In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 381

BETWEEN:

(1) BPMS LTD.
(2) INNOFUND LIMTIED
(3) INNOFUND INNOVATION INCUBATOR LTD.

Plaintiffs

and

THE GOVERNMENT OF BERMUDA

Defendant

RULING

Date of Hearing:	23 July 2024
Date of Ruling:	7 October 2024
Plaintiffs:	John Hindess of Wakefield Quinn Limited
Defendant:	Delroy Duncan KC and Ryan Hawthorne of Trott & Duncan Limited

RULING of Cratonia Thompson, Acting Puisne Judge

INTRODUCTION

1. The application before the Court was filed by the Defendant. It seeks to strike out evidence filed by the Plaintiffs on the basis that it: (1) contains irrelevant material; and (2) the material is inadmissible due to it falling within the category of without prejudice communications between the parties.

2. The Defendant's alternative position, should the Court not agree to strike-out the evidence filed by the Plaintiffs, seeks leave to respond to the relevant passages within 14 days.

3. The Defendant's application is opposed on the following grounds: (1) The material *is* relevant; and (2) disclosure of the parties' without prejudice communications is necessary and permissible in order to answer allegations made by the Defendant of inordinate and inexcusable delay.

4. Further, the Plaintiffs oppose the Defendant's application on the basis that it would be grossly unfair and in breach of the overriding objective set out in Order 1A of the Rules of the Supreme Court 1985 (**RSC**) to grant the relief sought.

5. In addition to opposing the Defendant's application, the Plaintiffs seeks their costs of this application on an indemnity basis.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

6. The general procedural history and factual background relevant to this application is as follows.

7. The Plaintiffs filed and served their Generally Indorsed Writ in these proceedings (the **Writ**) on 14 December 2022.

8. The Defendant filed their Memorandum of Appearance (the **MOA**) on 23 December 2022. Although filed on 23 December 2022, the MOA was not served on the Plaintiffs until 3 January 2023.

9. Pursuant to Order 18, Rule 1 of the RSC, the Plaintiffs were due to file and serve their Statement of Claim on or before 17 January 2023. The Statement of Claim was filed out of time on 24 April 2023.

10. By Summons dated 17 May 2023, the Defendants applied to the Court seeking an order to set the Statement of Claim aside for irregularity under Order 2, Rule 1 (2) and Order 18, Rule 1 of the RSC (the **Set-Aside Application**).

11. The Plaintiffs oppose the Set-Aside Application. In response to the Set-Aside Application the Plaintiffs filed the Affidavit of John Sunderland Hindess, together with Exhibit JSH 1 sworn on 24 May 2023 (the **Hindess Affidavit**). The Hindess Affidavit referred to without prejudice communications between the parties and argued that those communications explain the delay in filing the Statement of Claim.

12. By Summons dated 7 June 2023, the Defendant applied to strike out paragraphs 13 to 24 inclusive, and paragraphs 26 and 27 of the Hindess Affidavit, together with the related Exhibits (the **Strike-out Application**) on the basis, *inter alia*, that those paragraphs contain irrelevant material and also contain inadmissible, without prejudice communications between the parties. It is the Strike-out Application that is presently before the Court for determination.

13. The Strike-out Application is supported by the Second Affidavit of Raymond Jones sworn on 7 June 2023. The Defendants are also seeking an order striking out the Affidavit of Aaron Smith filed by the Plaintiffs sworn on 19 July 2023 (the **Smith Affidavit**), on the basis that it contains references to without prejudice conversations in response to the Second Affidavit of Raymond Jones.

14. Additionally, the Defendants are seeking leave to respond to any remaining paragraphs of the Hindess Affidavit and the Smith Affidavit and their related Exhibits (together the **Plaintiffs' Affidavit Evidence**).

15. The Plaintiffs accept that the communications referenced in the Plaintiffs' Affidavit Evidence fall within the category of without prejudice communications. It is also accepted that the Plaintiffs did not file an application seeking to extend the time frame for filing the Statement of Claim.

THE LAW

16. The general rule regarding the admissibility of without prejudice communications provides that 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 be admitted in evidence. There is no dispute as to the general inadmissibility of without prejudice communications.

17. Similarly, there is no dispute that there are exceptions to the general rule regarding the inadmissibility of without prejudice communications. Relevant to the application at hand, is the principle that without prejudice communications *can* be disclosed for the purpose of explaining the passage of time and the conduct of the parties in the context of an allegation of inordinate and inexcusable delay.

