[2024] JMSC Civ 01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV05211

BETWEEN	**MELISSA MANNING**	**CLAIMANT**
AND	**TEAMHGS LIMITED (t/a HINDUJAH GLOBAL SOLUTIONS)**	**DEFENDANT**

IN CHAMBERS

Ms. Althea Wilkins instructed by Dunbar and Co for the Applicant/Defendant

Ms. Cee Jae Cummings instructed by Johnson, Hay and Co for the Respondent/Claimant

Heard: November 9th, 2023 and January 8th, 2024

Civil Procedure – Application to strike out parts of an affidavit – Without prejudice rule – Exceptions to/limitations of the rule – Relevant and admissible

T. HUTCHINSON SHELLY J.

INTRODUCTION

[1] On the 8th of October 2019, the Claimant, who was an employee of the Defendant Company was leaving her workplace when she slipped and fell down the stairway which was wet because of the rain. As a result of the incident, she sustained injury and suffered loss. On the 8th of December 2021, she instituted legal proceedings against the Defendant seeking an award of damages for same. On the 12th of January 2022, judgment was entered in default as the Defendant failed to file an

Acknowledgment of Service. On the 7th of June 2022, a case management notice was issued, scheduling the matter for case management for assessment of damages on the 6th of December 2022. On that date, the Defendant was represented by Counsel, but no application was filed on their behalf. Several orders were made at this hearing which included setting the matter down for assessment. The Court also ordered that any application made by either side should be filed and served by the 20th of January 2023.

[2] On the 12th of April 2023, the day of the Pre-trial Review, the Defendant filed an application challenging the Court's jurisdiction. The application and accompanying documents were short served. As a result of this, the pre-trial review and hearing of this application were adjourned first to the 5th of July 2023 and then to the 3rd of October 2023. The latter date was occasioned by concerns which were raised by the Defendant on the 5th of July 2023. On the 3rd of October 2023, the hearing of the application challenging the Court's jurisdiction did not proceed as it had been overtaken by another application which had been filed by the Defendant on the 28th of September 2023. The crux of the application lies in an alleged breach of the "*without prejudice rule*" which the Defendant says arises in an Affidavit sworn to by Manfas Hay ('the Hay affidavit') in response to the application from Grace Davis challenging the Court's jurisdiction. In his Affidavit, Mr Hay outlined the alleged sequence of events which he says flowed from the incident on the 8th of October 2019. In doing so, he made reference to correspondence which had been exchanged, the recipients of same and the purpose of these documents. It is the Claimant's position that this affidavit and exhibits are necessary to establish a timeline of communication, given the Defendant's assertion that they had never been served and only became aware of this matter in August 2022 when notification was received by them from the Court's Registry.

THE APPLICATION

[3] In the application filed on the 28th of September 2023, the Defendant, TeamHGS Limited seeks the following orders: -

1. *That the frivolous and vexatious sections be struck out from the Affidavit of Manfas Hay in Response to the Affidavit of Grace Davis filed on May 26, 2023 by the Claimant.*
2. *That paragraph 8 together with Exhibits **MH2**, **MH3**, **MH4**, **MH5** and **MH10** of the Affidavit of Manfas Hay filed May 26, 2023 be struck out.*
3. *That the costs of this application be awarded to the Applicant/ Defendant.*
4. *That the Defendant company be permitted to rely on the Supplemental Affidavit of Christine Moore at the hearing of its Application to Challenge the Court's Jurisdiction.*
5. *That the order for Grace Davis to attend for cross-examination be varied to allow for Christine Moore to be cross-examined instead.*
6. *Such further and other relief as this Honourable Court deems fit.*

[4] At the outset of the hearing, Counsel for the Claimants indicated that they were not opposed to orders 4 and 5 being granted in light of the change of circumstances within the Defendant's organisational structure. Strong opposition was raised however in respect of orders 1 through to 3.

ISSUE

[5] The sole issue before the court is whether the correspondence referred to at paragraph 8 of the Affidavit of Manfas Hay as well as the relevant exhibits are "*without prejudice*" communication, thus making them inadmissible.

