[2016] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 60/2015

BEFORE:	**THE HON MRS JUSTICE MCDONALD-BISHOP JA** **THE HON MR JUSTICE WILLIAMS JA** **THE HON MISS JUSTICE WILLIAMS JA (AG)**	
BETWEEN	**WINSTON FINZI**	**1ST APPELLANT**
	MAHOE BAY COMPANY LIMITED	**2ND APPELLANT**
AND	**JMMB MERCHANT BANK LIMITED**	**RESPONDENT**

Written submissions filed by Ballantyne, Beswick & Company for the appellants

Written submissions filed by Hylton Powell for the respondent

14 June 2016

PROCEDURAL APPEAL

(Considered by the Court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] This is a procedural appeal brought by Mr Winston Finzi and Mahoe Bay Company Limited (Mahoe Bay), the appellants, against the decision of Sykes J, delivered orally on 5 May 2015 in the Commercial Division of the Supreme Court, in favour of the respondent, JMMB Merchant Bank Limited.

[2] On 4 May 2015, the first day fixed for the trial of the claim brought by the respondent against the appellants, the respondent sought orders, that, inter alia, portions of the witness statements of Mr Abraham Dabdoub and Mr Finzi that were filed on behalf of the appellants in the claim be struck out. The basis of the application was that the impugned portions of the witness statements in question referred to "without prejudice" communication that is privileged and the privilege has not been waived. Therefore, the communication is not subject to disclosure and use in the trial of the claim.

[3] At the conclusion of the hearing, Sykes J, among other things, struck out the impugned portions of the witness statements of Messrs Dabdoub and Finzi and granted the appellants leave to appeal. He also ordered one day's costs to the respondent. It is these aspects of the order that are the subject of this appeal.

[4] Unfortunately, the court has not had the benefit of an agreed memorandum of the oral judgment delivered by the learned judge. The substance of the decision is gleaned only from the amended notice of appeal filed on 20 May 2015, in which the appellants have set out the details of the decision appealed against. There is nothing from the respondent challenging the details provided by the appellants and so the appellants' record of the details of the decision is accepted as a true representation of the learned judge's decision.

[5] The details of the decision appealed against are set out as follows:

"a. That the Electronic Mail Communication dated 23rd May, 2012 is a Without Prejudice Communication.

b. That the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussion to which it refers are subject to Legal Professional Privilege

c. That the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussion to which it refers are not admissible and cannot be relied on in the trial by the Appellants as the other party has not waived privilege.

d. That the paragraphs of the Witness Statements of Winston Finzi and Abraham Dabdoub filed on the 29th April, 2015 which reference the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers be struck out.

e. Costs of the Application is one day's Costs to the Respondent."

The grounds of appeal

[6] The grounds of appeal are:

"a. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 was a Without Prejudice Communication;

b. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers were subject to Legal Professional Privilege.

c. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers are not admissible and cannot be relied on in the trial by the Appellants as the other party has not waived privilege.

d. That the Learned Judge erred in finding that discussions and related communications between the Appellant and a third party were without prejudice and were subject to Legal Professional Privilege.

e. That the Learned Judge erred when he found that any discussions regarding settlement of an issue between parties

who subsequently become involved in litigation are subject to Legal Professional Privilege and cannot be referred to in subsequent litigation, even if at the time of the discussions there was no litigation in progress or contemplated between the parties.

f. That the Learned Judge erred when he found that discussions between the parties prior to the commencement of litigation was subject to Legal Professional Privilege even though said discussions took place at a time when the parties had no dispute with each other and further had no relationship capable of giving rise to a cause of action against each other.

g. That the Learned Judge erred in concluding that the discussions and resulting correspondence was subject to Legal Professional Privilege when there was no evidence from any party that such a claim had been made at the relevant time or afterwards, and the Court had no jurisdiction to rule on the application without actual sworn evidence from a party claiming Legal Professional Privilege.

h. That the application did not consume one day of Court's time since a significant portion of the court's time was consumed with setting up, instructions and submissions in relation to the Digital Recording Pilot Project.

i. That the application did not consume one day of Court's time since the Respondent consumed time explaining and submitting why an adjournment was needed and why trial bundles had not been finalised." (Emphasis as in original)

[7] The appellants seek orders in these terms**:**

"a. That the appeal is allowed;

b. That the Order of Mr Justice Sykes is set aside in part;

c. A declaration that the Electronic Mail Communication dated 23rd May, 2012 is not a Without Prejudice Communication;

d. A declaration that the Electronic Mail Communication dated 23rd May, 2012 and the details of the

discussions to which it refers are not subject to Legal Professional Privilege.

e. A declaration that the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers are admissible and can be entered into evidence and otherwise referred to in the trial of the claim in the Court below.

f. That the paragraphs in issue in the Witness Statements of Winston Finzi and Abraham Dabdoub filed on 29th April, 2015 be allowed to stand.

g. Costs of this appeal and the application below are awarded to the Appellants and are to be taxed if not agreed and taxation authorized for both sets of costs."

Background

[8] As is gleaned from the grounds of appeal, at the heart of the dispute between the parties in these proceedings is an email correspondence of 23 May 2012 between Jamaica Money Market Brokers Limited (JMMB) and Mr Finzi. The circumstances giving rise to that email correspondence are outlined in the submissions filed on behalf of the appellants, but according to the submissions filed on behalf of the respondent, the appellants had set out a number of "facts" that were not in evidence in the Supreme Court. Regrettably, those facts have not been highlighted by the respondent for the benefit of this court and so the court does not know the extent to which new facts are being stated on appeal and the extent to which, if any at all, the facts stated by the appellants are disputed facts. However, in an effort to gain an insight into the factual background to the issues that have arisen for determination in these proceedings, care had to be taken to extract what would appear to be the least controversial facts

outlined by the appellants in their submissions. This had to be done because the originating documents in the proceedings below have not been forwarded for the attention of this court so that a distinction may be made between pleaded facts (in the substantive matter) and new facts being relied on appeal.

[9] What is clear is that the matter has its genesis in a dispute between Mr Finzi and a Mr Ryland Campbell concerning the purchase of shares in Capital and Credit Merchant Bank Limited (CCMB) in or around 2005. At the time, CCMB was a subsidiary of Capital and Credit Finance Group Limited (CCFG), of which Mr Campbell was Group President and Chief Executive Officer. This dispute led to court proceedings in Saint Lucia between Mr Finzi and Mr Campbell. The appellants contend that based on orders made by the court in those proceedings, Mr Finzi is entitled to a portion of shares that were held in CCMB by Weststar International (Weststar), a company owned by Mr Campbell.

