IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 00909

BETWEEN	**CANDICE LLOYD**	**CLAIMANT**
AND	**DWIGHT H.L. MOORE**	**DEFENDANT**

Miss Georgia Hamilton and Miss Lotoya Green for the Claimant instructed by Georgia Hamilton & Company.

Miss Stacia Pinnock and Mrs. Brown-Rose for Defendant instructed by Stacia D. Pinnock.

Heard: March 17 and 18 2008 and February 5, 2009

McDonald J

Two applications were placed before the court for determination. The first application was filed by the Claimant on August 18, 2007 seeking the following orders:-

(i) that specific portions of the Defendant's Defence filed on July 12, 2006 be struck out as an abuse of the court's process and/or for obstructing the just disposal of the proceedings.

(ii) that the Defendant has no reasonable prospect of successfully defending the claim on the issue of liability.

(iii) that there be summary judgment for the Claimant on the issue of liability with damages to be assessed.

Affidavits of Candice Lloyd and Carol Reid were filed in support of this application.

The grounds on which the Claimant seeks these orders are that (i) the issue of liability has already been agreed between the parties (ii) the granting of the orders will enable the court to proceed with the claim fairly and expeditiously.

The second application was filed by the Defendant on February 14, 2008 making a preliminary objection which sought the following orders:-

that the Claimant ought not to be heard on her application for summary judgment on the grounds that:-

(i) the Claimant's application is misconceived in law and is without merit.

(ii) that the communications between the Defendant's Insurers and the Claimant's Attorney are privileged

(iii) that the Claimant ought not to be allowed to rely on privileged communication between Defendant's Insurers and Messrs Grenyion Hamilton/Messrs Bignall Hamilton to prove that the Defendant has no prospect of defending the claim on the issue of liability.

Affidavits of Stacia D. Pinnock and Paul Bicknell, Attorneys-at-Law were filed in support of this application.

Background to the Proceedings

On November 9, 2005 the Claimant was injured in a motor vehicle accident involving motor vehicles 4193 DW and PC 0381.

At the time the Claimant was the driver of motor vehicle 4193 DW which was owned by her mother Carol Reid. Motor vehicle PC 0381 was owned by the Defendant and driven by Edward James as his servant or agent.

Miss Reid's motor vehicle was damaged as a result of the accident and her claim for damages and consequential loss were negotiated by her Insurers British Caribbean Insurance Company Ltd.

The Defendant's motor vehicle was insured with NEM Insurance Company. The Claimant instructed Messrs Grenyion Hamilton & Company to pursue a claim on her behalf for the injuries.

In so doing correspondence passed between the Attorneys and representatives of NEM.

When these negotiations broke down, the Claimant's Attorney-at-Law filed a Claim Form and Particulars of Claim on February 22, 2007. In her claim the Claimant alleged that the Defendant's said servant and/or agent James Edwards was the negligent party.

Process was later served on NEM pursuant to a court order for substituted service.

The Defendant's Acknowledgement of Service and Defence were filed on June 1 and July 17 2007 respectively and served on the Claimant's Attorneys. The Defence contested liability on the basis that the Claimant solely caused or alternatively contributed to the accident.

The issue in this case is whether the Claimant Candice Lloyd is entitled to summary judgment on the issue of liability against Dwight Moore.

In deciding this, it must be acknowledged that the Defendant has raised a preliminary objection that it is not competent for the Claimant to seek summary judgment in this case on the issue of liability as this court is not entitled to examine and construe the effect of without prejudice communication.

Preliminary Objection

The Defendant's Attorneys argued that the Claimant's application for court orders has sought to rely on the affidavits of Carol Reid and Candice Lloyd which exhibit negotiating correspondences which are headed 'without prejudice' by the Defendant's Insurers and which are privileged and should not be used against the Defendant Insurers in any court proceedings or at trial.

The Defendant is adamant that there was no agreement between the parties and objects to the admissibility of these documents.

It was further submitted that the tendering into evidence of these privileged communication have contravened the legal principle which govern their admissibility and should not be relied on by the court.

