JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 59/2008

BETWEEN	LEEROY CLARKE	APPELLANT
AND	LIFE OF JAMAICA LIMITED	RESPONDENT
BETWEEN	CAULTON GORDON	APPELLANT
AND	LIFE OF JAMAICA LIMITED	RESPONDENT
BETWEEN	HENNIS SMITH	APPELLANT
AND	LIFE OF JAMAICA LIMITED	RESPONDENT
BETWEEN	DERRICK BERNARD	APPELLANT
AND	LIFE OF JAMAICA LIMITED	RESPONDENT

PROCEDURAL APPEAL

Written submissions made by Pollard, Lee Clarke and Associates, attorneys-at-law for the appellants, and by Hart, Muirhead, Fatta, attorneys-at-law for the respondents.

12 August 2008

MORRISON, J.A.

Introduction

1. This is an appeal from the judgment of Campbell J dated 12 June 2008, granting the respondent's application for an order permitting it to withhold inspection or delivery up to the appellants of the documents listed in Schedule 1, Part 2 of the respondent's List of Documents dated 30 October 2007 ("the documents"). It appears that the appellants were in fact on 20 January 2008 permitted inspection of the documents at the

respondent's offices, but have not been permitted to take copies of them.

2. The documents are listed and described as follows in the respondent's List of Documents:

> "1. Letter to Maurice Sales from Life of Jamaica Limited 28th October 2002.
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> 2. Notes: calculation of Maurice Sales' compensation package, received 9th February 2004.
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> 3. Letter to Maurice Sales from Life of Jamaica Limited dated 18th February 2004.
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> 4. Spreadsheet re Maurice Sales, dated 20/02/04.
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> 5. Memo dated 26th February 2004.
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> 6. Table of Compensation Packages, Winston Bennett and Maurice Sales."

3. The basis of the respondent's resistance to delivering up the documents is that they are 'without prejudice' documents, subject to privilege and therefore immune from disclosure or admission in evidence in these proceedings. The application which was before Campbell J was but an aspect of hotly contested litigation between the appellants (who were former employees of the respondent) and the respondent over their claims to be entitled to additional benefits arising from the termination of their employment. The documents relate to the terms of separation from the respondent's service of Messrs. Maurice Sale and Winston Bennett, two

other former employees of the respondent (not parties to this litigation), in 2002.

4. Campbell J accepted the respondent's submission that the documents "form a chain of correspondence in negotiations genuinely aimed at a settlement", and accordingly held that they were privileged and not subject to discovery. In so doing he referred to and relied on the decision of the House of Lords and the seminal judgment of Lord Griffiths in ***Rush & Tompkins Ltd. v Greater London Council and another*** [1988] 3 All ER 737.

The appeal

5. By amended grounds of appeal dated 12 June 2008, the appellants have challenged Campbell J's decision, on the broad basis (albeit broken down into eight separate grounds) that the learned judge erred in regarding the documents as part of negotiations with a view to settlement, in light of the fact that there was no evidence of a "dispute" between the parties, that the documents were subject to prior disclosure orders, and that the supposed without prejudice correspondence itself permits disclosure "where required by law". The appellants also challenge the learned judge's award of costs to the respondent in the circumstances of this application.

6. The grounds of appeal were supported by a thirteen page written submission from the appellants, which elicited in response a reply of almost equal length (eleven pages) from the respondent. I hope that I do no injustice to these detailed and obviously well researched submissions by summarizing them in this way. The respondent submits, as Campbell J found, that the requested documents "form a chain of correspondence in negotiations genuinely aimed at a settlement". While it is conceded by the respondent that the description of at least one of the items as a "letter" was "inapt", the respondent contends "that the document forms part of the chain, whatever its description, and its contents [are] what is relevant, not its description." The appellants on the other hand insist that each document has to be looked at individually and that, when it is done, the so-called "chain" has not been established in any accepted meaning of the word.

7. The two issues which arise on the appeal are therefore whether the documents are of such a nature as to attract privilege under the without prejudice rule, and whether the judge's order for costs was a proper one.

The without prejudice rule

8. ***Rush & Tompkins*** confirmed that written or oral communications genuinely made with the object of effecting the compromise of a dispute remain privileged after a compromise has been reached and are accordingly inadmissible in any subsequent litigation concerned with the

same subject matter, whether between the same or different parties. The rule applies to exclude all communications genuinely aimed at settlement from being given in evidence. While it is usual to head all negotiating correspondence 'without prejudice', the use or absence of the time honoured phrase is not decisive 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" (per Lord Griffiths at page 740).