[10] JMMB subsequently became interested in purchasing the controlling interest in CCFG and commenced discussions with Mr Finzi concerning their interest in acquiring shares in CCMB in which Mr Finzi was claiming an interest. At the time of those discussions, JMMB was not the owner of CCMB and neither was it associated with Mr Finzi, Mr Campbell nor Weststar.

[11] On 23 May 2012, during the course of those discussions between JMMB and Mr Finzi, concerning the shares in CCMB, Ms Patricia Sutherland, Director of JMMB, sent the email communication in issue to Mr Finzi. On Thursday 24 May 2012, JMMB submitted a formal offer to the CCFG Board of Directors to acquire CCFG. JMMB

subsequently succeeded in acquiring the controlling interest in CCFG and thereby acquired CCMB. CCMB was later "rebranded" as the respondent.

[12] In the claim filed in the Supreme Court by the respondent against the appellants concerning loans made by CCMB to the appellants, Mr Finzi sought to rely on the email communication between him and Ms Sutherland. He averred that based on the assurances made to him during those discussions with JMMB, and which is evidenced by the email communication in issue, he did not assert his rights as a shareholder at the time of the acquisition of CCMB by JMMB. He raised the defence of estoppel based on those discussions. Mr Finzi also contends that this communication provides support for his counterclaim as it shows that JMMB, from its own due diligence, had found that there were sums owing to him by CCMB.

[13] The respondent raised objection to the admissibility of that communication, among other things, that was contained in the witness statements of Messrs Dabdoub and Finzi on the ground that the communication was "without prejudice". It was on the basis of that objection that the application was made for the relevant portions of the witness statements in question to be struck out, which succeeded.

[14] JMMB is not, and never was, a party to the proceedings.

The issues

[15] The appellants' case on appeal, as reflected in the nine grounds of appeal, has given rise to four broad issues; they are whether:

(1) the learned judge erred in ruling that the email communication is inadmissible on the basis that it was a 'without prejudice' communication;

(2) the learned judge erred in his ruling that the communication was subject to legal professional privilege and, therefore, inadmissible;

(3) the email communication is admissible as giving rise to an estoppel in favour of the appellants in the proceedings against the respondent; and

(4) the learned judge erred when he awarded costs for one day in favour of the respondent.

Grounds (a)–(g)

[16] For convenience, grounds (a)-(g) have been considered conjunctively, given the factual and legal bases for the complaints of the appellants in these grounds of appeal. These grounds have given rise to a consideration of issues (1)–(3), enumerated above.

Issue # 1: Whether the email communication was a "without prejudice" communication and inadmissible

The appellants' submissions

[17] It is submitted on behalf of the appellants that the communication was not "without prejudice". According to counsel on behalf of the appellants, for the "without prejudice" rule to be invoked to render the email communication inadmissible, there must be a dispute between the parties to the communication. They contend that the discussions and the subsequent offer made to Mr Finzi by JMMB was done at the time when JMMB was a third party to the dispute between Mr Finzi and Weststar. Therefore, any agreement between the parties was conditional on the successful acquisition of CCFG by JMMB. Additionally, they contend, there can be no viable argument that there is subsequent litigation between the appellants and JMMB as the current litigation has arisen on the basis of loans granted by CCMB to the appellants and the use of funds belonging to Mr Finzi by CCMB. So, there was no dispute between JMMB and Mr Finzi at the time of the email communication in question and there has never been a dispute between them. Accordingly, the facts do not support the learned judge's finding that the email was sent "during a dispute between the parties".

[18] In support of their contention that there was no dispute between JMMB and Mr Finzi, the appellants place reliance, in particular, on Halsbury's Laws of England, 5th edition, Volume 11, paragraph 804 and **Standrin and another v Yenton Minister Homes Ltd and others** The Times, 22 July 1991, CA.

The respondent's submissions

[19] The respondent does not dispute the appellants' account of how the email communication came into existence, albeit that it is contended by counsel on its behalf that some facts now disclosed by the appellants were not elicited in the proceedings in the court below. It is clearly not disputed, however, that JMMB was not the owner of the respondent at the time of the communication and that JMMB is not a party to the claim between the appellants and the respondent.

[20] As it relates to the appellants' contention that there was no dispute between JMMB and Mr Finzi at the time of the communication, the respondent contends that there was "plainly" a dispute between them. According to the respondent's submissions, there was a dispute between the parties as JMMB was faced with the appellants' claim of an interest in CCMB shares that JMMB had agreed to acquire. Counsel for the respondent contend that from this standpoint, the appellants' position was clearly adverse to JMMB's interests and JMMB was trying to find a way to resolve it. Accordingly, they contend, the email was more than an initiating document; it was a negotiating document employed in an attempt to arrive at a final resolution of the dispute where the negotiations were protracted. Sykes J was therefore correct to find that the email was "without prejudice".

[21] The respondent relies, primarily, on **South Shropshire District Council v Amos** [1986] 1 WLR 1271 and **Standrin v Yenton Minister Homes Ltd** in advancing this argument that there was a dispute between the parties.

Discussion and findings

The law

[22] The "without prejudice" rule and legal professional privilege that arise for consideration form part of the branch of privilege in the law of evidence. As Adrian Keane noted in his useful text, The Modern Law of Evidence, seventh edition, chapter 20, page 596, privilege operates to exclude relevant evidence not because it is unreliable or irrelevant to the facts in issue, but because of extrinsic considerations which are held to outweigh the value that the evidence would have at trial. The well-established considerations that may operate to bar the admissibility of relevant evidence on the grounds of privilege are:

(i) the rights of parties to be advised confidentially by their legal advisers ('legal professional privilege');

(ii) the rights of parties to enter into negotiations without being bound by what is said in the negotiation process ('without prejudice negotiations'); and

(iii) the rights of parties to be free from being compelled to answer questions where to do so would be self-incriminating ('privilege against self-incrimination').

[23] In so far as "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), paragraph 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."

[24] In paragraph 664, the limits of the rule are explained thus:

> **"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."

[25] The oft-cited case of **Rush & Tompkins 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."

[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."