The Defendant's Attorneys submitted that the without prejudice communication will become admissible only if the negotiations had resulted in an agreed settlement. They said that the Claimant conceded that the negotiations had broken down at paragraph 6 of their submissions; and as such the Defendant maintains that the parties were seeking to compromise the action. That for this reason evidence of the contents of these negations should not be admissible and do not fall within the exception as set out in Rush & Tompkins v Greater London Council & Anor (supra) that correspondence headed 'without prejudice' is admissible for the purpose of ascertaining whether or not an agreement has been reached.

The Attorneys asserted that the without prejudice communications were put in evidence before a determination of their admissibility was made, as the Claimant did not ask the court to determine whether or not there was an admission of liability from the without prejudice communications between the parties. No declaratory relief was sought.

In effect, the Defendant's Attorneys contend that in the absence of a request for a declaration by the Claimant that an agreement on the issue of liability was arrived at during the course of without prejudice communications, the court cannot look at the said communications in the context of the Claimant's application for summary judgment.

The Defendant sought to distinguish **Tomlin v Standard Telephones & Cables (1969) 3 AllER 201** on the basis that, unlike the Claimant's application the court had before it, a preliminary application on the issue of the admissibility of 'without prejudice communication'.

The Defendant's Attorneys maintain that the Claimant is attempting to establish that the Defendant had accepted liability and as such is using the 'without prejudice' communications to ground an application to strike out the defence and to enter summary judgment. The Defendant argued that the Claimant has failed to ground her application for summary judgment. The application before the court relies on the negotiating correspondences which the Defendant holds are privileged and cannot be relied on to satisfy the court that the Defendant has no real prospect of successfully defending the claim.

The Claimant's response is that the court has jurisdiction to look at the 'without prejudice' communications, that there is no need for a preliminary application on the issue of admissibility of 'without prejudice' communication.

Further that in the face of the alleged agreement on the issue of liability arising from the without prejudice discussions, these "without prejudice" communications are admissible without more.

The Claimant's Attorneys submitted that this is settled law and relied on **Walker vs Wilsher** (1889) 23 QBD 335, 337; **Tomlin vs Standard Telephones and Cables Ltd** 3 All ER 201 and **Rush & Tompkins Ltd v. Greater London Council and Anor**. (1989) 1AC 1280, 1299.

They asserted that the Defendant's preliminary objection cannot properly constitute a legitimate challenge to the admissibility of these communications and that the application before the court is amenable to summary proceeding.

The court is called upon to consider the issues concerning the 'without prejudice' discussions and make a ruling having regard to the Defendant's preliminary objection as well as the Claimant's response.

I do not find that the court is prohibited from looking at the without prejudice communication in the context of the Claimant's application for summary judgment in the absence of a request by the Claimant for a declaration that an agreement on the issue of liability was arrived at during the 'without prejudice' communications.

I find that the preliminary objection cannot be upheld on a matter of general principle since it is only from an enquiry that the court will be able to determine whether the parties had arrived at an agreement on the issue of liability.

In **Tomlin v. Standard Telephones & Cable** (supra) Danckwerts L J at page 203 stated:

> "I feel no doubt, as the learned judge felt no doubt, that the letters were admissible to decide whether there was a concluded agreement of any kind between the parties in accordance with the correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence."

The Defendant's case is that there was no agreement on the issue of liability.

The court cannot make a determination without first looking at the documentation in question.

In Rush & Tompkins v. Greater London Council & Anor. (supra) Lord Griffiths at page 1299 explained the historical development of the 'without prejudice' rule as follows:-

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon 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 vs. Head (1984) Ch. 290, 306:
>
> > "that the rule rests, at least, 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. vs. Drayton Paper Works Ltd (1927) 44 RPC 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 protection afforded by 'without prejudice' communication is not absolute as illustrated by Lord Griffiths at page 1300 of this judgment when he said the following:-

> "Nearly all cases in which the scope of the 'without prejudice' rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. ***These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of the authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve a settlement. Thus the 'without prejudice' material will be admissible if the issue is whether or not the negotiations resulted in an agreed***

> ***settlement, which is the point that Lindley L J was making in Walker vs Wilsher (1889) 23 QBD 335 and which was applied in Tomlin v Standard Telephones & Cables Ltd (1969) 1 WLR 1378. (Emphasis supplied)***

The definition of the phrase 'without prejudice' contained in the judgment of Lindley L J in Walker vs. Wilsher (1889) 23 QBD 335 also illustrates that the protection afforded by 'without prejudice' communications is not absolute.