18. The basis of this exception is that a party to litigation cannot present an untrue statement of affairs to the court on an interlocutory matter. Where this is the case, the court will '*pierce the without prejudice veil of protection*' and admit relevant evidence of that party's admission[1]. The exception also acts as an estoppel against a party seeking to rely on the rule contrary to any admission against interest they have made.[2]

19. Both parties referred in their oral and written submissions to the case of *Family Housing (Manchester) Ltd. v Michael Hyde & Partners* [1993] 1 WLR 354 (***Family Housing***) in support of the exception to the general rule regarding the inadmissibility of without prejudice communications. In that case, the court cites *Phipson on Evidence* (14th edn, 1990) pp 554-555, which provides as follows:

> *"It is certainly the case that without prejudice communications are admissible for the purpose of showing that they have been made. It is long established that they may be adduced in evidence as explaining delay. Though there is little authority on this topic, in practice, without prejudice correspondence is regularly exhibited to affidavits without objection from the court or counsel on interlocutory applications, for example to strike out for want of prosecution, or for discovery. In some cases this is because the correspondence, though headed without prejudice, is in reality nothing of the sort. In others, however, it genuinely falls within the protection accorded to without prejudice correspondence, but is admissible because the purpose for which it is tendered does not infringe the policy of the rules."*

[1] *Muller v Linsley and Mortimer* 1996 1 P.N.L.R. 74 at 78-80 and paragraphs 19-25 of Foskett on Compromise (9th edn)

[2] *Oceanbulk Shipping & Trading S.A.* [2011] 1 A.C. 662 at 32.

20. In *Family Housing* it was held that the public policy consideration of encouraging parties to talk frankly would not be inhibited if the without prejudice communications were admitted for the purpose of explaining delay, and the conduct of the parties at the relevant period. Further, the court held that the content of the without prejudice communications could be admitted as the plaintiff must be entitled to show either conduct, or implied intimation by the applicant. Fox LJ stated as follows at p. 576, para d of *Family Housing*:

> *"For the above reasons, I accept Mr Bloom's submissions, which seem to me to have particular force in relation to reliance on an alleged estoppel, which is undoubtedly open to a plaintiff in an application of this kind, having regard to the decision of the Court of Appeal in County & District Properties Ltd. v Lyell (Note) [1991] 1 W.L.R. 683. It seems to me manifest that a plaintiff must be entitled to rely for this purpose on any relevant statements in the without prejudice correspondence, to demonstrate either conduct or an implied intimation by the Defendant showing that he is willing for the case to proceed."*

21. Although both the Defendant and the Plaintiffs' Counsel made reference to the *Family Housing* case as an authority, the parties are at odds regarding how the principles should be applied to the case at hand.

THE DEFENDANT'S POSITION

Basis of the Defendant's application

22. The Defendant makes this application under the court's inherent jurisdiction to exclude irrelevant evidence from consideration in any determination the Court is empowered to make, and under the overriding objective to manage the dispute between the parties efficiently. The Defendant argues that the Court is also empowered to prevent a party from relying upon without prejudice communications in determining any issue before the Court.

23. The Defendant argues that while the Court may permit reference to without prejudice communications to explain the delay in commencing and prosecuting litigation as an exception to the general rule, the application of this exception does not apply when a party is seeking to explain a failure to comply with mandatory rules of the Court (i.e. the RSC).

24. It is also the Defendant's case that the public policy considerations behind the without prejudice rule are such that this Court should refrain from relaxing the rule save for in clear cases whether the evidence is relevant to an issue before the Court.

Reasons why the without prejudice evidence relied upon by the Plaintiff is irrelevant

25. The Defendant argues that the without prejudice communications referred to in the Plaintiffs' Affidavit Evidence is irrelevant as it post-dates the date that the Statement of Claim was due to be filed and served.

26. Further, the Defendant argues that the Court must consider whether the without prejudice communications and alleged discussions show (either expressly or impliedly) that the parties mentioned, discussed or agreed that the Plaintiffs were no longer bound by the mandatory obligation in Order 18, Rule 1 of the RSC to file and serve their Statement of Claim within 14 days of receipt of the Defendant's MOA. It is the Defendant's case that the substance of the without prejudice communications, and the Plaintiffs' Affidavit Evidence, do not demonstrate that the Plaintiffs ever raised the issue of extending the deadline for filing and serving the Statement of Claim. The Defendant argues that they never asked to extend the deadline to file and serve the Statement of Claim, and that there is no evidence of any discussion or agreement concerning the issue of extending the deadline. In light of this, the Defendant's consider the without prejudice communications irrelevant.