[27] The privilege, as it is said, attaches to any discussions that take place between actual or prospective parties with a view to avoiding litigation, including discussions within conciliation and mediation schemes. The fact that the expression "without prejudice" is actually used is 'not without significance' but does not conclude the matter: provided that that there is some dispute and an attempt is being made to settle it, the courts should be ready to infer that the attempt was "without prejudice". The basis of the rule is to encourage those in dispute to settle their differences without recourse to, or continuation of litigation. See Adrian Keane, The Modern Law of Evidence, seventh edition, page 634.

[28] In **Ofulue and another v Bossert** [2009] AC 990 at page 997**,** Lord Hope stated the operating principle this way:

> "2 …The principle which the court should follow was that expressed by Romilly MR in *Jones v Foxall* (1852) 15 Beav 388, 396. If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a dispute could ever be made. The basis for the rule has been explained more fully by Oliver LJ in *Cutts v Head* [1984] Ch 290, Lord Griffiths in *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280 and Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436. With the benefit of those explanations it may be re-stated in these terms.
>
> Where a letter is written 'without prejudice' during negotiations with a view to a compromise, the protection that these words claim will be given to it unless the other party can show that there is a good reason for not doing so."

Was there a dispute between the parties for the purposes of the "without prejudice" privilege?

[29] 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.

[30] In **Barnetson v Framlington Group Ltd and another** [2007] 3 All ER 1054, it was held that to give full effect to the policy underlying the rule, a dispute may engage the rule notwithstanding that litigation has not begun. Auld LJ, who delivered the judgment on behalf of the court, however, cautioned (page 1064, paragraph [33]):

> "On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest

> underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear..."

[31] In treating with the question as to how proximate negotiations should be to the start of litigation in order to engage the rule, Auld LJ opined (page 1064, paragraph [34]):

> "…the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."

[32] The appellants contend that there is no dispute between the appellants and JMMB (the parties to the communication) and that there was no dispute at the time of the communication and so the pre-condition for the applicability of the rule is not satisfied. The respondent contends otherwise, arguing that there was a dispute between JMMB and Mr Finzi at the time of the communication and so the pre-condition for the operation of the rule is met.

[33] The burning question that now arises for resolution at this juncture is whether it can be said that the privilege applies in this case on the basis that there was a dispute between JMMB and Mr Finzi, the parties to the communication.

[34] In examining this question, it is important to highlight several points of interest, which are:

(i) There was a dispute between the appellants and Mr Campbell, then of CCFG, concerning shares in CCMB, which led to a court order in Saint Lucia.

(ii) JMMB was not a party to that dispute between the appellants and Mr Campbell.

(iii) There was communication between Mr Finzi and JMMB concerning the shares claimed by Mr Finzi in CCMB and in which JMMB had an interest in acquiring.

(iv) At the time of the discussions between Mr Finzi and JMMB, JMMB had not yet acquired the shares and had not yet made a formal offer to do so.

(v) CCMB was not a party to those discussions between JMMB and Mr Finzi.

(vi) JMMB was not acting as agent of CCMB in those discussions.

(vii) CCMB was acquired by JMMB after the communication between Mr Finzi and JMMB.

(viii) The respondent was not a party to or a beneficiary of those negotiations.

[35] On the facts presented, there is no evidence that JMMB was at any time connected with Mr Campbell and Weststar, in any way, when they approached Mr Finzi. They were, therefore, not negotiating as a party to any dispute between Mr Finzi and Mr Campbell and/or Weststar.

[36] The facts have revealed, however, that at the time of the negotiations, JMMB had merely an interest in acquiring CCFG, and by extension, CCMB. Against that background, they became aware that Mr Finzi was claiming shares in CCMB and so they embarked on discussions with Mr Finzi concerning those shares. So, at the time, JMMB, having not yet put in its formal offer to acquire CCFG, would not have been the owner of any shares in CCMB, either legally or beneficially. It follows then that JMMB would not have been in a legal position to assert any claim to shares in CCMB that, at the time, would have been in conflict with Mr Finzi's claim to shares in CCMB so as to give rise to a justiciable issue between them. Similarly, Mr Finzi at that time could not have properly asserted any legal claim against JMMB in relation to those shares.

[37] Based on the facts presented to this court, it would seem that JMMB had embarked on discussions with Mr Finzi as part of a prospective business deal being worked out (following what apparently was its due diligence investigation) and not within the context of any issue which could have led to litigation between them and Mr Finzi, if the negotiations broke down. As Auld LJ noted in **Barnetson**, the "crucial

consideration" in determining whether this claim of "without prejudice" privilege can be sustained is whether in the course of the negotiations, the parties contemplated or might reasonably have contemplated litigation, if they could not agree. Indeed, to date there has not been any reported litigation between JMMB and Mr Finzi concerning those shares and or the negotiations concerning them. This leads to a reasonable inference that at the time of the negotiations, recourse to litigation was not contemplated between the parties, if negotiations failed. The respondent, who is relying on the protection of the privilege, is not properly placed to provide any evidence to rebut this inference because it was not a party to those discussions.

[38] Therefore, whatever was the intention of JMMB at the time, there is no evidence before this court, and none that is shown to have been placed before Sykes J, that they had made any overtures or offers to Mr Finzi, within the context of any dispute with Mr Finzi, and that the negotiations were a genuine attempt to settle such dispute with a view to avoid or settle legal action. In other words, there is no evidence that the parties had engaged each other in discussions as disputants *inter se*, actual or prospective, concerning shares in CCMB.

[39] It is also duly noted that the maker of any statement in the email would have been JMMB and not CCMB. JMMB and CCMB were, at the time of the discussions in question, two separate legal entities with no factual or legal relationship between them. Furthermore, there is no evidence that JMMB was acting as agent for CCMB in any dealing with Mr Finzi concerning the shares JMMB was desirous of acquiring. So in

those circumstances, nothing done or said by JMMB could be imputed to CCMB and, by extension, the respondent, that could have properly formed the subject of litigation between Mr Finzi and CCMB (or the respondent).

[40] The respondent's counsel, in arguing that there was "plainly a dispute" between JMMB and Mr Finzi, have relied on **South Shropshire District Council** to argue that the authorities have given a wide interpretation to the word 'dispute' in support of their argument. They submit that in **South Shropshire District Council**, there was no disagreement or dispute between the parties at the time of the communication in question, but that the Court of Appeal, nevertheless, held that there was a dispute for the purposes of the "without prejudice" privilege. Given this submission of counsel for the respondent, it was considered necessary to closely consider the facts of that case in order to see how far it could assist in resolving the question that arises for resolution in this case.

