

4 pages.

In the Royal Court of Jersey

197A

(Samedi Division)

17th November, 1989.

Before the Bailiff of Jersey.

(88/277)

BETWEEN	Broadland Estates Limited	PLAINTIFF
AND	Samuel Henry Alfred Lapidus	FIRST DEFENDANT
AND	Consolidated Hotels (Channel Islands) Limited	SECOND DEFENDANT

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Appeal by the plaintiff to the Royal Court against the decision of the Deputy Judicial Greffier refusing the plaintiff's application for an order that that part the defendants' amended answer which refers to a letter for which the plaintiff claims privilege be struck out

Privilege - "without prejudice" letter - the Court, having examined the letter, applies test of whether communication formed part of a genuine attempt at settlement of an existing dispute or a genuine offer to negotiate - letter falls within one of those categories - appeal allowed - offending part of defendants' amended answer struck out under the provisions of Rule 6/13(c) of the Royal Court Rules, 1982.

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Advocate P.C. Sinel for the plaintiff (appellant)

Advocate R.J. Michel for the defendants

BAILIFF: "This is an appeal by the plaintiff against the decision of the Deputy Judicial Greffier on the 21st September, 1989, dismissing the plaintiff's application to strike out paragraph 7.4 of the defendants' amended answer and claim that the plaintiff's letter of the 20th September, 1988, was a privileged communication. The Deputy Judicial Greffier held that the letter of the 20th September, 1988, ("the letter") written by Clifford E. Jones, Managing Director of the plaintiff, to the first defendant although headed "without prejudice" was not, in fact, a privileged document and that accordingly references to that letter (which form part of the defendants' defence) in the defendants' amended answer to the amended Order of Justice might remain in.

The law in this case seems reasonably clear and is cited succinctly in the text book Documentary Evidence by Style and Hollander, which has obviously had the imprimatur, if I might say so, of Lord Alexander (Robert Alexander, Q.C.). The passage is to be found on page 144:-

"The test is whether the communications formed part of a genuine attempt at settlement of an existing dispute. If so all documents forming part of the negotiations will fall within the privilege, including the document initiating the negotiations, whether or not they are themselves offers".

The authority for that statement derives from the Court of Appeal judgment in the case of South Shropshire District Council -v- Amos (1987) 1 All ER 340 and it is clear to me from reading that case that the conclusions drawn by the two authors are correct.

Applying those principles to this appeal, there is no doubt there is a dispute between the plaintiff and the defendants and that the dispute was in existence at the time when the letter was written. The letter is dated the 20th September, 1988, and refers to the plaintiff's earlier letter to the first defendant of the 8th September, 1988. It is a matter of record that the Order of Justice was served on

the 11th October, 1988, and Advocate Sinel has told me that he sent a letter before action on the 23rd September, 1988.

I now turn to the letter and it is clear that from reading it that there had been a previous claim by the plaintiff by letter and telephone which the first defendant had ignored totally and there is no doubt whatever that there was a dispute between the parties. What I have to decide is whether the letter itself is part of a genuine attempt at settlement or a genuine offer to negotiate.

The ante penultimate paragraph of the letter reads as follows:-

"Harry, I do realise that the figure of commission (£150,000) we originally spoke of is out of the question but I do sincerely feel after my thorough study of the events that there is some commission due. I feel it is pointless going into screeds as I think we have known one another long enough to be able to sit down and conclude the matter".

What the letter tells me is that the writer accepts that his original claim for £150,000.00 commission was out of the question but that he felt he ought to receive something. In effect, he is saying to the defendants in "well alright, I cannot persist in my claim for £150,000.00. I do think I am entitled to something. There is some commission due. I suggest we sit down together and arrive at a figure".

To me that is clearly a negotiating offer; it does not matter whether the plaintiff was initiating it or whether it was a continuation of earlier offers. The letter therefore falls with the principles to which I have referred and is privileged. Accordingly, the appeal is allowed. Mr. Michel agrees that the second part of the appeal is dependent on the outcome of the claim for privilege and that accordingly that part of the defendants' amended answer which refers to the letter shall be struck out under the provisions of Rule 6/13(c) of the Royal Court Rules, 1982, as amended."

Discussion on matter of costs.

Appellant awarded costs of appeal and below, but no order for costs made in relation to the preliminary question of procedure raised by the respondents concerning the form of summons and service of summons.

Authority cited

South Shropshire District Council -v- Amos (1987) 1 All ER 340  
(1986) 280 EG 635; (1986) 1 W.L.R. 127

Texts cited

Cross on Evidence (6th Edition) pp 408-410

Law Society's Gazette 28th January, 1989 "Without prejudice explained" by D.W. Williams (Principal Lecturer and Course Director, Department of Surveying, Liverpool Polytechnic) pp244 & 245

Documentary Evidence (2nd Edition) Christopher Style and Charles Hollander pp 143-145

Rules etc.

Rule 6/13 Royal Court Rules, 1982

Order 24/5/17 The Supreme Court Practice (1988 Edition)