

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
CLAIM NO: ANUHCV 2017/0649
BETWEEN:
GEO W. BENNETT BRYSON & CO. LTD.
Trading as BRYSON'S SHIPPING
Claimant
and
PORT AUTHORITY
Defendant

Before:

Ms. Jan Drysdale

Master

Appearances:

Justin L Simon QC of counsel for the claimant

Craig Jacas of counsel for the defendant

2018: February 28th

2018: March 20th

DECISION

- [1] **Drysdale, M.:** On 22nd December 2017 the claimant filed a claim form and statement of claim seeking inter alia relief for overtime fees with respect to certain maritime services. In the alternative the claimant also claimed a refund of the sum of \$581,174.76 previously paid to the defendant with respect to those disputed overtime charges.
- [2] Prior to the commencement of these proceedings the claimant by letter dated 9th January 2017 documented its position with respect to these

charges and sought clarification on the legal authority of the defendant to levy the charges.

- [3] The defendant on 13th February 2017 responded in writing by virtue of a letter marked „without prejudice“ setting out its position and justifying its ability to charge the fees complained of. Further the letter whilst acknowledging that the fees charged to the claimant were an undervalue of what by law the defendant ought to have charged gives a concession that the defendant would be willing not to surcharge the claimant for those fees provided there was no further objection. Finally the letter ends with an invitation to the claimant that in the event doubt remained as to the authority of the defendant to charge the fees complained of to discuss any concerns with a view to amicably resolving the situation.
- [4] It appears that nothing further came from this offer of further discussion. The claimant's next course of action was to institute these proceedings claiming inter alia damages. Interestingly the claimant exhibited the without prejudice letter as an admission by the defendant of the legal justification to charge the requisite fees.
- [5] As a consequence of the disclosure of the without prejudice correspondence the defendant filed an application with affidavit in support on 2nd February 2018 to strike out paragraph 8 of the statement of claim which referred to and exhibited the without prejudice letter as being an abuse of the process of the court.

ISSUE

- [6] Having reviewed the application and heard the parties the sole issue for determination is whether the without prejudice letter is subject to privilege and should therefore be struck out.

WITHOUT PRIVILEGE COMMUNICATION

- [7] As a general principle of law communication between parties are not subject to privilege save where the communication is without prejudice. Without prejudice communication whether oral or written which forms part of negotiations are protected communication. This essentially renders any such communication inadmissible in court unless a party can demonstrate that the communication falls within an

exception or as indicated by Lord Hope of Craighead “unless the party can show that there is a good reason for not doing so.”¹

- [8] The purpose of such communication is to encourage the parties to be unhindered in their discussions with each other about all issues whether legal or factual. The court finds support in this contention in the decision of Lord Rodger of Earslferry who in the case of **Ofulue and another v Bossert**² articulated the premise of such communication as follows:

“it is that parties and their representatives who are trying to settle a dispute should be able to negotiate openly, without having to worry that what they say may be used against them subsequently, whether in their current dispute or in some different situation.”

- [9] Accordingly Lord Hope of Craighead in **Ofulue and another v Bossert at page 5 paragraph 12** went on to articulate that the rule concerning without prejudice communication should be given a generous application. In his judgment he opined as follows:

“Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement.”

- [10] Bearing this in mind, the claimant in attempting to defeat the argument that the protection afforded to without prejudice letter must convince the court that there is a good reason or exception to disallow such protection.

- [11] In attempting to do so the claimant argued that the letter though titled without prejudice should not attract the privilege as it was not a genuine attempt at negotiation. The claimant’s argument was premised on a segment of the final paragraph of the letter. However for the purpose of this decision the entire final paragraph is replicated hereunder:

“In the circumstances, we hope you would agree that your client is in a rather fortunate position, having been spared

¹ Ofulue and another v Bossert [2009] UKHL 16

² Ibid fn 1 paragraph 43 page 20

from any applicable premium rates for cargo handling performed during overtime hours. If the legal basis on which the Port Authority charges for overtime is still in doubt, our client is minded to substitute the said overtime charges for the premium handling rate. It is with this in mind that we invite you to meet with us to discuss your client's concerns with a view to an amicable resolution"

- [12] The claimant argued that the first two lines of the paragraph in particular the second line was tantamount to a threat and therefore was not a genuine attempt at negotiation. As noted previously the claimant did not file any affidavit opposing the defendant's assertion that the letter was written in the context of negotiations. Therefore the claimant's arguments at the bar table cannot arise to the level of evidence especially evidence of such a quality to impugn the evidence provided by the defendant.
- [13] It is trite law that he who alleges must prove. This is especially important in the context of a claim of something being not genuine which connotes untruthfulness or dishonesty. However the claimant has not satisfied the court that on a balance of probabilities that there exists any evidence that the communication was insincere, false or not genuine upon which his arguments may be founded.
- [14] Further the claimant's attempt to utilise the without prejudice communication was as previously indicated not for the purpose of establishing a particular monetary offer but as an admission of the legal basis put forward by the defendant to charge the disputed fees. Accordingly the attempt to rely on the sentence which articulated the option of the defendant to exercise its rights to charge the correct fees vis a vie the lesser disputed fees is at odds with the claimant's contention that the purpose of the letter was to indicate the legal justification utilised by the defendant, which justification the claimant rejects in his statement of claim.
- [15] Finally for the purposes of completeness an analysis of the letter in its entirety to determine whether there was indeed a bona fide attempt to resolve the dispute is also necessary as a failure to so do notwithstanding the use of the term "without prejudice" would not attract the associated privilege.
- [16] The subject letter seemingly is indicative of the defendant attempting to state its legal position as well as the desire to continue to entertain

further discussions on the matter. The letter does purport to reserve the defendant's right to charge more than the sum complained about by the claimant on the basis that that sum was in fact a mere proportion of what legally the claimant ought to have been charged if the claimant continued to refuse to settle the disputed sum. If the letter had ended on this note it may have been possible to construe the letter in a different context. However the letter ends with an invitation for the parties to discuss the issue should any further doubt subsist with a view to resolving the matter amicably. To ignore this and only focus on the preceding line would be to do an injustice in the circumstances.

- [17] Negotiation according to Black's Law Dictionary³ is "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." It is instructive that definition of negotiation does not render the same as nugatory where there has been a failure by the parties to settle the disputed issues. What appears to be significant is an attempt to discuss and or settle the disputed issues. On the face of it, that attempt was made but unsuccessfully. The failure of the parties to reach a consensual position cannot defeat the indisputable evidence that the letter was part of negotiations and therefore subject to privilege.

ORDER

- [18] Based on the foregoing I make the following order:

1. That the application to strike out paragraph 8 of the statement of claim is granted.
2. Costs shall be costs in the cause.

Jan Drysdale

Master

By The Court

Registrar

³ 7th edition page 1059