IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV0850/2003

BETWEEN	LEE ROY CLARKE	CLAIMANT
AND	LIFE OF JAMAICA LIMITED	DEFENDANT

CLAIM NO. HCV1387/2003

BETWEEN	HENNIS SMITH	CLAIMANT
AND	LIFE OF JAMAICA LIMITED	DEFENDANT

CLAIM NO. HCV1386/2003

BETWEEN	CAULTON GORDON	CLAIMANT
AND	LIFE OF JAMAICA LIMITED	DEFENDANT

CLAIM NO. HCV 1390/2003

BETWEEN	DERRICK BERNARD	CLAIMANT
AND	LIFE OF JAMAICA LIMITED	DEFENDANT

Mrs. Ingrid Lee Clarke-Bennett instructed by Pollard Lee Clarke & Associates for the claimants.

Mr. Weiden Daley instructed by Hart Muirhead Fatta for the defendants.

Heard 13th October 2004, 10th March and 12th June 2008

Campbell, J.

Specific Disclosure
Documents Listed, Part of Correspondence, without Prejudice
Document Disclosed and Viewed, Objection Raised to Taking Copies
Public Policy Considerations – Agreement of Parties

(1) As part of Case Management Conference of 22nd May 2007 and of 22 July 2005. It was ordered that:

> The documentation related to termination package of Winston Bent and Maurice Sale should be disclosed to the claimants.

There has been partial compliance with the order, but a dispute has arisen as to whether certain of the documents are subject to privilege and ought to be disclosed, or should be part of the Order, for viewing, inspection and taking copies of the Documents have been viewed and inspected, but objection has been raised by the defendant to the claimant's taking copies of the documents.

The Documents are items 1-6 of defendants' List of Documents filed 31st October 2007.

The defendants claim a right to withhold disclosure and inspection of the documents. At this hearing it was urged that the documents were subject to privilege.

The claimants have been allowed inspection and viewing but have refused the taking of copies. It is recognised that justice is better served by candour than by suppression.

(2) The items listed are as follows:

(1) Letter to Ms. from LOJ, dated 28th October 2002.

(2) Notes calculation of Ms. compensation package, received 9th February 2004

(3) Letter to Ms. from LOJ dated 18th February 2004.

(4) Spreadsheet re Maurice Sales, dated 20th February 2004.

(5) Memo dated 26th February 2004.

(6) Table of Compensation Packages, Winston Bennett and Maurice Sales

The Claimants' Case

(3) The claimant submits that the documents are relevant to the claim, which has as its central issue whether the defendants deliberately concealed from the claimants the fact of their being entitled to redundancy payments at the time their contracts were terminated. They allege that the letter of the 28th October 2002 is meant to be kept a secret, not because of any admissions

contained therein, but because it reveals that others of a similar rank as Sale would learn that they may also be entitled to a severance or redundancy payments.

(4) The claimants submitted that simply placing the words "without prejudice" does not make the document inadmissible. That there was no evidence of a dispute between the parties. The documents were not therefore made to effect a compromise. It was in any event written after negotiations were closed and a compromised arrived at.

(5) The claimants further submitted that they were not part of any agreement that "their negotiations "should not be admissible. That they were entitled to rely on the documents to establish the existence of agreements. Only one document entitled "without prejudice". The defendant has not indicated any basis upon which it claims to withhold full disclosure.

The Defendant's Case

(6) The defendant contends that the parties to the negotiations agreed that the contents would not be disclosed. The letter agreement makes it clear that there were negotiations which culminated in the agreement. That the agreements were reached by way of compromise. The other documents are attachments and form part of a single chain of correspondence connected with the negotiated settlement. The fact that an agreement is arrived at does not affect the privilege. There was a dispute between Bennett and the defendant on the issue of liability, and on the basis of any such liability and quantum.

Analysis

(7) The without prejudice rule rests on two limbs, the first is that of public policy considerations. The second is the express or implied agreement of the parties themselves.

Lord Grifiths, points the way in determining the applicability of the without prejudice rule, in **Rush & Tompkins Ltd. v GIC**, Lord Griffiths said at pg 740;

> "I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interests in promoting settlements and the public interest in full discovery. Between parties to a litigation, the admissibility of evidence and rests squarely on two limbs that of public policy and secondly on the agreement of the parties."

(8) The first head of public policy considerations is simply not to discourage free and open discussions among parties striving to reach an agreement. It recognizes that in the process of negotiations a party will make admissions against his interest in order to achieve a compromise. The law facilities this mode of resolution, the law recognizes that the administration of justice is enhanced with parties managing to compromise their disputes. This underlying public policy consideration is more pronounced in this jurisdiction where lengthy delays are likely to be encountered in the litigating matters.

