12page

IN THE ROYAL COURT OF THE ISLAND OF JERSEY
(SAMEDI DIVISION)

102

Hearing dates: 22 May, 01 Jun'92: Judgment reserved.
Reserved judgment: 11 Jun'92.

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Vint and Hamon

BETWEEN	JOSE LORA	PLAINTI
AND	SVEND ERIK PEDERSEN	FIRST DEFENDA
AND	CHIPPINGS HOTEL (1986) LIMITED	SECOND DEFENDA
AND	C. A. & P. INVESTMENTS LIMITED	THIRD DEFENDA
AND	GROSVENOR HOTEL LIMITED	FOURTH DEFENDA
AND	HOTEL SUISSE LIMITED	FIFTH DEFENDA
AND	NORFOLK HOTEL (1987) LIMITED	SDIXTH DEFENDA
AND	SUNSHINE HOTEL (1989) LIMITED	SEVENTH DEFENDA
AND	WAVERLEY COACHES LIMITED	EIGHT DEFENDA
AND	THE ROYAL BANK OF SCOTLAND (JERSEY) LIMITED	FIRST PAR CIT
AND	TRAVELSPHERE (HARBOROUGH) LIMITED	SECOND PAR CIT

Application by the plaintiff to strike out two affidavits, filed in support of the contentions of the first defendant and of the second party cited on the grounds that they contain matters inadmissible in evidence, as being "without prejudice" to terms of settlement.

Advocate P.C. Sinel for the plaintiff.
Advocate T.J. Le Cocq for the first defendant.
Advocate A.D. Robinson for the second party cited.

JUDGMENT

THE COMMISSIONER: We have before us a summons which involves a narrow point of evidence.

The substantive action is not yet ready to be heard but, because this point of evidence may well affect the conduct of that substantive action, it is convenient to deal with the narrow point of evidence at this stage. In substance the substantive action calls for a claim to a just and equitable winding up of a series of companies which were the product of a joint venture between the plaintiff and the first defendant. These two gentlemen were business partners in what was and remains a profitable hotel business. The second party cited is a travel company which has provided on terms, which include a solus agreement, financial backing to the series of companies which appear to be completely deadlocked by reason of the shareholding in those companies.

The substantive action is designated by the plaintiff a "cause de brièvété". Both the urgency of the cause and the first application for a just and equitable winding up of the companies under Article 155 of the Companies (Jersey) Law 1992 (which has, as yet, no Rules of Court promulgated in relation to it) are opposed by the first defendant and the second party cited.

The narrow point of evidence arose in this way. At the initial hearing on Friday 22nd May, Mr. Sinel, for the plaintiff, took exception to two affidavits filed in support of the contentions of the first defendant and the second party cited.

The objection took both counsel appearing for these two parties by surprise. They had no intimation of the objection until they came into Court. In the circumstances we adjourned the hearing to today so that preparation could be made to argue the point of evidence.

There are, therefore, two summonses before us.

The first applies for certain parts of the Affidavit of Svend Erik Pedersen (the first defendant) to be struck out on the grounds that they contain matters inadmissible in evidence as being "without prejudice" to terms of settlement.

The second applies in the same way and for the same reason for certain parts of the Affidavit of Michael John Edwards (a director of the second party cited) to be struck out.

The Rule upon which Mr. Sinel relies is set out in Rule 24/5/17 of the Supreme Court Practice in this way:

> ***"Without prejudice communications - Any discussion between the parties for the purpose of resolving the dispute between***

them are not admissible, even if the words "witho prejudice" or their equivalent are not expressly us (Chocoladefabriken Lindt & Sprungli A.C. v. Nestlé & Co. Lt (1978) RPC 287). It follows that documents containing su materials are themselves privileged from production.."

It is clear that if there is a genuine attempt to compromi a dispute between the parties then public policy requires th such attempts should not be discouraged. Whether or not they a expressly deemed to be "without prejudice" they cannot be used evidence if such attempts to compromise fail.