[41] In that case, a discontinuance order was made under the Town and Country Planning Act, 1971 in respect of the business use of premises by Mr Amos (the claimant). Mr Amos subsequently made a written claim for compensation to the District Council pursuant to the Act. The claim, at first, did not contain any quantification of the amount claimed and it indicated, inter alia, that Mr Amos wished to have the amount of the compensation negotiated with his agents. In the first letter that was sent by Mr Amos' agents to the Council, which was not headed "without prejudice", they indicated that it was their intention to submit a detailed claim with the intention "that such a

claim will be full and final under all heads and which will be included in the reference to the Lands Tribunal, the papers for which are currently in course of preparation".

[42] Following that letter, other correspondence followed, including two documents that became the subject matter of proceedings before the court. The first one was a document called "Document A" (by the Court of Appeal) which was headed "without prejudice". It contained full particulars of the claim then being advanced by Mr Amos, together with submissions in support of the claim. The District Council did not accept the claim as specified in that document. As a result, a second document (called "Document B" by the court), which was also marked "without prejudice", was later submitted by Mr Amos' agents. This document superseded Document A. The parties failed to arrive at a settlement and the claim was referred to the Lands Tribunal for resolution.

[43] The Lands Tribunal ruled the two documents marked "without prejudice" inadmissible. The District Council made a successful application to the Queen's Bench Division of the High Court for the documents to be admitted in evidence. The judge, in ruling that the documents were admissible, formed the view that the two documents did not constitute "an offer to settle a dispute" but were particulars of the original unspecified claim to compensation. This order was set aside by the Court of Appeal on the basis that both documents were inadmissible by virtue of the "without prejudice" privilege.

[44] In so far as is relevant for our purposes, the court explicitly noted that it was "conceded" that there was a dispute between the parties at the time of the communications in question. According to the court, it was conceded that a dispute '**had been in existence since December 1977 when Mr Amos had put in his original claim**". (Emphasis added)

[45] The court also observed that following the submission of his original claim for compensation, Mr Amos, from the outset, had indicated that he wanted to negotiate. Also, the letter written by Mr Amos' agents at the start of the negotiations (referred to in paragraph [41] above) had clearly indicated that a reference to the Lands Tribunal, which was the body to which claims for compensation were submitted for resolution, was intended and so the documents were being prepared for that purpose. It was also, as noted by the court, common practice for parties to negotiate before proceeding to the Lands Tribunal.

[46] It was against all that background that the court then concluded that both documents in question were inadmissible. According to them, Document A was marked "without prejudice" when produced, which prima facie meant that it was intended to be a negotiating document. The court noted in relation to that document (page 1277):

> **"**Bearing in mind the original expressed intention to negotiate, **the fact that there was a dispute in existence,** that it is common practice for such claims to be the subject of negotiation before the parties resort to a reference to the Lands [Tribunal] we have no hesitation in concluding that those words should be given their ordinary effect." (Emphasis added)

The court then stated the position with respect to Document B:

> "The position with regard to Document B. is in our view plainer. It was clearly written in the course of negotiation and was accompanied by a letter which was itself headed 'without prejudice'."

[47] There was enough on the evidence in **South Shropshire District Council** for the court to have found (even in the absence of a concession) that there was a dispute between the parties to be resolved concerning the compensation payable to Mr Amos and that the communication in question was made during the negotiations to settle that dispute. Also, and even more importantly, for present purposes, it was clearly contemplated, anticipated, or intended by the parties to the communication that litigation (before the Lands Tribunal) would have ensued, if the negotiations failed. The negotiations in that case were therefore, undeniably, conducted within the context of an extant dispute between the parties to the communication, with litigation looming in the background, if those negotiations failed. The negotiations failed and the matter was litigated before the Lands Tribunal as was reasonably within the contemplation of the parties.

[48] So, contrary to the arguments of counsel for the respondent, the court had no need to stretch or widen the meaning of the term 'dispute' in order to conclude that a dispute had existed between the parties at the time of the communication. That was not an issue. The question for the court was whether the documents in question that were marked "without prejudice" had formed part of the negotiations between the parties in settlement of that dispute so as to attract the protection of the rule, and they

so found. The critical ruling of the court, in so far as is relevant, is accurately reflected in the headnote in these terms:

> " …[A]lthough documents marked 'without prejudice' were only inadmissible in evidence if they came into being because there was an existing dispute which the parties were seeking to settle, documents so marked were privileged if they formed part of the negotiations, whether or not they were documents making offers, and included documents that initiated the negotiations; but that the 'without prejudice heading' did not conclusively or automatically make them privileged…"

[49] The respondent's reliance on that case is rather misplaced in asking this court to find that there was a dispute between Mr Finzi and JMMB for the operation of the "without prejudice" rule.

[50] My analysis of the circumstances of this case within the context of the applicable law, as I understand it to be, has led me to state that while it is accepted that JMMB and Mr Finzi were in negotiations with each other with respect to the shares and that the email communication was towards the settling of those negotiations, there is no evidence to suggest, even remotely, that the purpose of those negotiations was the assertion of a legal claim by either party against each other, which could properly have been the subject of litigation between them, if they had failed to arrive at an agreement.

[51] I am, therefore, propelled to the conclusion that there is no evidence to support a finding that there was a "dispute between the parties" to the communication at the time of the email communication in question, at which the negotiations were directed,

and so the communication was not a genuine attempt to settle any dispute in order to stop or avoid litigation. I have also concluded that there was no dispute between the parties to this litigation at the time of the email communication. So broadly speaking, the pre-condition that the communication was made during a "dispute between the parties" is not satisfied.

Is the "without prejudice" privilege applicable in the proceedings between the appellants and the respondent?

[52] Despite my conclusion above, I must go further to indicate that while I do accept that the email communication was a negotiating document between Mr Finzi and JMMB concerning the shares in CCMB, the critical consideration for this court is not that there were negotiations between them but rather the purpose of those negotiations and to what matter they were connected. The communication between them must be shown to be sufficiently connected to the subject matter of the litigation between the appellants (or any of them) and the respondent in order for one of them to claim the protection of the privilege in the proceedings. Indeed, the crucial question arises: on what basis would the respondent be entitled to claim the protection of the "without prejudice" privilege, it not being a party to the communication?

