clear agreement to use a document for the purposes only of settlement negotiations. Ultimately, however, Mr Flynn persuaded me of the significance of the relatively clear agreement that discussions concerning US matters, including the matters contained in the Document, were to be governed by FRE 408.
68. The two factual matters I have mentioned do not actually seem to me to be in conflict. The parties seem to have agreed that the discussions were without prejudice and that the Document was provided only for the purposes of the settlement negotiations, but that the discussions about the US matters including the Document were to be governed by FRE 408.
69. Nugee LJ asks whether the statement by Mr Ayrton at the third meeting partially **replaced** the agreement that the discussions should be without prejudice as that expression is understood in English law (see [37] and [41] above). I agree that that is the right question, but the replacement in question is only a partial one. The two essential facts that I have mentioned as having been agreed are not inconsistent as terms of an agreement that was undoubtedly not subject to any exclusive jurisdiction clause. All that seems to me most probably to have been agreed, taking the documentary evidence at face value, and without making any final decision on the point, is that all the discussions should be without prejudice and the Document was provided for the purposes of settlement negotiations only (in accordance with the rubric), but that any US law discussions would be governed by FRE 408 insofar as that was relevant.
70. The parties must be taken to have known that FRE 408, as Nugee LJ has set out, related to “Compromise Offers and Negotiations” in US proceedings. It set out what evidence was not admissible in US proceedings, including “conduct or a statement made during compromise negotiations about the claim”, subject to certain stated exceptions. As such a reference to FRE 408 in the context of a debate about US matters between the parties can only, I think, have meant that its provisions were intended to apply to any future attempt to admit parts of the “US law discussions”, including the Document, into any future US proceedings.
71. Viewed in this way, it seems to me that the provision in the minutes was a clear qualification to the overall without prejudice blanket covering the discussions. As I put to counsel in the course of argument, it seems likely that Ocado’s own US lawyers had wanted that qualification, and asked Mr Ayrton to provide for it before the US matters were discussed at the third meeting.
72. I do not think, unlike Nugee LJ, that it is significant that the only statement of express agreement in the minutes refer to an absence of a waiver of privilege. The minutes clearly record that any US law discussions were to be governed by FRE 408, and that has not been contested as a matter of fact. Nor do I think that the variation to the agreement encapsulated in the minutes is unworkable. FRE 408 is a US procedural provision applicable to admissibility of material into US proceedings. And that is the context in which AutoStore is seeking now to apply it.
73. I completely accept that my analysis of the factual situation is not free from doubt. Like Nugee LJ, however, I do not think that there would be likely to be much more

evidence available at a trial that would change what the court now knows and what the parties effectively agree as to what happened and as to what is contained in the contemporaneous documents.

74. I would emphasise also that my evaluation of the facts is not influenced by any authority. Whilst the facts in this case are similar to those in *Instance v. Denny*, they are by no means identical. There are, I think, two factual matters that particularly distinguish it. First, there was no agreement in *Instance v. Denny* of the kind recorded in the minutes referring specifically to a provision of foreign law. Secondly, the parties in that case subsequently agreed that their settlement was to be exclusively governed by English law, which must, at least, have emphasised that the negotiations for that agreement were to be governed by English law (see Lloyd J at page 874).

The significance of comity, governing law and jurisdiction

75. As is common ground here, the status of the negotiations is to be construed as an agreement, whether express or implied. In my judgment, the question of the law and jurisdiction that were to govern that agreement is of some significance. First, if there had been an agreement as to the applicability of English law and as to the exclusive jurisdiction of the English courts, it would have been unlikely that there could also have been an agreement as to the applicability of FRE 408 to the question of admissibility of the discussions in US proceedings. Secondly, an agreement as to English law and jurisdiction would have been an unpromising foundation for AutoStore's argument that the grant of an injunction would be a breach of comity.
76. As it is, however, it is common ground that the agreement did not include any express agreement as to exclusive jurisdiction. The agreement that any US law discussions were to be governed by FRE 408, in my view, also negates any agreement that English law was to apply to every aspect of the discussions.
77. These points are significant because the disputes between the parties extended to actual or intended proceedings in, at least, England, the European Patent Office, Germany and the USA. Accordingly, to put the matter at the lowest, it is not obvious that the parties intended that the English court was to have jurisdiction over the question of whether or not material deployed in the settlement negotiations was to be admissible in foreign proceedings. This, in my judgment, has a bearing on the next question as to the test that the court should apply in considering whether to grant an injunction in this case.

What legal test should be applied to the facts?