As was said in the leading case of Cutts v. Head (1984) 290 at 306 :

"Parties should be encouraged so far as possible to sett their disputes without resort to litigation and should not discouraged by the knowledge that anything that is said the cause of such negotiations (and that includes, of cours as much the failure to reply to an offer as an actual repl may be used to their prejudice in the course negotiations."

If privilege is claimed but, as here, is challenged then t Court can look at the document in dispute (and such matte concerning it as are relevant) in order to determine the nature the document.

What are the "without prejudice" matters claimed as such the plaintiff?

The affidavit of Michael John Edwards contains detail reference to a proposed valuation of the Group Hotels by t accountants, Touche Ross. It states that the valuation has be commissioned and should be available during June. It refers to telephone conversation between Mr. Edwards and the plaintiff the 7th May. It obliquely refers to a meeting held on that da between the plaintiff, and the defendant. The logical conclusi is that if a valuation is in train then the "cause de brièvété" unjustified and the application under Article 155 of the Compani Law is misplaced.

The Affidavit of Svend Erik Pedersen again refers to meeting held on the 7th May, 1992. The four options contained the document prepared for that meeting are stated to be a cle example of the plaintiff's duplicity. As Mr. Pedersen says " *the light of this offer made openly to me I simply do n understand how Mr. Lora can say that it is impossible for him continue in business with me."* Further on there is again reference to the proposed Touche Ross valuation. As Mr. Peders says (at page 7 of his Affidavit) *"it is quite inconsistent of M Lora to progress a full valuation (at not inconsiderable expen*

to the Group) and to then seek a precipitate winding up of the Group.".

The final passage of Mr. Pedersen's Affidavit (which the plaintiff seeks to strike out) states :

> *"The plaintiff has failed to advert at all to my offers, to the valuation course presently being pursued or the fact that he has offered to stay in business with me."*

We have, therefore, two matters to which reference is claimed to be precluded by operation of law.

The meeting of the 7th May, 1992, and the four options contained in it is the first. The second deals with a letter requesting a valuation to be prepared by Touche Ross. That letter is signed by the Advocates acting for the plaintiff and the defendant, Mr. Sinel and Mr. Le Cocq, and is dated 23rd April, 1992. It is clear that the meeting of the 7th May was intended to be an examination of possible terms of settlement; it is clear that the letter of the 23rd April is a step to a possible settlement. The letter says so. For example: *"We are hopeful that the above alternative scenarios will enable our clients to reach an informed judgment as to the possibility or desirability of an equity swap or alternatively one purchasing the other out of his interest in the Group."*

On the face of it, the matter is closed. As was said by Megarry VC in Chocoladefabriken Lindt & Sprungli A.G. & Another v. The Nestlé Co. Ltd. at page 288.

> ***"From the authorities put before me by Mr. Prescott, it seems plain that the Courts favour the protection of discussions which take place between actual or prospective litigants with a view to avoiding the expense and burden of litigation, and are very ready to hold that discussions made with this purpose are inadmissable in evidence."***

If that were not so then parties would always be hesitant in saying anything which might compromise their position and particularly in regard to the matter of costs if the dispute came to trial. In the Nestlé case the Vice Chancellor did not think that he had a general discretion to admit the evidence. As he said (again at page 289): ***"Where the "without prejudice" rule applies so as to exclude evidence, then unless the parties concur in admitting it, the rule might be, and I think is, a rule absolute and not a rule nisi."***

The rule is a rule absolute if a course of negotiations is expressly or tacitly held to be "without prejudice" for then, if

the negotiations do not lead to an acceptance of the proposal made, the course of negotiations is not to be referred to at all.

There are, inevitably, exceptions to the general rule.

These exceptions are set out in "Documentary Evidence" b Style & Hollander (Second Edition) at page 144. There the learne authors said this:

"There are a number of restrictions on the scope of th privilege:

(a) If a claim to privilege is challenged, the court wil look at the document to determine whether it i privileged or not: South Shropshire District Council Amos [1987] 1 All ER 340, at 344.