[53] 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. It seems useful at this point to consider two important authorities cited by the parties: **Rush & Tompkins v GLC** and **Standrin v Yenton Minister Homes Ltd.**

[54] In **Rush & Tompkins**, the second defendants applied for discovery of "without prejudice" correspondence, which had passed between the plaintiffs and the first defendants, leading up to the settlement between the plaintiffs and the first defendants. This application was made in order for the second defendants to ascertain the value that had been placed on their claim by the plaintiffs and the first defendants. The House of Lords held that the second defendants were not entitled to discovery of the documents. This was partly on the basis that "without prejudice" correspondence, which is entered into with the object of effecting the compromise of an action, remains privileged after the compromise had been reached.

[55] The court also held (as correctly reflected in the head note) that the correspondence was inadmissible because, in general, the "without prejudice" rule renders inadmissible in "**any subsequent litigation connected with the same subject matter** proof of any admissions made with a genuine intention to reach a settlement; and that admissions made to reach a settlement with **a different party within the same litigation** are also inadmissible…". (Emphasis added)

[56] The distinguishing features between **Rush & Tompkins** and the instant case are readily evident. As the appellants themselves have indicated, this litigation is about

loans made by CCMB to Mr Finzi and also about funds belonging to Mr Finzi that were allegedly utilised by CCMB. Nowhere in the midst of this is JMMB standing as a relevant party to the dispute relating to any of those subject matters. So, this is not a "subsequent litigation" connected with the "same subject matter" and it does not involve parties to any litigation in which JMMB was a party and in which any admissions by it was made. So there is no "same litigation" involving "different parties". The principle derived from **Rush & Tompkins** does not apply to afford protection to the respondent on the basis of "without prejudice" privilege.

[57] In **Standrin**, 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.

[59] The Court of Appeal considered the issue whether the claim to privilege, on any ground, was appropriate. The court examined the 54 documents in issue and held that some of the documents, detailing communication between the plaintiffs or their solicitors with the insurers, who were not themselves a party to the claim, were subject to legal professional privilege as well as "without prejudice" privilege, even though made when litigation was not yet pending. The basis of that decision was that the insurers had assumed conduct of the proceedings against the defendants before they had paid the claim and that after they had paid the claim, they pursued the action against the defendants in the name of the plaintiffs by virtue of their rights of subrogation. As the court put it: "Thereafter the conduct of the proceedings was effectively in the insurers' hands".

[60] In such circumstances, the court held that communication by the insurers with the plaintiffs' solicitors was privileged because it would have been so privileged had the insurers appointed their own solicitors, and furthermore, that some of the documents were negotiating documents that fell within the "without prejudice" rule. Some of the documents that had passed between the loss adjusters and the plaintiffs' solicitors before the claim was settled by the insurers were also found to be "doubly privileged", that is, subject to legal professional privilege, as well as being properly marked "without prejudice".

[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 tha[t], then prima facie it is not protected."

[62] In examining the facts of the instant case, and particularly, JMMB's standing in it, it is clear that JMMB did not stand in a position akin to that of the insurers in **Standrin** in negotiating with Mr Finzi and does not stand in that position in the proceedings between the appellants and the respondent. In sum, JMMB is not at all connected with the conduct of these proceedings. The circumstances of this case fall outside the ambit of the 'Standrin principle', as I would, conveniently, call it.

[63] JMMB was and continues to be, for all intents and purposes, a stranger to the dispute between the appellants and the respondent, which is the subject matter of the proceedings in the Supreme Court, in the same way that the respondent was a stranger to the discussions between Mr Finzi and JMMB concerning the shares claimed by Mr

Finzi in CCMB. So there would have been no nexus between the negotiations between Mr Finzi and JMMB concerning the acquisition of the CCMB shares and the later dispute that arose between the respondent (standing in the stead of CCMB) and the appellants.

[64] This court has not been provided with any authority in which the "without prejudice" privilege has been invoked, and successfully so, in circumstances as obtained in this case in which the parties to the litigation are not the same as the parties to the communication and in which the subject matter of the communication is not the same as, or connected to, the subject matter of the litigation.

[65] In the absence of any good and compelling authority disclosed to this court that is supportive of the respondent's position that the "without prejudice" privilege should apply to avail it in these circumstances, it is my view that the privilege does not arise to afford such a protection as it is wholly inapplicable on the facts and circumstances of this case.

[66] I am led by my analysis to accept the submissions of the appellants that the email communication was not a "without prejudice" communication for the purposes of these proceedings between the appellants and the respondent. As a result, it is my view that Sykes J would have fallen in error in concluding that the "without prejudice" privilege could have been invoked by the respondent in the circumstances to render the email communication inadmissible. It follows then that all aspects of the decision that are based on the finding that the correspondence was inadmissible on account of the

applicability of the "without prejudice" rule are unsustainable. There is merit in relation to these aspects of the grounds of appeal.

Issue (ii): Whether the email communication is subject to legal professional privilege

[67] The appellants also complained in grounds of appeal (b), (d) (e) (f) and (g) that Sykes J erred when he found that the communication was subject to legal professional privilege and for that reason was inadmissible. The appellants seek a declaration that the communication was not subject to legal professional privilege.

Legal professional privilege

[68] The common law doctrine of legal professional privilege that is applicable to our jurisdiction operates in three sets of circumstances. In the first place, it enables a client to maintain the confidentiality of communications between him and his lawyer made for the purpose of obtaining and giving legal advice. This is known as 'legal advice privilege'. In the second way, it enables a client to have communications between him or his lawyer and third parties (such as potential witnesses and experts), the dominant purpose of which was preparation for contemplated or pending litigation. This is known as 'litigation privilege'. Thirdly, the privilege extends to items enclosed with or referred to in such communications and brought into existence for obtaining legal advice, among other things. See Adrian Keane, The Modern Law of Evidence, Seventh edition, page 609.

[69] The rationale for the rules of legal professional privilege is that they encourage those who know the facts to state them fully and candidly without fear of compulsory disclosure. See **Waugh v British Railways Board** [1980] AC 521 at 531-2 and **R v Derby Magistrates' Court, ex p B** [1996] AC 487.

Discussion and findings

[70] It is observed against the background of the applicable law that no submissions have been made either by the appellants or the respondent, specifically, in relation to legal professional privilege. Furthermore, there is nothing from the learned judge to assist this court with regard to the basis for a finding that legal professional privilege applies to the communication in question.

[71] The background facts presented do not support a finding that legal professional privilege applies, in any of its forms, to render the communication inadmissible in the proceedings on that basis.

[72] Furthermore, and even more importantly, the privilege would not have been one for the respondent to claim, it being no party to any discussion to which legal professional privilege could have attached for its benefit and protection.

