JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74 OF 2004

BETWEEN	**ISSAR GROUP OF COMPANIES LIMITED**	**APPELLANT**
AND	**WEST INDIES ALLIANCE INSURANCE COMPANY LIMITED**	**RESPONDENT/ 1ST DEFENDANT.**
AND	**SPECTRUM INSURANCE BROKERS LIMITED**	**2ND DEFENDANT**

PROCEDURAL APPEAL

IN CHAMBERS

Palmer & Walters Attorneys at Law for and on behalf of the Appellant.

Nunes, Scholefield, DeLeon & Co. Attorneys at Law for First Defendant/ Respondent.

NOVEMBER 9, 2004

HARRISON, J.A. (Ag.)

This matter is filed as a Procedural Appeal and comes before me as such. It arises from an order made by Mr. Justice Dukharan on the 21st day of July 2004, whereby he struck out reference to admissions and an offer to settle embodied in "without prejudice" communications in the Statement of Claim and the Reply to the Defence.

The litigation between the parties arose out of an alleged refusal by the 1st defendant/respondent to honour the plaintiff's claim under a policy of insurance entered into between the parties. A Writ of Summons was filed by the

plaintiff/appellant in the Supreme Court claiming damages for negligence, breach of contract and unjust enrichment.

The appellant filed Notice and Grounds of Appeal and written submissions on the 27th July 2004. Written submissions by the respondent were filed on the 12th August 2004. I am without the benefit however, of the affidavits in support of the application that were placed before the learned judge. Copies of the pleadings were filed in the Registry of the Court of Appeal on the 2nd November 2004 but they were only brought to my attention on the 8th November.

Grounds 5, 6, 7 and 8

I turn first to grounds 5 - 8 of the Appeal. They concern the "without prejudice" correspondence and I propose to deal with these grounds together.

The Order complained of was made by the learned Judge at a case management conference that was held on the 17th September 2003. The applicant relied on several grounds in its application but the one more pertinent to this appeal states as follows:

> "1. The relevant paragraphs of the Claimant's Statement of Claim and Reply be struck out on the basis that they refer to correspondence, and in particular the first defendant's letter of July 30, 2001, which was written "without prejudice" and made no admission, but was in the nature and context of without prejudice negotiations".

The letter of July 30 2001, states inter alia:

> "...Nevertheless, we are only prepared on this occasion to accept that the act of hooking up the tractor head to the marine container as being sufficient force to classify the loss as theft resulting from a removal of a vehicle off the premises....on this basis that we are proposing a settlement under the vehicle load extension of the

> policy...we now look forward to receiving the signed form of acceptance confirming the insured's agreement to accept $350,000.00 in full and final settlement of the claim."

Counsel for and on behalf of the appellant, submitted that no proper or any enquiry was made with respect to the contending arguments regarding privilege. He further submitted that there was no proper process for the claiming of and challenge to the claim of privilege that was invoked and that the allegations of privilege were made for the first time in affidavits supporting the application to strike out. It was also submitted that the "without prejudice" rule is a rule of evidence and not pleading so the Claimant had no option at the stage of filing of its Particulars of Claim, but to identify all documents that the Claimant considered necessary to its case.

Counsel for the respondent has submitted on the other hand, that the letter of July 30 is privileged, and its contents ought not to have been pleaded.

Two questions therefore arise for determination. Was the learned judge in error when he found:

1. That the 2nd defendant was entitled to the privilege which attaches to "without prejudice" correspondence.
2. That the rules of evidence regarding the admissibility of without prejudice correspondence are a sufficient basis for striking out allegations in the Claimant's Statement of Claim.

It is a general rule that nothing that is written or said to be without prejudice concerning negotiations between the parties can be referred to in Court

subsequently without the consent of the parties. The protection was necessary because of public policy and convention. See **Simman Co. v Pilkington Glass** [1987] 1 All E.R 345. In **Cutts v Head** [1984] 1 All ER 597, [1984] Ch 290, the underlying public policy is described by Oliver LJ as follows ([1984] 1 All ER 597 at 605–606:

> 'It is that parties should be encouraged as 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 ... may be used to their prejudice in the course of the proceedings. They should ... 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.'

This statement of principle was subsequently approved by the House of Lords in **Rush & Tompkins Ltd v Greater London Council** [1988] 3 All ER 737 at 739–740. In **Unilever plc v The Proctor & Gamble Co** [2001] 1 All ER 783 Robert Walker LJ, reviewed the scope of the privilege in a wide-ranging judgment. He stated at page 792, that the rule could not be used 'as a cloak for perjury, blackmail or other "unambiguous impropriety".' After referring to the authorities Robert Walker LJ, said that 'this court has ... warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.' He concluded at page 796:

> '[The modern authorities] show that the protection of admissions against interest is the most important

> practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in *Rush & Tompkins* Ltd *v Greater London Council* [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders. Lord Griffiths in the *Rush & Tompkins* case noted, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused.'