78. As Nugee LJ has already said, the parties are agreed that the court should apply a higher test to the likelihood that Ocado would succeed at trial than the "serious issue to be tried" test set out in *American Cyanamid*. The competing positions are the "high degree of probability" test applicable to anti-suit injunctions and utilised by the Judge, and the approach adopted by Ocado which was that "in addition to the question of serious issue to be tried, a reference to the merits was appropriate in light of the potential that interim relief might have final effect" (see *Cambridge Nutrition Ltd v. BBC* [1990] 3 All E.R. 523 at 534-5). Ocado said that its approach was subject to Jackson LJ's qualification in *Araci v. Fallon* [2011] EWCA Civ 668 at [39] to the effect that "[w]here the defendant is proposing to act in clear breach of a negative

covenant, in other words to do something which he has promised not to do, there must be special circumstances ... before the court will exercise its discretion to refuse an injunction”.

79. In my judgment, in the light of the parties’ agreement that their US law discussions were to be governed by FRE 408, there is, as the Judge said, an analogy with the situation with which the court deals in considering the grant of an anti-suit injunction, where the court requires the applicant to show a high probability of success in establishing an arbitration agreement, exclusive jurisdiction agreement, or agreement not to litigate elsewhere (see *Ecobank* at [89] and [91], *Hamilton-Smith v. CMS Cameron McKenna LLP* [2016] EWHC 1115 (Ch) at [18(1)], and *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 95D). Such injunctions are, as Nugee LJ has already said, “interfering, albeit indirectly, with the working or output of a foreign court” (*Ecobank* at [91]).
80. In my view, the Judge was right to think that an injunction in this case would interfere with the conduct of the ITC proceedings, albeit to a lesser extent than an anti-suit injunction. The judge in the ITC would be deprived of deciding whether an exception to FRE 408 applied so as to allow AutoStore to admit the Document on the question of the alleged equitable estoppel. Moreover, Ocado had itself stipulated for the application of FRE 408. It seems, in those circumstances, particularly unjust that it should now be able to sweep away the application of FRE 408 in precisely the kind of proceedings to which it must have apprehended it might in the future be relevant.
81. For these reasons, I accept AutoStore’s argument that in a case of this unusual kind, the court should not grant an injunction which has the final effect of preventing a foreign court deciding whether, according to its own law and procedures, the Document should be admitted, unless Ocado can show a high probability of establishing its case at trial.

Has Ocado shown a high degree of probability that it will establish its case at trial?

82. It is already clear from what I have said that, in agreement with the Judge, I do not think Ocado has shown a high probability of success on the merits. Ocado has to show that the agreement as to the deployment of the settlement discussions and the Document in the US proceedings is likely to be governed by English law. Nugee LJ has held that the agreement was that the discussions were without prejudice, as that concept is understood in English law, and that none of the exceptions to that rule have been shown to apply, so that, even if the high probability test applied, it was satisfied.
83. I beg to differ, because I see the question differently. In my judgment, there are three essential features. First, I would expect AutoStore to establish at trial that the agreement was varied at the third meeting to provide that “any US law discussions were to be governed by [FRE] 408”, rather than the English without prejudice rule. Secondly, that variation necessarily imports an understanding that it would be up to a US court to decide upon the admissibility of materials discussed at the London meetings into US proceedings within the provisions of FRE 408. Thirdly, in those circumstances, however blanket the “without prejudice” agreement may have been, it did not include decisions that would fall to be made in future US proceedings. In short, FRE 408 is inconsistent with an agreement as to the application of English without prejudice rules.

84. This court is unable to make any assessment of which side will win the argument under FRE 408 in the ITC. Neither side has asked it to do so. Ocado says that the agreement was governed by the English law of without prejudice and that it has a high probability of showing that the Document cannot be relied upon by AutoStore under those rules. I agree, but that is not the relevant question. As I have said, the relevant question is whether Ocado has a high probability of showing that the question of the admissibility of the Document in the ITC is governed by English law without prejudice principles. In my judgment, it does not.

Conclusions

85. In these circumstances, there is no need to consider the balance of convenience or the balance of irreparable harm. If it had to be considered, I think it falls squarely in favour of refusing the injunction. The parties agreed that FRE 408 should decide the admissibility of the Document in the event that US proceedings eventuated. It would be a breach of comity for the English court to interfere with those US proceedings by imposing English without prejudice rules, when Ocado had expressly stipulated FRE 408 should apply. It should be held to its bargain. Moreover, as the Judge said, if the injunction is not granted, the ITC will be able to decide the admissibility of the Document on the basis of FRE 408 which it seems most likely the parties agreed should apply.
86. The issues raised by AutoStore by their Respondent's Notice do not in the circumstances arise for consideration. This appeal is dismissed.