[73] I must state, parenthetically, that it does appear that the concept 'legal professional privilege' is being used loosely throughout to refer to "without prejudice" privilege. That seems to explain the failure of counsel on both sides to refer to and to delve in that aspect of the grounds of appeal in their submissions. In fact, the

appellants in their submissions have treated grounds (a)-(f) as "relating to the designation of the 23rd May, 2012 communication…as a **without prejudice communication**" and they addressed those grounds together under that head of privilege, although legal professional privilege is the subject matter of grounds (b), (d), (e), (f) and (g).

[74] Given that the details of the judgment appealed against include a complaint against a finding by Sykes J of legal professional privilege and the related grounds of appeal in relation to it have not been abandoned, it is considered necessary, as a matter of completeness for the record, to dispose of the question whether legal professional privilege applies to bar the email communication.

[75] I would be satisfied to simply state that there is no basis shown on the facts disclosed to this court on which it could properly be found that the email communication in issue is subject to legal professional privilege. It seems that the learned judge would have erred in his finding in this regard.

[76] The complaints of the appellants as contained in grounds of appeal (a)-(g) are not without merit. The appeal against the decision of Sykes J would succeed on these grounds.

Issue (iii): Whether the email communication is admissible as being directly relevant to the appellants' defence of estoppel or otherwise

[77] Although it is found that privilege does not operate to bar the admissibility of the communication, the enquiry by this court would not end there, as a matter of law because the fundamental test for admissibility of evidence is not the non-operation or operation of privilege but relevance. It is trite law that the test for admissibility is relevance but it should be noted too that even where the statement may be relevant, its admissibility may be ousted by some other exclusionary rule, such as the hearsay rule, or in the discretion of the court, where the prejudicial effect outweighs the probative value. There is no corresponding residual inclusionary discretion in our courts, either at common law or by statute.

[78] So, given that the appellants are asking this court to declare that the email communication is admissible, and also because the proceedings before this court are by way of a re-hearing, it follows, then, that despite the finding that privilege does not apply, the question whether the email communication is admissible at the trial still arises for determination. Therefore, it must be established to our satisfaction by the appellants that the email communication is, indeed, admissible.

The appellants' submissions

[79] The appellants have submitted, albeit as an alternative argument, that if the court were to find that "without prejudice" privilege applies to bar the communication,

the communication would, nevertheless, be admissible because it is directly relevant to the facts of the case to support the defence of estoppel that is raised by them.

[80] The appellants, in advancing this argument, have placed reliance on the dictum of Robert Walker LJ in **Unilever**, in which he enumerated some of the occasions on which, despite the existence of "without prejudice" negotiations, "without prejudice" privilege would not prevent the admission into evidence of what one or both of the parties said or wrote. At page 792, his Lordship stated one of the most important instances, when the rule does not render the communication inadmissible, in these terms:

> "(3) **Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel**. That was the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal." (Emphasis added)

[81] At paragraph 16 of the submissions, the appellants state:

> "…Based on the offer by JMMB, Mr Finzi did not assert his rights as a shareholder of CCMB when the shares in CCMB were purchased by JMMB. As a shareholder, whose shareholding was listed in the name of another company without his consent, Mr Finzi was entitled to take any step necessary to ensure that no transfer of shares was effected until his shareholding was taken account of and would have been entitled to an appropriate payment for any shares transferred to which he was entitled in equity…Relying on the promises in the communication, Mr Finzi did not take these steps and in fact acted to his detriment. We therefore submit that he is entitled to rely on this communication in order to support his defence of estoppel."

The respondent's submissions

[82] The respondent's counsel contend, however, that the statements made by JMMB cannot give rise to an estoppel against the respondent as the appellants cannot vacillate between the positions that the discussions were between JMMB and Mr Finzi, on the one hand, and that the discussions should extend to include the respondent to ground their defence, on the other hand. Also citing the appellants' submissions that the email communication does not relate to the respondent, and that the litigation before the court arose from loans granted by CCMB to the appellants, counsel for the respondent contend that the learned judge was right to exclude the email as it is irrelevant to the subject matter of the litigation between the appellants and the respondent. Accordingly, they urge this court to find that there is no merit in the appellants' request to declare the email communication admissible.

Discussion and findings

[83] The crucial questions that now arise for the consideration of this court at this juncture is whether the email communication is directly relevant to the defence of estoppel being raised by the appellants (and/or to any particular fact in issue in the proceedings) or whether it is wholly irrelevant, as contended by the respondent.

[84] The case for the appellants is not that the respondent, as the party in litigation with them, was a party to any negotiations with them and had made any statement in the email communication on which they had acted or intended to act to their detriment. The communication they are relying on is that of a third party, who, they themselves

have argued, is a stranger to the litigation and with whom there is and never had been any dispute. I do agree with the submission made on behalf of the respondent that the appellants cannot treat the email communication in different ways to suit their position in the litigation.

[85] The appellants cannot rely on any statement made by JMMB in that communication to which the respondent (or CCMB) was not a party to the negotiations, and so had not itself made any representation to the appellants concerning the shares that were the subject of negotiations between JMMB and Mr Finzi. Furthermore, JMMB was not acting for or on behalf of the respondent (or CMMB) with respect to the shares or the loan (the subject matter of the claim), or otherwise, when the email communication was made. Therefore, I am impelled to find that the email communication between Mr Finzi and JMMB cannot properly be held to be relevant to the appellants' defence of estoppel being raised against the respondent and it is not demonstrably shown to be directly relevant to the appellants' counterclaim that CCMB had used funds belonging to them or to any other fact in issue in the proceedings.

[86] It should be noted too, that even if the email communication were relevant, it would have been, in any event, and in the scheme of things, hearsay correspondence. This is so because it is, in fact, an out of court statement made by a party who is not a party to the proceedings, which is being tendered for the truth of the facts stated therein. To make it even more so, the statement would have been made behind the back of the respondent (or CCMB) who was not a party to such communication, directly

or indirectly. In the absence of the parties agreeing to its admissibility, there is no basis in law which would allow such communication to be admissible, by way of an exception to the hearsay rule, even if the "without prejudice" rule does not render it inadmissible.

[87] I conclude, therefore, that the communication is, at base, irrelevant to the facts in issue between the appellants and the respondent in these proceedings. I would go further to state, however, that even if it were relevant, it would have been caught within the operation of the hearsay rule. Therefore, there is no merit in the appellants' contention that the email communication is admissible as being directly relevant to a fact in issue in the proceedings.