(b) If the without prejudice communications result i agreement, an enforceable contract may be established Evidence of the communications may be admitted for th purpose of deciding whether or not a binding contrac has been reached and, if so, its terms: Walker Wilsher (1889)23 QBD 335, at 337, accord, Tomlin Standard Telephones & Cables [1969] 1 WLR 1378. settlement agreement can be enforced in the same way a any other contract.

(c) Without prejudice communications may be admitted wher laches is raised or on an application to strike out fo want of prosecution: Walker v Wilsher (1889) 23 QB 335, at 338, accord, Simaan General Contracting Compan v Pilkington Glass [1987] 1 All ER 345, at 347.

(d) In Chocoladefabriken Lindt & Sprungli v Nestlé Co [1978 RPC 287, 289 Megarry VC left open the question whethe the privilege could be relied on in 'any case in whic there are grounds for believing that the rule is goin to be used to perpetrate some fraud or dishonesty'.

(e) In Re Daintrey [1893] 2 QB 116, 120 Vaughan Williams observed obiter that 'the rule has no application to document which, in its nature, may prejudice the perso to whom it is addressed'. On this basis a lette containing an admission of the writer's inability to pa his debts was admitted as evidence to prove an act o bankruptcy despite being marked 'without prejudice'. I Cutts v Head [1984] Ch 290, at 314 Fox LJ expressed th restriction in this way:

... whilst the ordinary meaning of 'without prejudice' i without prejudice to the position of the offeror if his offe is refused, it is not competent to one party to impose suc

terms on the other in respect of a document which, by its nature, is capable of being used to the disadvantage of that other. The expression must be read as creating a situtation of mutuality which enables both sides to take advantage of the 'without prejudice' protection.

(f) Order 22, r14 allows a court exercising its discretion as to costs pursuant to Ord 62, r9 to receive in evidence any offer expressed to be 'without prejudice save as to costs' and which relates to any issue in the proceedings. This codifies the decision in Cutts v Head.

(g) It has been held that the privilege does not prevent the admission of facts admitted in a without prejudice communication which are independent of the negotiations or do not refer to the dispute in question. So in Waldridge v Kennison (1794) 1 Esp 142, an action on a bill of exchange, Lord Kenyon CJ admitted in evidence the defendant's admission in the course of settlement negotiations that the signature on the bill was his. It is unlikely that a court today would follow this decision. The policy of promoting candour and freedom of expression calls for the protection of without prejudice to encompass all admissions made for the purpose of the settlement negotiations."

It is upon these exceptions that Mr. Robinson and Mr. Le Cocq rely.

Counsel drew our attention to a report in the Digest to Halsbury's Laws (1988: 2nd Reissue) which cites at paragraph 6802 the Australian case of Johnston v Jackson (1880) 6 VLR (L) 1 as deciding that:

"Where a party has on a previous application in the action made use of the fact that he had offered a compromise, evidence of such offer is admissible at the trial, though it is purported to be made without prejudice. Such previous use of the offer divests it of the character of a privileged communication."

Counsel also drew our attention to the words of Megarry VC in the Nestlé case (supra) at page 289:

"Mr. Watson contends that the effect of excluding this evidence would be to prevent the true case coming before the Judge hearing the substantive action. It is, however, a result of the "without prejudice" rule that otherwise admissible evidence is excluded from the purview of the Court, that is a necessary and inevitable consequence of the rule. I need say nothing about any case in which there are

grounds for believing that the rule is going to be used to perpetrate some fraud or dishonesty."

There is one further point of law which concerns the production of part of a document. This eventuality arose in the case of Great Atlantic Insurance Co. v. Home Insurance Co. and Others (1981) 2 All ER 485 at page 492 where Templeman LJ having analysed the cases concluded:

"In my judgment, however, the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the Judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in Court it cannot be erased."

Again at page 494 Templeman LJ said :

"In my judgment when counsel in the course of a trial introduces into the record a document or part of a document he thereby effectively waives any privilege attaching to that document which could otherwise be asserted by his client."