9. The rationale of the rule was restated by Lord Griffiths in the following, oft cited, terms:

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in ***Cutts v Head*** [1984] 1All ER 597 at 605-606, [1984] Ch 290 at 306:
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> > 'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in ***Scott Paper Co v Drayton Paper Works Ltd.*** (1927) 44 RPC 151 at 157, 'be encouraged freely and frankly

> to put their cards on the table...The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'"

10. None of this is now controversial, nor, indeed, is there any question that the relevant principles were accurately stated by Campbell J in his written judgment in this case. Neither is it in dispute that the rule is not absolute and that, to name one clear exception, the without prejudice material "will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement" (per Lord Griffiths at page 740; see also ***Tomlin v Standard Telephones and Cables Ltd.*** [1969] 3 All ER 201 and ***Crosby v Lyn*** (1963) 8 JLR 242). Perhaps of less certain scope is "the proposition that the admission of an 'independent fact' in no way connected with the merits of the case is admissible even if made in the course of negotiations for a settlement" (per Lord Griffiths at page 740, where he described the old authority of ***Walridge v Kennison*** (1749) 176 ER 306, usually cited in this context as "an exceptional case [that] should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis for compromise, admitting certain facts").

11. There are two further points which should be made before turning to the documents themselves. The first is that, although ***Rush & Tompkins*** was a case in which the material in question had arisen in the course of the litigation, it is clear that the fact that litigation has not yet commenced is not a decisive factor. As Auld LJ put it in the recent case of ***Barnetson v Framlington Group Ltd and another*** [2007] 3 All ER 1054, 1062, "...for the 'without prejudice' rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun." The second point is the broader one made by Lord Griffiths in ***Rush & Tompkins*** itself, when he observed that the question of applicability of the privilege in cases where it is claimed must be "resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation" (page 740). As Campbell J observed in his judgment in the instant case, "It is recognized that justice is better served by candour than by suppression" (paragraph 1).

The documents

12. Against this background, I turn now to the documents themselves.

(a) Letter dated 28 October 2002, Life of Jamaica Ltd. (LOJ) to Maurice Sale.

This letter, captioned "Termination Agreement", is boldly marked **"WITHOUT PREJUDICE"** and refers to "discussions" between the

parties regarding the terms of Mr. Sale's "separation" from LOJ "with effect from 31 December 2002." It sets out "the terms which were agreed", establishes a formula for payment to Mr. Sale based on his earnings as at 31 December 2002 and states that "the details of the amount to be paid will be forwarded to you as soon as they are available". It contains a request from LOJ that the details of the agreement "should be retained in the strictest confidence" and not divulged by Mr. Sale "except where required by law". It ends by recording the agreement of the parties that in accepting the agreed terms, Mr. Sale "will not seek employment in any other insurance company for a period of up to five (5) years with effect from December 31 2002", and is counter-signed by him in confirmation of his acceptance of the terms.

(b) **Note headed "Maurice Sale – Details of Calculation"**

This undated note sets out details of various calculations of Mr. Sale's payment entitlements, marked "Schedules (i), (ii), (iii) and (iv)", and dated 17 October 2002, 20 December 2002, 9 February 2004 and 28 January 2004 respectively. The schedules are obviously made up on a progressive basis, with Schedule (i) projecting Mr. Sale's total 2002 earnings by annualizing his earnings to September 2002, Schedule (ii) adjusting the figures slightly (showing a net payment due to Mr. Sale as at 20 December 2002 approximately

$100,000.00 more than that shown in Schedule (i)), Schedule (iii) updating the figures by applying his actual 2002 earnings and taking into account amounts previously paid to Mr. Sale, and Schedule (iv) positing alternative scenarios with regard to the calculation of Mr. Sale's redundancy payment (based on company policy as against statutory requirements).

(c) **"Letter" to Maurice Sale from LOJ dated 18 February 2004**

This note, which the respondent now accepts to have been inaptly described as a letter, further updates Mr. Sale's entitlements by applying a multiplier of 3 years to his actual earnings (in place of the 2.15 years stated in the Termination Agreement), presumably based on a recommendation contained in the undated note at (b) above.

(d) **Spreadsheet re Maurice Sale, dated 20 February 2004**

This document is also marked "Schedule (iii)" and appears to update the original Schedule (iii) at (b) above, by showing the effect of applying a multiplier of 3 instead of 2.15.

(e) **Memo dated 26 February 2004**

This appears to be an internal LOJ document, captioned "additional payment - Maurice Sale" requesting preparation of a cheque for an additional amount to Mr. Sale, based on the recalculation shown in the spreadsheet at (d) above.

(f) **Table of compensation packages, Winston Bennett and Maurice Sale**

This document sets out in tabular form the various inputs into the compensation packages of Messrs. Bennett and Sale respectively.