Reasons why the admission of the without prejudice evidence is contrary to the authorities

27. The Defendant suggests that it is the Plaintiffs' case that the Defendant's application is made in bad faith. In response, the Defendant argues that the Plaintiffs have provided no authority to support the proposition that without prejudice communications can be admitted to support an allegation that the time limit to file a Statement of Claim under the RSC can be extended because of the bad faith of the opposing party. It is the Defendant's case that there is no evidence of bad faith as there was no agreement to extend the time limit to file and serve the Statement of Claim – an extension was neither discussed, asked for nor agreed.

28. As to the authority, the *Family Housing* case, the Defendant argues that the decision in *Family Housing* concerns reliance on without prejudice communications as an exception in circumstances where a party has no obligation to bring and prosecute a claim and is accused of delay in prosecuting that claim. The Defendant argues that this is a distinguishing factor from the case at hand, where the Plaintiffs are under a mandatory obligation to file and serve their Statement of Claim within the time prescribed by the RSC. The Defendant's referenced the passage in *Family Housing* set out in paragraph 20 of this Ruling in support of this position.

29. It is the Defendant's case that absent any discussion regarding extending the time for Plaintiffs to file and serve the Statement of Claim, the Plaintiffs cannot demonstrate either conduct or an implied intimation by the Defendant showing that it was willing to allow an extension of time to file and serve the Statement of Claim. Accordingly, the without prejudice communications should be excluded.

THE PLAINTIFF'S POSITION

30. The Plaintiffs invited the Court to consider the principles set out in Halsburys Laws of England, stating that the critical question for the court to consider 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.[3]

31. It is the Plaintiffs' case that reference to the without prejudice communications must be allowed in order to defend the allegations against them of inordinate and inexusable delay. The Plaintiffs argue that the contents of the without prejudice communications clearly show that the Plaintiffs reasonably relied on the fact that the negotiations were continuing and that the Defendant repeatedly requested more time to respond in thinking they would either settle or proceed.

[3] Halsbury's Laws of England, Civil Procedure (Volume 11 (2020), paras 1-496; Volume 12 (2020), paras 497-1206; Volume 12A (2020), paras 1207-1740) > 17. Disclosure, Privilege and Immunity > (2) Exceptions to the Obligation to Produce Documents for Inspection > (iv) 'Without Prejudice' Communications, at footnote 6

32. Additionally, the Plaintiffs argue that it would be grossly unfair and in breach of the overriding objective set out in Order 1A of the RSC to grant the relief sought by the Defendant.

33. The Plaintiffs rely on the passages in *Family Housing* set out in paragraph 20 of this Ruling in support of their case, and also referred the Court to the following from Hirst LJ found at p. 570, para b – c of *Family Housing*:

> "*It seems to me, when considering questions of delay and striking out for delay, it is not sufficient just to know there have been negotiations. If that is all a judge knows he might well do an injustice either to a plaintiff or to a defendant. To my mind it is sensible in such cases to see what each party was saying to the other, and to see if for instance delay was actively encouraged, whether protests were being made about it, whether both were just letting the action sleep. Such an inquiry would ensure that a judge, who is deciding whether a party should be struck out or not because of delay, would have a full picture before him so that he could meet the full justice of the case without any blindfold.*"

34. The Plaintiff also relies on the principles set out in *Allen v McAlpine* [1968] 2 O.B. 229 (***Allen v McAlpine***) and *Greek City Co Ltd. and Another v Demetriou* [1983] 2 All ER 921 (***Greek City***).

35. In *Allen v McAlpine* it was held that where a defendant has induced the plaintiff to believe that the action is to be allowed to go on, and the plaintiff has in consequence taken action to alter his position or to act to his detriment, the defendant is debarred from relying upon inordinate and inexcusable delay in order to secure the dismissal of the action for want of prosecution.

36. Similarly, in *Greek City*, the defendants applied for orders to dismiss the actions because of the plaintiffs' failure to serve statements of claim within the prescribed time pursuant to RSC Order 18, Rule 1. The Court held that the mere failure to observe a time limit in the rules of court for taking a step in the action, such as failing to serve a statement of claim in time, was not to be treated as equivalent to disobedience of a peremptory order of the court, nor was it a default which was to be treated as intentional and contumelious and thus an abuse of the court's process.

37. The Plaintiffs argue that the principles cited dictate that the Plaintiffs must be allowed to refer to the without prejudice communications in order to defend the allegations against them of inordinate and inexcusable delay. Further, the contents of that evidence clearly show that the Plaintiffs reasonably relied on the fact that the negotiations were continuing.