Now the analogy here is not the same. The privilege of "without prejudice" correspondence or conduct is shared by each party and each party knows the course that the negotiations have taken. The privilege relating to documents is a privilege held by the party holding the document the contents of which may be entirely unknown to the other side (in the Great Atlantic Insurance Co. case the document was a memorandum received by the plaintiffs from their American attornies). Both Mr. Le Cocq and Mr. Robinson asked us to extend the analogy so as to cover the "without prejudice" discussion of the 7th May and the existence of the Touche Ross valuation.

Their arguments, which though separate, are not dissimilar.

Mr. Le Cocq based his arguments on two premises :

1. Where the "without prejudice" privilege had been waived, converting the correspondence into open correspondence then matters arising from that correspondence remained open-ended and thus extended into the meeting of the 17th May.

..2.The "without privilege" protection, even if waived, would be lost if there were dishonesty. . There were clear indications that the plaintiff was dishonest in what he had said in his affidavit.

He explained the matter to us in this way. There have been certain previous hearings both in this Court and before the Judicial Greffier. Letters, some marked "without prejudice" and others clearly written with a view to settlement, have been included in bundles by both sides without exception being taken by either party at any time.

So, by way of example, we have disclosed a letter dated the 21st January, 1992, from Mr. Sinel to Mr. Le Cocq which has as its opening paragraph these words:

> *"I write further to our meeting on Thursday 16th January, 1992. No progress is going to be made forward or backward until we have a realistic valuation which both people can abide by. Accordingly, I have invited your client to acquiese in the group having itself valued. If your client can but accede to this logical request then we can do some fine tuning about criteria for valuation and who actually does it."*

There are further numerous letters where terms of settlement have been disclosed. On the 10th April, 1991, a letter from Ogier and Le Cornu repeats *"the offer contained in our letter of the 20th March as an open offer".* It sets out in very great detail an offer to buy out the plaintiff's shares. A letter of the 18th April, 1991, starts with these words ..*"I am concerned that there may be some misunderstanding on your Firm's part as to how the valuation of shares offer would operate not least because at the end of yesterday's hearing your assistant"* (the letter is from Mr. Le Cocq to Mr. Sinel) *"seemed to be under the impression that the valuation route would assume that the hotels were valued at cost ... I must, however, repeat that this route seems to meet everything your client is seeking in his Order of Justice and therefore reserve the right to refer this letter to the Court when this case comes back next Wednesday."*

The disclosed correspondence over the next few months constantly refers to negotiations - particularly with a view to preparing a valuation. As Mr. Sinel said in a letter of the 3rd April, 1992:-

> *"I am still endeavouring to be constructive.*
>
> *1. Valuation of the Group. Let us have the meeting I suggested many months ago in order to settle on a valuer and his guidelines. I phoned this morning to arrange a meeting and have since not heard from you, we are very*

keen to have the Group properly valued as soon as possible."

That letter finishes with these words:-

"Please ring and we can sort out a valuer."

It is not necessary to analyse all the correspondence. It may indeed by invidious for us to have given a mere selection of letters. What is clear is that all those letters and documents already disclosed on discovery on earlier interlocutory applications both before the Judicial Greffier and before the learned Bailiff are now before this Court and any privilege which might have attached to them is lost. One cannot, in our view, disclose a "without prejudice" letter in one application and then claim that it is privileged from disclosure in another application in the same action.

Mr. Robinson goes further. He referred us to Mr. Lora's Affidavit of the 19th May, 1992, sworn twelve days after the meeting of the 7th May. That Affidavit has a number of exhibits attached to it.

One of those exhibits (F) is his letter of the 22nd April, 1992. That letter contains these words:-

"At present there are a number of options open for resolving the dispute:-

(a) A cash buy out one party of the other. After over a year of trying Mr. Pedersen may at long last have agreed to a valuation of the Group by the Group, whether or not he has any money to buy our client out is a different matter - third party finance for hotel acquisitions could prove problematic in the present market.