THE APPLICANT'S SUBMISSIONS

[6] In submissions made on behalf of the Defendant, Ms Wilkins commenced by making reference to the Court's powers at **Part 26** of the Civil Procedure Rules (hereinafter referred as the **"CPR"**)**.** She submitted that **Rule 26.1(1)** outlines a list of the powers which the Court possesses, which are in addition to any other power given to the court by any other rule, practice direction or by any enactment. Learned Counsel also highlighted **Rule 26.1(7)** and submitted that it empowers the Court to make an order and includes a power to vary or revoke that order.

[7] Ms Wilkins also made reference to **Rule 26.3(1)** and argued that the Court is empowered to grant the application as this provision allows it to strike out a statement of case or part of a statement of case, if it appears to the court:

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

[8] Learned Counsel stated that in asking for these orders, reliance was also being placed on **Rule 30.3(3)** of the CPR which states:

"30.3(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."

[9] Ms Wilkins commended a number of authorities to the Court which included ***Winston Finzi v Mahoe Bay Company Limited and JMMB Merchant Bank Limited*** *[2016] JMCA Civ 34*, ***Unilever plc v The Procter & Gamble Co*** *[2001] 1 All ER 783* and ***Rush & Tompkins Limited v Greater London Council and another*** *[1989] AC 1280*. Counsel also highlighted the principle established in ***Waugh v British Railways Board*** *[1980] AC 521 (HL)* that '*documents that are created and passed between the client/ his attorney/ his insurers and a third party are privileged where the dominant purpose of the creation of that document was for legal advice and/or in contemplation of litigation proceedings*'.

[10] Ms Wilkins asserted that the Affidavit of Manfas Hay offends established legal principles, and as such, paragraph 8 together with Exhibits **MH2**, **MH3**, **MH4**, **MH5** and **MH10** should be struck out as they disclose privileged communication between the Claimant's Attorneys-at-Law and British Caribbean Insurance Company Limited and exhibited several "*Without Prejudice*" communication. Learned Counsel further contended that this paragraph and exhibits are irrelevant to the application challenging the Court's jurisdiction and thus offends **rule 30.3(3)** of the CPR.

[11] Ms Wilkins submitted further that the Claimant and the Defendant company's insurers, British Caribbean Insurance Company Limited, engaged in without prejudice discussions/negotiations without any admission or acceptance of liability

on the part of the Defendant company. Learned Counsel contended that, in keeping with established practice, the discussions occurred in the context of simply resolving the matter and as such fall firmly within the category of "*without prejudice*" communications, which are prohibited by law from being disclosed to the court, unless both parties agree or the Defendant's company and its insurers waive the right to the privilege, which they have not.

[12] Ms Wilkins disagreed with the justification for the attachments which was provided by the Claimant. She insisted that these sections of the affidavit and the exhibits, are not relevant to the application at hand, as the mere existence of negotiations between the Defendant's Insurer and the Claimant, does not in any way relate to service of the Claim Form and Particulars of Claim. Learned Counsel argued that the Defendant has consistently maintained that it was not properly served with the initiating documents and even if they had been engaged in discussions with the Claimant, those discussions would not and could not negate the duty of service.

[13] Ms Wilkins asked the Court to find that none of the exceptions to the "*without prejudice rule*" exist in these circumstances. Learned Counsel posited that neither the Claimant, nor the Court can assume that the Defendant company and the Defendant's insurers are one and the same and are privy to the same information. In respect of the Notice of Proceedings which had been served on the insurer, Ms Wilkins argued that this did not in itself mean that the Insured was effectively served or even has any knowledge of the suit against it. Learned Counsel maintained that even if the Claimant seeks to use the correspondence as evidence of the period when communication began between them and the Insurers about the claim, it would not reflect any timeline of communication between the Defendant or knowledge on the part of the Defendant as to when it became aware of the claim.