[88] In the result, it is my view that this court is not in a position to grant the declaration sought by the appellants that the communication and the details of the discussions to which it refers are admissible as evidence in the trial of the claim between them and the respondent.

[89] Given the finding that the email communication is inadmissible, the paragraphs in issue in the witness statements of Messrs Finzi and Dabdoub, relating to that communication, cannot be allowed to stand as applied for by the appellants. Those aspects of the witness statement fall to be struck out pursuant to rule 29.5(2) of the Civil Procedure Rules (the CPR).

[90] I would also hold that Sykes J would have been justified in striking out those aspects of the witness statements, albeit that he did so on a different basis of law,

which is found to have been erroneous. To this extent and for this reason, the appeal against the order of Sykes J, striking out the impugned portions of the witness statements, should be dismissed.

Grounds (h) and (i)

Issue (iv): Whether the learned judge erred when he awarded costs for one day in favour of the respondent

[91] In grounds (g) and (h), the appellants challenge the award of costs to the respondent for one day. They submit that Sykes J did not take into consideration all the relevant circumstances. According to them, the application did not consume one day of the court's time because a significant portion of the court's time was consumed with (i) setting up the digital recording pilot project (which according to them was at least one hour); (ii) hearing the respondent's explanation/submissions for an adjournment; and (iii) hearing the respondent's submissions on why trial bundles had not been finalised.

The respondent's response

[92] Counsel for the respondent contend that the appellants' argument, concerning the respondent's request and submissions for an adjournment, is based on a "false misstatement of facts". They pointed out that the respondent had made no submissions for an adjournment. According to them, the learned judge ruled that he would hear and rule on the application to exclude the evidence before considering the application for an adjournment. It was after the learned judge heard the application for striking out of the witness statement that he reserved judgment for the afternoon, when he granted the orders. The appellants' counsel then requested an adjournment until the following day

to take instructions. On the following day, the appellants asked for leave to appeal and that the trial be adjourned, pending the hearing of the appeal. That application was granted.

[93] Counsel for the respondent also indicate that the respondent's 'submissions' in relation to the bundles was a "one minute explanation" that the bundles had not been finalised pending the court's ruling on the application. According to them, the time spent on those matters was minimal and the learned judge could reasonably have ignored them in deciding on the costs award. They further submit that the learned judge's award was reasonable based on the conduct of the matter and that, in any event, the order for costs was a matter in the learned judge's discretion. As such, they maintain, this court should be slow to interfere with the order awarding the respondent costs for the day.

Discussion and findings

[94] Bearing in mind that the order in relation to costs made by Sykes J is an exercise of his discretion in accordance with section 28E(1) of the Judicature (Supreme Court) Act, this court must be slow to interfere with the exercise of this discretion. This position has been stated and reiterated in several authorities from this court: see, for instance, **Ilene Williams v Wesley Williams** [2015] JMCA App 48 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay**, endorsed the principles in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, set out in the oft-cited speech of Lord Diplock, when he stated:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[95] Parts 64 and 65 of the CPR have been formulated by the Rules Committee to govern the award of costs in civil proceedings pursuant to section 28E of the Judicature (Supreme Court) Act. Accordingly, the provisions of Parts 64 and 65 would have been of material relevance to the learned judge, once he decided to award costs in the proceedings.

[96] Rules 64.6(1) and 65.8(2) embody the general rule that if the court decides to make an order about costs that "costs follow the event", that is to say, that the unsuccessful party must be ordered by the court to pay the costs of the successful party in the proceedings or on an application, respectively. The court may, however, order the successful party to pay the costs of the unsuccessful party (rules 64.6(2) and 65.8(3)) or may make no order as to costs (rule 64.6(2)). In deciding who should be liable to pay the costs, the court must have regard to all the circumstances, including those matters set out in the rules (rules 64.6(3) and 65.8(3)).

[97] It is accepted that while the learned judge may have had the absolute discretion to determine the award of costs, he was duty bound to exercise his discretion judicially and on reasons connected with the case. Only if he should fail to do so and it is shown

that he acted plainly or demonstrably wrong would this court be justified in interfering with the exercise of his discretion. See **Director of State Proceedings and Others v Administrator General of Jamaica** [2015] JMCA Civ 15, particularly, paragraph [35].

[98] There is no objection to the order reflecting the general rule, that the appellants, being the unsuccessful party on the application, should pay the costs of the application; the challenge is in relation to the order that they should pay the costs of one day.

[99] It is observed that there is a slight difference in the presentation by the parties of the details of what had transpired before the learned judge at the time of the hearing. There are no notes of the proceedings furnished to the court and no evidence by way of affidavit or otherwise has been produced setting out an account of what had transpired in order to assist the court. The absence of notes of the hearing and sworn evidence has therefore generated the need for caution on the part of this court before reliance is placed on the assertions of the parties.

[100] Against this background, it is noted that the respondent's counsel have alleged that there was a misstatement of facts on the part of the appellants concerning the respondent's request and submissions for an adjournment. They have sought to provide more details as to what they contend occurred at the hearing. The appellants have filed nothing in response to counter the assertions of the respondent's counsel and so there is no reason shown for this court to doubt the veracity of what has been stated by way of submissions on the matter on the respondent's behalf. I would therefore rely on the account given by the respondent, in so far as is absolutely necessary.

[101] It is evident that the date was fixed for the trial to proceed but in the light of the application, the date was not kept. The day fixed for the trial to commence was lost based on the hearing of the application on which the respondent was successful. The application was at the centre of the court's proceedings that day and may be said to have been the 'operating cause' for the adjournment of the trial, given that the preparation of the trial bundles and the application of the respondent for an adjournment were contingent on the outcome of that application. Furthermore, upon the decision made on the application, the appellants asked for an adjournment of the trial pending the appeal.

[102] Based on the competing arguments of both counsel, the circumstances of the case, and the relevant authorities dealing with the approach of the appellate court to the exercise of the discretion of a first instance judge, I am rather hesitant to interfere with the decision of the judge in relation to the award of costs. Even though, the appellants have succeeded in their arguments on appeal that "without prejudice" privilege and legal professional privilege do not arise to render the relevant portions of the witness statements inadmissible, the portions of the witness statements in question were, in any event, objectionable and so ought properly to have been ruled inadmissible in any event. So, on this critical aspect, the respondent would have succeeded. Furthermore, the appellants have not appealed the entire order of the learned judge that would have affected other portions of the witness statements as well as another witness statement that have not formed the subject of appeal.