(9) The public policy principle is explained, in **Rush & Tompkins Ltd. v Glc 1988 3 ALL ER 737** Lord Griffins at page 739 said;

> The "without prejudice rule "is a rule governing the admissibility of evidence and is founded on 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) 1 ALL ER 597 AT 605-606, (1984) Ch 290 at 306:
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> > "That the rule rests, at least in part, on 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 course of the proceedings. They should, as it was expressed, Clauson, J in Scott Paper Co v Drayton Paper Works Ltd. (1927) 44RPC 151 at 157, be encouraged freely and frankly to put their cards on the table. The public policy justification, in truth essentially rests on the desirability of preventing statements being brought before the court of trial as admissions on the question of liability."

(10) Lord Griffiths' examination recognized that the rule is not inflexible and absolute, and the rule may be departed from when the justice of the situation demands it. For example, although generally accepted that the rule will not be applied if the negotiations ended in a settlement, if the issue is whether or not the negotiations resulted in a settlement, the court will be entitled to look at the document. In **Tomlin v Standard Telephones 1969 3 All ER 201** Lord Danckwert felt that the without prejudice documents ought to be admitted because it was "impossible to decide

whether there was a concluded agreement or not unless one looked at the correspondence". He commented on the reliance the judge had erroneously placed on the dicta of Lindley L. J. in **Walker v Wilsher**, where Lindey, J had said;

> "What is the meaning of the words 'without prejudice' I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one." Lord Danckwerts was of the view that the dictum of Lindley was of great authority and provided the basis for his finding that, there was a possibility of a binding agreement being in place, that would entitle the court to look at the letters."

(11) The claimants' attack upon the letter of the 28th October 2002, was multiple-pronged. It was alleged that it was not the product of a dispute, neither was its terms agreed in the course of a dispute or negotiations, but came at the end of the process. According to the claimants, the "without prejudice label is merely a facade to keep it from the reach of other person of similar status, to Mr. Sale.

(12) As to the allegation that there was no dispute, as none can be gleaned from a mere reading of the said letter. I disagree, the subject-matter is potentially highly contentious; it concerns the severance package of a branch manager, some three years before the scheduled period. The letter discloses that there was a meeting, and that the defendant "was now pleased" to announce the agreement.

(13) The Concise Oxford Dictionary defines a dispute as being, difference of opinion, debate, heated contention, controversy. The authorities use the term negotiations interchangeably with the word dispute. It is clear that there need be no rancour or discord before it could so qualify. It is fair to assume that Mr. Sale would be interested in obtaining the maximum to which he considered himself entitled. There were several heads of severance payments being discussed, it would be most unlikely that management and himself would have initially concurred on every head. The document reveals that there was give and take. Sale had his ability to practice his skills severely restrained and restricted for a period of 5 years after leaving the defendant. It is safe to assume that Mr. Sale would not have brought that to the table. He was further obliged to

do nothing prejudicial to the interest of the defendant. I find that the letter evidences a dispute or negotiations between Sale and the defendant.

(14) The claimant, in an attempt to avoid Lord Griffiths dictum in **Rush and Tomkins Ltd. v Greater London Council and another** (1980) 3 All England Reports 737, where he said that "without prejudice correspondence entered into with the object of effecting the compromise of an action remained privileged after the compromise had been reached." Submitted that the document in issue cannot fairly be said to have been written with the object of effecting the compromise of an action, as there is no evidence that an action was ever commenced or even contemplated. The judgment of Lord Griffiths itself makes it clear that the underlying public policy is to encourage, as far as possible, the parties to settle their disputes without resort to litigation. The specific facts of **Rush & Tompkins** involved the commencement of an action. Lord Griffiths makes it clear at page 740 letter b, the extent of the rule.

> "The rule applies **to exclude all negotiations genuinely aimed at settlement** whether oral or in writing from being given into evidence." (Emphasis mine)

(15) I find that all the documents item 1-6 of the list form a chain of correspondence in negotiations genuinely aimed at a settlement. The fact that the parties negotiations succeeded and ended in agreement, as evidenced by the letter of October 2001 does not affect the privilege. Lord Griffith again relied on the underlying principle of public policy to demonstrate that whether there was a settlement or not, the fact of encouraging the parties to have open discussions with a view to a settlement, was the dominant consideration in both instances. Counsel's argument that the negotiations having ended in agreement the privilege is not applicable, is therefore without merit. Per Lord Griffiths, at page 74 letter j.

"I cannot accept the view of the Court of Appeal that **Walker v Wilsher** is authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege goes, having served its purpose...."

And at page 741 letter c

> "I would therefore hold that as a general rule the without rule renders inadmissible in any subsequent litigation connected with the same subject-matter proof of any admissions made in a genuine attempt to reach a

settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party."

The defendants' application for an Order permitting it to withhold inspection or delivery up to the claimant the documents listed in Part 2, Schedule 1 of the defendants List of Documents dated 30th October 2007, is granted.

Cost of this application to the defendant to be agreed or taxed.