[14] In support of her submissions on relevance, Ms Wilkins relied on paragraphs 55 of ***Winston Finzi and Mahoe Bay Company Ltd*** (*supra)* where the Learned Judge indicated:

> *[55]"The connection of the email communication to these proceedings must be clearly established because of the fact that the privilege operates to bar relevant evidence from being disclosed or adduced during the course of proceedings. Therefore, if the communication to be adduced is, in itself, irrelevant to the proceedings in issue, then it is, simply, inadmissible on that basis and so the question of "without prejudice" privilege would not arise for consideration."*

[15] Ms Wilkins concluded her submissions by asking the Court to strike out the '*offending*' paragraphs and exhibits as not only being in contravention of the "*without prejudice rule*" but also wholly irrelevant to these proceedings.

THE RESPONDENT'S SUBMISSIONS

[16] Ms Cummings agreed that the issue for the Court's consideration rested solely on the applicability of the "*without prejudice rule*." She acknowledged that the existence of this rule, and the policy reasons for it, are well-known and well-established. Counsel noted that in ***Rush & Tompkins Limited*** (supra), the Court gave clear guidance on this rule where it was stated:

> *"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings...',*

[17] Ms Cummings asked the Court to be mindful of the fact that exceptions to the "*without prejudice rule*" have developed over the years. Learned Counsel submitted that in ***Unilever Plc v Proctor and Gamble Co*** *[2000] 1 WLR 2436,* Robert Walker LJ provided a non-exhaustive list of some of the most important exceptions to the without prejudice rule, one of which was noted as follow:

> *(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in Walker v Wilsher (1882) 23 QBD 335. 338, noted this exception but regarded it as limited to 'the fact that such letters have been written and the dates at which they were written ".*

[18] Ms Cummings argued that occasionally '*fuller evidence*' is needed in order to give the court a fair picture of the rights and wrongs of the delay. Learned Counsel also relied on the Court of Appeal decision of ***Winston Finzi and Mahoe Bay Company Ltd v JMMB Merchant Bank Limited*** (*supra)*, specifically the references to the limitations of the "*without prejudice rule*" which were highlighted as follows:

> *"664. Limits of the rule. The contents of a communication made 'without prejudice' are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place or that an act of bankruptcy, or a severance of a joint tenancy, or a trigger for a rent review clause, has occurred, but generally speaking they are not otherwise admissible.*

[19] Ms Cummings submitted that the letters labelled without prejudice which are exhibited to the Affidavit of Manfas Hay are not being relied on as it relates to any admission to liability of negligence on the part of the Defendant, but purely to establish timelines of when communication commenced with the Defendant's insurance company. Learned Counsel argued that this falls within the exception expressed in the ***Walker v Wilsher*** case and is also relevant as a part of the Defendant's reason for their delay in filing their application disputing the court's jurisdiction, in that it took them some time to retrieve the information.

[20] Ms Cummings contended that the dates of the letters would clearly establish that the Defendant company and their insurers had knowledge and information

pertaining to the Claimant's allegations since 2019 and had been in communication/negotiation with the Claimant's Attorneys in respect of same. Learned Counsel insisted that service of the Notice of Proceedings on the Insurer was also of great significance as this occurred on the same day that the claim was served on the Defendant.

DISCUSSION AND FINDINGS

[21] It is not in dispute between the parties that where "*without prejudice*" communications (or negotiations) are concerned, the general rule is as stated in the online edition of Halsbury's Laws of England, Volume 12A (2015), at paragraphs 663, that:

> *"663. Communications 'without prejudice'. Written and oral communications made during a dispute between the parties, which are made for the purpose of settling the dispute, and which are expressed or are by implication made 'without prejudice', cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed."*

[22] The limitations on this rule are outlined at paragraph 664 as follows:

> *"664. Limits of the rule. The contents of a communication made 'without prejudice' are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, or that an act of bankruptcy, or a severance of a joint tenancy, or a trigger for a rent review clause, has occurred, but generally speaking they are not otherwise admissible. … The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication; … The critical*