[103] In addition to all this, the learned judge was integrally involved in the proceedings and would have been in a position, with the advantage that this court lacks, to assess the time the application took to be disposed of; the conduct of the parties during the proceedings; and the effect on the day's fixtures, among other things.

[104] Although we are not aware of the learned judge's specific reasons behind awarding costs for the day, in my view, the appellants have not demonstrated that in the circumstances as disclosed, the learned judge's decision to award costs to the respondent for one day was so demonstrably or plainly wrong or was such that no judge, regardful of his duty to act judicially, would have made it.

[105] In the result, there is no proper basis established that would justify this court disturbing the costs order of Sykes J. Accordingly, grounds (h) and (i) fail.

The disposal of the appeal

[106] The appellants have asked that the appeal be allowed and that the order of Sykes J be set aside on the ground that he was wrong to rule the email communication inadmissible on the ground that it was "without prejudice" communication. In my view, the appellants are, indeed, correct that Sykes J had erred in ruling the email communication inadmissible on the basis that it was "without prejudice" communication and/or was subject to legal professional privilege.

[107] That, however, does not render the communication admissible as the appellants contend. The communication is irrelevant to the issue between the parties as it cannot be applied to ground the defence of estoppel as contended by the appellants and it is not shown to be directly relevant to any other fact in issue in the proceedings. Furthermore, and in any event, the communication is clearly hearsay in the litigation between the appellants and the respondent and so, in the absence of any agreement for its admissibility, would be inadmissible, even if relevant, because it does not fall under any exception to the hearsay rule.

[108] It means then that the declaration sought by the appellants that the email communication is admissible at the trial cannot be granted.

[109] It follows too that the order of Sykes J, striking out the relevant portions of the witness statements, must stand, for all practical purposes, even though it was made on an erroneous basis.

[110] Accordingly, the order sought by the appellants, for the paragraphs in issue in the witness statements of Messrs Finzi and Dabdoub to be allowed to stand, is refused.

Absence of a counter-notice of appeal

[111] It has not escaped observation that although it is contended on behalf of the respondent that the email communication is irrelevant to the proceedings, and therefore, inadmissible, they did not file a counter-notice of appeal requesting that the decision of the learned judge be affirmed on grounds other than those on which he had

relied to base his decision, in accordance with the Court of Appeal Rules (the CAR), rule 2.3(3).

[112] In this case, however, it does seem that the need for a counter-notice would have been obviated by the case of the appellants on appeal, as reflected in the notice of appeal and the orders being sought. The appellants had not only challenged the learned judge's findings in relation to admissibility on the ground of privilege but had gone further to ask this court to declare the email communication to be admissible and for an order that the impugned portions of the witness statements in issue be allowed to stand. Also, the appellants themselves have raised the question of admissibility of the email communication on the ground of relevance for the consideration of this court when they advanced the argument (albeit posited as an alternative one) that the communication was admissible because it was directly relevant to their defence of estoppel. The respondents, on the other hand, have sufficiently responded to those arguments.

[113] Given the law, once the issue of admissibility arises for resolution, then, the question of relevance will, inevitably, arise for consideration because that is the primary test for admissibility.

[114] So, having paid due regards to the provisions of the CAR, rule 1.16(2) and (3), concerning the requirements of the filing of a counter-notice of appeal and the powers of the court where none is filed, I am satisfied that both sides have had the opportunity to sufficiently explore the issue of the admissibility of the email communication on the

grounds of relevance and so, in the absence of a counter-notice, there would be no need for any further submissions from the parties in order for this court to properly decide the appeal on a ground different from that which formed the basis of Sykes J's decision.

[115] For all the foregoing reasons, I would affirm the decision of Sykes J, striking out the relevant portions of the witness statements, albeit on a different basis in law, and so allow the appeal, only in part.

Costs of the appeal

[116] The appellants are successful in part, albeit that they would have failed to secure the crucial order that they are seeking to have the email communication adduced in evidence. The respondent's counsel have submitted that even if the appeal succeeds, the appellants, having not appealed the entire ruling of Sykes J, are not entitled to costs; the costs of the appeal, they say, should be the respondent's.

[117] The substratum of Sykes J's ruling has been successfully challenged on appeal. The respondent had based its application before Sykes J in relation to the email communication on the premise that "without prejudice" privilege applies. The appellants had to respond to the application by raising the argument that privilege does not apply to the communication. They were not wrong in doing so, in my view. It cannot be said, then, that their challenge of the learned judge's decision on appeal is unwarranted and unjustifiable. The only thing against them is that the inclusion of the email communication in the witness statements, is objectionable, in fact and in law, and so

they were wrong to have sought to adduce evidence of it from the very start. This is taken into account in not disturbing the costs order that was made in respect of the proceedings below.

[118] In all the circumstances, I would propose, in keeping with authority, that there be no order as to costs of the appeal, given that both sides have reaped almost equal measure of success on the issues raised on appeal. If, however, the parties (or any of them) are of the view that costs should be awarded, then they should be at liberty to file and serve written submissions on the issue within 21 days of the date of this order, failing which, there shall be no order as to costs.

F WILLIAMS JA

[119] I have read the draft judgment of my learned sister, McDonald-Bishop JA, and agree with her reasoning and conclusion. I have nothing further to add.

P WILLIAMS JA (AG)

[120] I too have read in draft the judgment of my learned sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing that I can usefully add.

MCDONALD-BISHOP JA

ORDER

(1) The appeal against the decision of Sykes J, made on 5 May 2015, is allowed in part, in that:

(i) the Electronic Mail Communication dated 23 May 2012 is not a "without prejudice" communication in the proceedings between the appellants and the respondent ; and

(ii) the electronic mail communication dated 23 May 2012 and the details of the discussions to which it refers are not subject to Legal Professional Privilege in the proceedings between the appellants and the respondent.

(2) The appeal is otherwise dismissed and the order of Sykes J is affirmed, in the following terms (by reference to the orders sought by the appellants):

(i) The electronic mail communication dated 23 May 2012 and the details of the discussions to which it refers are inadmissible and so cannot be entered into evidence and otherwise referred to in the trial of the claim between the appellants and the respondent in the court below.

(ii) The paragraphs in issue in the witness statements of Messrs Winston Finzi and Abraham Dabdoub filed on 29 April 2015, subject matter of the appeal, are not permitted to stand and, accordingly, shall be struck out.

(iii) Order for costs of one day to the respondent in the court below to stand.

(3) There shall be no order as to costs of the appeal unless either party files and serves written submissions within 21 days of the date hereof for an award of costs to be made.