In this judgment Ludley L J at page 337 stated:

> "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." (Emphasis Supplied)***

I find that the court is entitled to look at the 'without prejudice' communications between the Claimant's Attorneys and representatives of NEM to determine their admissibility. There is no dispute that the communications exhibited are 'without prejudice' communications made during the course of negotiations.

(a) Exhibit CL 1 – correspondence from Grenyion Hamilton & Co. dated 13th January 2006.

(b) Exhibit CL 2 – correspondence dated 21st February 2006 from NEM

(c) Exhibit CL 3 – correspondence dated 10th May 2006 from Georgia Hamilton to NEM (Miss Debra Newland)

(d) Exhibit CL 4 – correspondence dated 22nd June 2006 – from NEM.

(e) Exhibit CL 6 – correspondence dated 27th September 2006 to NEM (Mrs. Pauline Brown-Rose) from Georgia Hamilton

(f) Correspondence dated 9th October 2006 – Georgia Hamilton to Mr. Paul Bicknell NEM Insurers.

(g) Exhibit CL 7 – correspondence dated 6th November 2006 – from Paul Bicknell to Georgia Hamilton plus letter dated 16th November 2006 – Georgia Hamilton to Paul Bicknell

(h) Exhibit CL 8 – correspondence dated 2nd January 2007 Georgia Hamilton – to Paul Bicknell

(i) Exhibit CL 9 – correspondence from NEM to Georgia Hamilton

(j) Exhibit CL 10 – correspondence from Georgia Hamilton to Mr. Paul Bicknell

(k) Exhibit CL 11 – correspondence from Paul Bicknell to Georgia Hamilton.

The correspondence item (b) amounts to an offer to settle on a contributory basis. This offer was refused in correspondence noted at item (c). However this correspondence sets out a renewed offer for NEM to settle the Claimants entire claim.

I find that correspondence at (d) above is an unequivocal acceptance of this offer together with an invitation for the Claimant to submit details of her claim. This invitation was responded to by letter dated 29th June 2006 followed by letter dated 27th September and 9th October 2006.

The crucial words in correspondence (d) reads

> "On review of the file we do not see the question of liability being an issue. We therefore invite you to submit details of your client's claim for consideration."

As stated previously many cases were cited before me including Rush & Tompkins v. Greater London Council (Supra) where the authorities were

reviewed. The gist of the law is that it is permissible for a court to examine the correspondence between the parties to ascertain if there was an agreement.

The Insurers were served with a notice pursuant to the relevant stature. On this basis I find, that the Defendant through his insurers has accepted liability.

I find that although there is no express reference to an 'agreement on the issue of liability' in letter dated 22nd June 2006 there is cogent evidence from which an agreement may be implied and I so find.

I accept the Claimant's Attorney's submission that from the basic laws of contract, the absence of express references to an agreement is not fatal to her submission that the issue of liability was agreed on between the parties.

In the instant case there is an express statement from NEM – which states "on review of the file we do not see the question of liability being in issue."

In my opinion an agreement as to liability was concluded.

The Defendant through his Insurers has accepted full liability in clear and unequivocal terms and as the Claimant's attorneys submitted "this acceptance came in the face of strident communication from the Claimant's Attorneys contending that there no issue of contributory negligence. The result thereafter is that both parties proceeded on the basis that only the issue of quantum had to be resolved."

This is evidenced by the letters dated 29th June 2006, 27th September 2006, 9th October 2006, 6th November 2006, and 16th November 2006.

I find that the letter dated 16th December 2006, could not operate to alter the parties agreement on the issue of liability since only an offer, not an agreement may be revoked unilaterally.

I find that the 'without prejudice' letters are admissible as the issue is whether or not the negotiations resulted in an agreed settlement.

The letter of 22nd June 2006, although written 'without prejudice', to adopt the words of Lindley J in Walker v. Wilsher (Supra) "operates to alter the old state of things and to establish a new one."

(1) order in terms of paragraph (i) and (iii) of Notice filed on August 18, 2007.

(2) The preliminary objection filed on February 14, 2008 fails with costs to the Claimant to be agreed or taxed.

(3) There should be an assessment of damages –

(4) Leave to appeal granted.