> *question for the court as to admissibility is where to draw the line between the public policy of encouraging parties to resolve disputes without litigation, and wrongly preventing one or other party from putting their case at its best in litigation."*

[23] In the ***Winston Finzi*** decision, a detailed examination of these extracts as well as additional guidance on this rule was provided by McDonald Bishop JA where she observed that:

> *[25] The oft-cited case of Rush & Tompkins Limited v Greater London Council and another [1989] AC 1280 serves as strong authority on the question of the invocation of the privilege that attaches to "without prejudice" communication. At page 1299, Lord Griffiths stated:*
>
> > *"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:*
> >
> > > *'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table.... The public policy*

> *justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'*
>
> *The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."* (emphasis added)

[24] Having highlighted these legal principles, the Learned Judge continued her remarks by examining the application of this rule in other authorities and stated further:

> *[26] In Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783, it was further established by Robert Walker LJ at page 789, that the "well-known passage" of Lord Griffiths cited above, "recognises the rule as being based at least in part on public policy". He then added: "Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of*

> *their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues."*

[25] The Court adopts the statement made by McDonald Bishop JA that this '*privilege*' attaches to any discussion that occurred between actual or prospective parties with a view to avoiding litigation, including discussions within conciliation and mediation schemes. It is also acknowledged that while the use of the expression "*without prejudice*" is of some significance, it does not determine the matter.

[26] In terms of the application of the rule, the Learned Judge made it clear in the ***Winston Finzi*** decision that '*the authorities have established that the "without prejudice" rule has no application unless a person is in dispute or negotiations with another and terms are offered for the settlement of the dispute or negotiations: see Re Daintrey, Ex parte Holt [1893] 2 Q B 116 and Norwich Union Life Insurance Society v Tony Waller Ltd 270 EG 42; [1984] 1 EGLR 126'. (emphasis added)*

[27] The connection of the disputed correspondence to the proceedings is also of paramount importance as the privilege operates to bar relevant evidence from being disclosed or adduced during the course of proceedings. If the communication is irrelevant to the proceedings in issue, it would be inadmissible and the question of "*without prejudice*" privilege would not arise for consideration.

[28] The decision of ***Standrin and Another v Yenton Minister Homes*** **Ltd and others** The Times, 22 July 1991, CA was also reviewed by McDonald Bishop JA and provides useful guidance on what would be considered relevant and/or falling within the "*without prejudice rule*." The facts of this case were helpfully reviewed by the Learned Judge and a portion of same from paragraphs 57 and 58 of the ***Winston Finzi*** case are extracted below as follows:

> *[57] The plaintiffs brought an action against the defendants for damages in respect of the subsidence of a house they had purchased. At the time of bringing the action against the defendants, the plaintiffs had already submitted their claim to their insurers. The claim was eventually settled by*

> *the insurers after the writ was issued against the defendants. The second defendants sought specific discovery of various documents passing: (a) between the plaintiffs or their solicitors and their insurers; and (b) between the plaintiffs' solicitors and the insurer's loss adjustors. The order was made.*
>
> *[58] The plaintiffs subsequently asserted by affidavit evidence before another judge that the documents ordered to be disclosed were irrelevant or, in any event, subject to privilege on the ground that they came into existence in the course of their negotiations for settling their claim with the insurers and were by their nature privileged, whether or not marked "without prejudice". The judge ruled the documents privileged and inadmissible. The second defendants appealed.*

[29] In the course of analysing this decision, the Learned Judge commented on the application of the "*without prejudice rule*" to a number of the documents in question and observed that several other documents were also ruled inadmissible as they were covered by legal professional privilege and continued thus:

> *[61] The court further held, however, that eight documents that had passed between the plaintiffs and the insurers' loss adjusters before the claim was settled, and at a time when the loss adjusters were awaiting an engineer's report, were "**nothing more than an initial assertion of the plaintiffs' claim" and were not negotiating documents. For that reason, those documents were held not to be subject to privilege. Lloyd LJ stated the relevant principle in these terms: "The principles to be derived from the authorities, if it can be called principle, that the 'opening shot' in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement or to take Parker LJ's example in South Shropshire District Council v Amos, where a person offers to accept a sum in settlement of an as yet unquantified claim. But where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie it is not protected."** (emphasis added)*