38. The Plaintiffs' Counsel encouraged the Court to review the authorities filed by both the Plaintiffs and the Defendant in respect of this application, and argued that the Defendant's Counsel had not referred the Court to certain relevant passages of the case authorities that supported the Plaintiffs' case.

39. I have considered the authorities filed by both parties, and in addition to the passages set out elsewhere in this Ruling, I have found the following commentary of Fox LJ (found at p. 575, para j – p. 576, para a – c) in *Family Housing* helpful:

> "*The main considerations of public policy in favor of the general rule excluding the reference to without prejudice correspondence, on which Mr Grime so strongly relies, seem to me to have litter or not application in the present context, seeing that I do not think the parties' willingness to talk frankly about the strengths and weaknesses of their case, and to make provisional offers or admissions for the purposes of negotiation only, will be to any significant extent inhibited by the knowledge that the negotiations may be referred to in this very narrow field, not for the purpose of showing that such provisional offers or admissions were made, but solely for the purpose of explaining delay and the conduct of the parties at any relevant period... Moreover the admission of such material is by no means a one-sided advantage, since the defendant may well wish to refer to it to show that the plaintiff was not negotiating sincerely or was dragging his feet. Consequently I am unable to see how exposure of the course of negotiations in this narrow context is in any way harmful to either side. If the application succeeds, the action will be at an end. If it fails, and the case proceeds to trial, the material will not be available to the trial judge…"* (Emphasis added)

APPLYING THE FACTS TO THE LAW

40. The communications in question fall squarely within the category of without prejudice correspondence. Therefore, such communications are, at first blush, considered inadmissible.

41. While it is accepted that the Court has an inherent jurisdiction to exclude irrelevant evidence, I do not agree that the without prejudice communications are irrelevant on the basis that the date to file the Statement of Claim had already lapsed, nor do I accept that that the without prejudice communications are irrelevant on the basis that the Plaintiffs were obligated, by virtue of Order 18, Rule 1 of the RSC (and in the absence of any express agreement to the contrary), to file their Statement of Claim on or before a certain date. The Court's findings in *Greek City* show that failing to serve a statement of claim in time is not to be treated as equivalent to disobedience of a peremptory order of the court, nor is it a default which is to be treated as intentional and contumelious, and thus an abuse of the court's process.

42. Consequently, I do not accept the Defendant's argument that the exception principle set out in the *Family Housing* case does not apply in cases where a party is seeking to rely on without prejudice communications to explain a failure to comply with mandatory rules of the Supreme Court.

43. Further, I do not accept that an express agreement to extend the time to file the Statement of Claim is required in order to admit the without prejudice communications as evidence, or for the evidence to be considered relevant. The *Family Housing* case shows clearly the court's willingness to admit without prejudice communications "*to demonstrate either conduct or an <u>implied intimation</u> by the Defendant showing that he is willing for the case to proceed*" (Emphasis added).

44. Similar to the Respondent in *Family Housing*, the Plaintiffs have made it clear that they intend to argue at the hearing of the Set-Aside Application that the Defendant in this case is estopped from making the Set-Aside Application by reason of their conduct, and seek to rely on the without prejudice communications to make good their case. The Plaintiffs also seek to rely on the without prejudice communications to defend the Defendant's allegations of delay. In line with the authorities, it is open to the Plaintiffs to argue conduct or an implied intimation by the Defendant.

45. In order for the Court considering the Set-Aside Application to make an informed decision, I am of the view that the Court should have at its disposal all evidence relevant to the

application before them which, given the Plaintiff's intended argument, would include the without prejudice communications.

46. I would add for completeness, that as was the case in *Family Housing*, I do not consider the admission of the without prejudice communications in this case to be a one-sided advantage. The Defendant may well wish to refer to it to support their case that there was no express agreement to extend the timeline for filing of the Statement of Claim. Consequently I am unable to see how exposure of the without prejudice communications is in any way harmful to either side.

CONCLUSION

47. In light of the above, I dismiss the Defendant's application to strike-out the Plaintiffs' Affidavit Evidence. I accept the Defendant's alternative position, and grant the Defendant's leave to respond to the relevant passages of the Plaintiffs' Affidavit Evidence within 14 days of this Ruling.

48. As to the Plaintiffs' application for indemnity costs, I consider it more appropriate for that application to be considered by the trial judge of the substantive matter or the Set-Aside Application. That being the case, the costs of the present application are reserved.

Dated this 7 October 2024

HON. MRS. CRATONIA THOMPSON
ACTING PUISNE JUDGE