Savings and Investment Bank Ltd v Fincken [2004] 1 All ER 1125, a decision of the English Court of Appeal, is one of the most recent cases dealing with the issue of without prejudice negotiations. The case held inter alia:

> "An admission in without prejudice negotiations was not to be treated as tantamount to an impropriety unless the privilege afforded to such discussions was itself abused. The public interest in the without prejudice rule was very great, and not to be sacrificed save in truly exceptional and needy circumstances. Mere inconsistency between an admission and a pleaded case or stated position, with the mere possibility that such a case or position, if persisted in, might lead to perjury, did not lose the admitting party the protection of the privilege. It was the fact that the privilege was itself abused that did so. It was not an abuse of the privilege to tell the truth, even where the truth was contrary to one's case. (Emphasis supplied)

I now turn to the instant appeal. The centre of controversy surrounds the letter of the 30th July 2001. The authorities all illustrate that the underlying purpose of the rule regarding non-disclosure of without prejudice negotiations is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

The facts presented before the learned Judge reveal that there was a dispute between the parties and whilst negotiations were in progress, an offer to settle was made without prejudice to the plaintiff/appellant. Whether or not the contents of the letter of July 30th are to be interpreted to be either an admission or an exception because of special circumstances, there was an attempt on the part of the defendant to negotiate a settlement in the matter. Accordingly, I agree with the learned judge that the document would be privileged and its contents ought not to have been pleaded in the Statement of Claim and Reply to the Defence.

Grounds 1, 2, 3 and 4

When should an objection to disclosure of the privileged document be raised? The authorities seem to suggest that an objection can be raised when the offending party attempts to disclose the without prejudice correspondence in evidence.

It was submitted by Counsel for the appellant that a defendant who challenges the validity of any allegation in the Statement of Claim that it is contended ought to be struck out, must do so before filing a Defence. Counsel argued that if this was not done, then by implication, the defendant waives any

right to apply to strike it out. He further submitted that an application to strike out any portion of a Reply that repeats or further particularizes identical references in the Statement of Claim, ought not to be struck out since no useful purpose would be served thereby.

The Civil Procedure Rules 2002 (C.P.R) have brought about changes in the procedure in civil proceedings. Part 11 of the C.P.R deals with general rules concerning applications for Court Orders. It sets out at 11.3(1) that so far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review. The evidence in support of the application must be contained in an affidavit unless a rule, practice direction or a court order otherwise provides. See 11.9(2). Rule 27.3(1) of the C.P.R also provides that as a general rule the registry must fix a case management conference immediately upon the filing of the Defence.

The Rules therefore provide that all applications in relation to objections including the disclosure of without prejudice correspondence, should take place before trial. If the application is not made at the case management conference or at the pre-trial review hearing, the Court must order the applicant to pay the costs of the application unless there are special circumstances. See Rule 11.3(2) of the C.P.R.

I now turn to Rule 9.6 of the C.P.R. I agree with Counsel for the respondent that it is restricted to challenges made in respect of the Court's jurisdiction so it does not apply in this appeal. There is no challenge to the

Court's jurisdiction in the instant matter. The case raises the question with respect to the circumstances in which parties are allowed to use without prejudice documents in proceedings before the court.

Counsel for the appellant also submitted that the ground specified in the notice of application for court orders (that is, that the correspondence is privileged) is not a basis for striking out a pleading. He further submitted that of the bases listed in Rule 26.3, none relate to the pleading of a document about which there is a disputed claim of privilege. Counsel for the respondent in response, submitted that Rule 26.3 of the C.P.R merely confers jurisdiction on the Court in respect of sanctions and it does not limit the number of grounds that a party can formulate to fall within the Rule. There is merit in the submissions of Counsel for the respondent. The Rule provides that in addition to any other powers under the Rules, the Court may strike out a statement of case or part of a statement of case.

On the basis of the above provisions in the C.P.R, I conclude that the defendant was not obliged to plead its objection in the Defence. The learned Judge was seised of the matter at the case management conference and had properly exercised his discretion by striking out the offended allegations in the Statement of Claim and Reply to the Defence.

Conclusion

I find no merit in the grounds of appeal filed. The appeal is therefore dismissed. There shall be Costs to the 1st defendant/respondent both here and below, to be taxed if not agreed.