[30] The effect of the reasoning in the ***Standrin*** case as emphasised in the extract above by McDonald Bishop JA, is that while the Court should avoid allowing into evidence correspondence which had come into existence pursuant to efforts to settle matters in dispute, careful regard should also be had to the exceptions which include correspondence which are nothing more than an initial assertion of the Claimant's case. Bearing these legal principles in mind, the Court then considered the contents of the '*offending paragraph and exhibits*.'

[31] It is not in dispute between the parties that paragraph 8 and **MH2, MH3, MH4** and **MH5** make reference to communication sent by Counsel for the Claimant and received from 3rd parties to include the Defendant's Insurance Brokers and Insurance Company. It was asserted by Mr Hay in paragraph 7 that the first communication was sent to the Defendant from July 8th, 2019. Correspondence dated the 10th of July 2019 (Exhibit **MH1**) was subsequently received from Fraser Fontaine and Kong who were the Defendant's Insurance brokers. A review of this correspondence reveals that there is no reference to settlement discussions/offers and merely acknowledges receipt of the previous correspondence. The correspondence indicates that the matter was being investigated and gives directives as to future correspondence being sent to British Caribbean Insurance Company. Exhibit **MH10** which is actually mentioned at paragraph 28 of the Hay affidavit was also carefully examined. It was described by Mr Hay as being a copy of the initial correspondence sent to the Company on the 8th of July 2019. The letter is dated the 8th of July 2019 and the recipient is stated as the Defendant company. From the language used in both pieces of correspondence, I am satisfied that what had occurred up to this stage was written assertion by the Claimant of her situation and an acknowledgment of same by the Defendant's brokers. In light of this finding, I am satisfied that neither situation would have placed **MH10** within the realm of offending against the "*without prejudice rule*".

[32] The remainder of this paragraph as well as exhibits **MH2**, **MH3**, **MH4** and **MH5** were then examined. It was observed that unlike the abovementioned documents, the impugned exhibits and sentences delve deeply into negotiations/settlement

discussions to include the question of liability and discussions on offers all of which would certainly run afoul of the established legal principles on this rule. Accordingly, I find that there is some merit in the Applicant's argument insofar as it relates to these sentences and exhibits and rule that exhibits **MH2**, **MH3**, **MH4** and **MH5** should be struck from the affidavit as well as the reference to same which commence with the words, '*In letter dated March 3rd, 2021*' and ends '*to letter dated June 18th, 2021 respectively*'.

[33] In addition to their position that the documents and paragraph were in breach of these rules, the Applicant also asked the Court to find that they were not relevant to the substantive matter and on that basis should be excluded as inadmissible. Where these sentences and exhibits are concerned, the Claimant has argued that their importance lies in the fact that they undermine the Defendant's argument as to being wholly unaware of this matter until August 2022, as initial communication in respect of same was had with them. While I agree that these communications pre-date the filing of the claim, this is not sufficient to undermine the requirement for the Defendant to be served with the originating documents and the fact that discussions may have been had between the Parties would not assist a Court tasked with enquiring into whether service had been effected. In the circumstances, I am satisfied that the Defendant has established an appropriate basis for excluding the reference to Exhibits **MH2, MH3, MH4** and **MH5** as well as the portions of paragraph 8 outlined at paragraph 32.

[34] As such, the Defendant's application is allowed.

Orders

[35] Pursuant to the ruling, the following orders are made as stated below:

1. The Defendant's Application filed on the 28th of September 2023 is granted.

2. The Defendant company is permitted to rely on the Supplemental Affidavit of Christine Moore at the hearing of its Application to Challenge the Court's Jurisdiction.

3. The order for Grace Davis to attend for cross-examination is varied to allow for Christine Moore to be cross-examined instead.

4. Costs of the application is awarded to the Claimant to be taxed if not agreed.