Analysis

13. In determining whether the documents are in fact privileged, the letter of 28 October 2002 from LOJ to Mr. Sale (the "Termination Agreement") is obviously the foundation document. This is Campbell J's analysis of this letter in the light of the submissions made to him:

> "The claimants' attack upon the letter of the 28th October 2002 was multiple-pronged. It was alleged that it was not the product of a dispute, neither was its terms agreed in the course of a dispute or negotiations, but came at the end of the process. According to the claimants, the 'without prejudice' label is merely a facade to keep it from the reach of other persons of similar status, to Mr. Sale.
>
> As to the allegations that there was no dispute, as none can be gleaned from a mere reading of the said letter, I disagree, the subject-matter is potentially highly contentious; it concerns the severance package of a branch manager, some three years before the schedule period. The letter discloses that there was a meeting, and that the defendant 'was now pleased' to announce the agreement.
>
> The Concise Oxford Dictionary defines a dispute as being, difference of opinion, debate, heated contention, controversy. The authorities use the term negotiations interchangeably with the word dispute. It is clear that there need be no rancour or discord before it could so qualify. It is fair to assume that Mr. Sale would be interested in

> obtaining the maximum to which he considered himself entitled. There were several heads of severance payments being discussed, it would be most unlikely that management and himself would have initially concurred on every head. The document reveals that there was give and take. Sale had his ability to practice his skills severely restrained and restricted for a period of 5 years after leaving the defendant. It is safe to assume that Mr. Sale would not have brought that to the table. He was further obliged to do nothing prejudicial to the interest of the defendant. I find that the letter evidences a dispute or negotiations between Sale and the defendant."

14. I agree with and cannot improve on Campbell J's elegant formulation, which I accordingly gratefully adopt. While I might myself be somewhat more diffident about describing the subsequent documents (b) to (e) at paragraph 12 above (I have deliberately excluded (f), which is dealt with separately at paragraph 16 below), as part of a "chain of **correspondence**" (emphasis mine), as Campbell J did, it is nevertheless clear that they are all integrally connected to the 28 October 2002 letter as part of the negotiations aimed at a settlement and would have been communicated to Mr. Sale as such. That letter, it will be recalled, was written more than two months before the end of 2002, but recorded an agreement between the parties to calculate Mr. Sale's termination benefits using his 31 December 2002 earnings. Given that the final figures would have had to come from LOJ in due course, they would in my view have had to be communicated to Mr. Sale subsequently in order to

secure his concurrence with them, so that he could be assured that the agreed terms were being faithfully adhered to. To that extent, I would regard documents (b) to (e) as being part and parcel of the negotiations explicitly reflected in the 28 October 2002 letter.

15. In this regard, nothing turns in the light of the authorities (see paragraph 11 above) on the fact that no litigation appears to have ensued from the "discussions" between Mr. Sale and LOJ. Neither can there be any significance, in my view, in the fact that these discussions obviously resulted in a compromise agreement. ***Rush & Tompkins*** confirms that the privilege continues to exist even where discovery is sought on behalf of a third party to the original dispute, though it may be disregarded where the issue is (ordinarily as between the original parties) whether or not the negotiations resulted in a concluded compromise agreement. And finally, even if there is a rule that without prejudice communications may be disclosed for the purpose of establishing independent facts (and Lord Griffiths in ***Rush & Tompkins*** certainly showed no great enthusiasm on this point – see page 740), it is not clear to me what are the "independent" facts, beyond the actual terms of the privileged correspondence itself, upon which the appellants rely in this instance.

16. It follows from all of this that I am in general agreement with Campbell J and would dismiss the appeal in relation to the documents (a)

through (e) listed at paragraph 12 above. However, I think that document (f) (Table of compensation packages, Winston Bennett and Maurice Sale), attracts somewhat different considerations. In the first place, I cannot readily connect it to the series of other documents (b) to (e) which followed the Termination Agreement with Mr. Sale, in the way that these documents appear to me to be obviously connected to each other. Secondly, and this is plainly a related point, it is not at all clear to me how the information relating to Mr. Bennett (whose termination letter is dated 31 December 2002) would have formed part of the single chain of correspondence and documents connected with Mr. Sale's termination package, as the respondent contends. I would therefore allow the appeal to the limited extent of saying that this particular document is not subject to privilege and is therefore discoverable.

Costs

17. On the issue of the costs of the hearing before Campbell J, the appellants submit that they ought not to have been ordered to bear the costs of the respondent's application made of its own volition, while the respondent submits that there is no reason in this case for there to be any departure from the general rule, which is that costs follows the event Civil Procedure Rules 2002 Rules 64.6 (1) and 65.8 (2)).

18. Costs are a discretionary matter for the judge and no reason has been shown why Campbell J ought to have departed from the general

rule that costs follow the event. The respondent's application was obviously heavily contested by the appellants, who did not succeed, and I would therefore regard the order that they should pay the respondent's costs as one which was well within the judge's discretion. However, in the light of my conclusion on the appeal (see in particular paragraph 16 above), I would vary Campbell J's order by ordering that the appellants should bear 85% of the respondent's costs in the court below, as well as 85% of the costs of the appeal.

Conclusion

19. In the result, the appeal is allowed to the extent indicated in paragraphs 16 and 18 above, with 85% of the respondent's costs to be paid by the appellants, such costs to be taxed if not agreed. In all other respects, the appeal is dismissed and the order of Campbell J is affirmed.

ORDER:

The appeal is allowed in part. Eighty-five percent (85%) of the respondents' costs in the court below, as well as Eighty Five (85%) of the costs of the appeal are to be paid by the appellants, such costs to be taxed if not agreed. In all other respects, the appeal is dismissed and the order of Campbell J is affirmed.