(b) An equity swop - this is the most rational way out and one which my client has always favoured, it enables the parties to go their separate way with a just share of the assets. Subject to negotiation, it might result in your client's position being enhanced, same number of beds without the warring factions. When asked about an equity swop Mr. Pedersen either says no out of hand or says "as Travelsphere do not like it I will not do it". If Travelsphere do not like an equity swop then they force my client to pursue the "winding up route".

(c) A just and equitable winding up - hotels sold on open market, loss of beds for Travelsphere, exit the Travelsphere operation in Jersey - in which case Travelsphere and Pedersen will only have themselves to blame."

There we have three of the four options mentioned at the meeting of the 7th May. It may well be that we can conclude that the four options raised at the meeting of the 7th May were already being discussed. That, of course, does not in itself open the meeting of the 7th May but on the 7th May Mr. Michael John Edwards, a Director of Travelsphere, received a phone call from the plaintiff. That conversation cannot be "without prejudice", it deals with statements of fact and contains statements such as these:-

> *"Lora said he did not want a winding up. I asked him why he had allowed the order to go through. He replied that this was the only way he could get Svend or Travelsphere to talk."*

Mr. Robinson urges upon us that it is inconsistent and dishonest to tell this Court that there is no alternative to a just and equitable winding up when the plaintiff is saying to one of the parties that he does not in fact want a winding up. That is hardly dishonest. It may be disingenuous.

There is one other important matter. Mr. Lora's Affidavit states at paragraph 5 in support of his contention that the relationship between plaintiff and defendant has deteriorated that *"no constructive reply has been received"* to Mr. Sinel's letter to Travelsphere dated the 22nd April, 1992. The letter is exhibited. We were told that, in fact, there was a response to that reply. It is dated 29th April, 1992. None of these letters are marked "without prejudice". Even if they were then following the authorities that we have examined it seems to us not only good law but also common justice that if one party produces a letter and asserts that "no constructive reply has been received to that letter" then the other party is entitled to produce his replies to rebut the assertion. The letter of Mr. Robinson to Mr. Sinel dated the 28th April is illuminating. His third paragraph reads:-

> *"You summarise three options. Do you not think it would be better to see whether option (a) is viable before embarking on option (c) as you did last Friday with your client's representation? I understand you to have had a full say in the terms of reference for the valuation and that the accountants have now been instructed by the Group."*

The "valuation" referred to can only be the instructions to Touche Ross signed by both parties, through their lawyers, and dated the 23rd April, 1992.

We are confident that all the correspondence and documentation disclosed on discovery in earlier actions is not now covered by any privilege. We are satisfied that the letter to Touche Ross is also now available for examination by the Court should either party wish to refer to it.

We are not, however, prepared to admit the evidence of the notes of the meeting of the 7th May. Mr. Le Cocq appeared to argue that once a line of negotiation is admissible everything similar and subsequent to that admission is also to be admitted. This cannot be so. We are not prepared to waive the "without prejudice" ruling in this case for the rule is an absolute rule subject to exception.

The plaintiff, after seeking advice from his lawyer and to save costs, attended upon the defendant and put four options to him. It is clear that that was a "without prejudice" discussion. In our view, it remains so.

Of Mr. Pederson's Affidavit"-

The marked passages in paragraph 7 (c) are not admissable and those passages shall be struck out.

Paragraph 7 (e) shall not be struck out.

Paragraph 8 shall not be struck out.

Of Mr. Edward's Affidavit:-

Paragraph (5) shall not be struck out.

Paragraph (6) shall not be struck out.

Authorities

R.S.C. (1988 Ed.): Vol. 1: 24/5/17.

Cutts -v- Head (1984) Ch. 290 at 306.

Chocoladefabriken Lindt & Sprungli AG and anor. -v- The Nestlé Co. Ltd.(1978) RPC p.287.

Style & Hollander: "Documentary Evidence" (2nd Ed.) p.144.

Johnston -v- Jackson (1980) 6 VLR (R) reported in digest to Halsbury's Laws (1988 2nd reissue).

Great Atlantic Insurance Co. -v- Home Insurance Co. and ors. (1981) 2 All ER 485 at p.492.