Neutral Citation Number: [2019] EWCA Civ 1937

Case No: A2/2019/2554/QBENF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
MRS JUSTICE MOULDER
[2019] EWHC 2590 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE ARNOLD

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Between :

(1) BGC BROKERS LP **(2) MARTIN BROKERS GROUP LIMITED** **(3) BGC SERVICES (HOLDINGS) LLP**	**Appellants**
- and -	
(1) TRADITION (UK) LIMITED **(2) ANTHONY JOHN VOWELL** **(5) MICHAEL ANDERSON**	**Respondents**

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Max Mallin QC and **Emily McKechnie** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Appellants**
Sa'ad Hossain QC and **Joyce Arnold** (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing date: 31 October 2019

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Approved Judgment

Lord Justice Arnold:

Introduction

1. This appeal concerns the applicability of the doctrines of without prejudice privilege and litigation privilege to an application for inspection of a settlement agreement between some, but not all, of the parties to proceedings. The Claimants ("BGC") have entered into a settlement agreement with the Third Defendant, Simon Cuddihy ("the Settlement Agreement"). The First, Second and Fifth Defendants ("the Tradition Defendants") seek inspection of an unredacted copy of the Settlement Agreement (inspection of a redacted version already having been provided). BGC resist inspection on the grounds of without prejudice privilege, alternatively litigation privilege. Master Davison rejected both claims to privilege and ordered inspection: [2019] EWHC 1569 (QB). Moulder J dismissed BGC's appeal: [2019] EWHC 2590 (QB). BGC appealed to this Court with permission granted by Males LJ. The hearing of the appeal was expedited since the trial of BGC's claim against the Tradition Defendants is listed for 20 November 2019. At the conclusion of the argument we announced that the appeal would be dismissed for reasons to follow. These are my reasons for concurring in that conclusion.

Factual background

2. BCG carry on business as inter-dealer brokers. The First Defendant ("Tradition") is a competitor. Mr Cuddihy and the Fourth Defendant, Robert Goan, are brokers who worked for BGC at the relevant times. It is common ground that on a number of occasions in 2016 and 2017 Mr Cuddihy supplied confidential information (which he had obtained from Mr Goan) to the Second Defendant, Anthony Vowell, who was a broker at Tradition.

3. On 9 October 2017 Foskett J granted interim injunctions against Mr Cuddihy, Mr Goan, Tradition and Mr Vowell on a without notice application by BGC. The injunctions were served on the Defendants the next day, and BGC issued a claim form. On 12 and 18 October 2017 Mr Cuddihy attended interviews with BGC's solicitors ("BLP"). These interviews were conducted on an expressly "without prejudice and confidential" basis. On 16, 17 and 25 October 2017 Mr Cuddihy's solicitors ("CC") sent emails to BLP, again on a "without prejudice and confidential" basis. On 1 November 2017 Mr Cuddihy made "short" and "long" affidavits pursuant to the order dated 9 October 2017. On 2 November 2017 BGC and Mr Cuddihy entered into the Settlement Agreement, which became effective on 9 November 2017. (There has also been a settlement between BGC and Mr Goan, but that is not material for present purposes.)

Relevant provisions of the Settlement Agreement

4. Clause 2.2 of the Settlement Agreement provides:

> "Mr Cuddihy warrants and represents as per Clause 3 that he has provided full and frank disclosure of the supply of Confidential Information by him to Mr Vowell and/or Tradition and/or Related Parties as set out in (a) his two affidavits appended to this Agreement at Schedule 1 (short form) and

> Schedule 1A (long form) (the 'Two Affidavits') (for the avoidance of doubt, BGC agrees that Mr Cuddihy's obligations to provide separate affidavits as set out in Schedule D to the Order extending the interim injunction, filed at Court by consent on 27 October 2017 (the 'Consent Order') are discharged by this agreement and the Tomlin Order referenced at clause 2.6 below, (b) the interviews conducted on a 'without prejudice' basis on 12 October 2017 and 18 October 2017 (notes of which are at Schedule 4), (c) the emails sent on a 'without prejudice' basis on 16 October 2016 and 17 October 2017 (copies of which are at Schedule 5), (d) copies of the WhatsApp messages exhibited to the witness statement and/or (e) the information in respect of Mr Ruddell set out in an email from CC to BLP sent at 17:09 on 25 October 2017 (together, the 'Disclosures'). For the avoidance of doubt, the Disclosures which are without prejudice (which does not include the Two Affidavits) will retain without prejudice privilege save that BGC and/or Mr Cuddihy will be able to waive the without prejudice privilege at its sole discretion in order to protect its position in the event that BGC considers or asserts that Mr Cuddihy has breached a term of this Agreement."

5. By clause 3.1, Mr Cuddihy represented and warranted that:

> "3.1.1 All of the information provided in the Disclosures contains a full and frank, to the best of his recollection, account of all Confidential Information supplied by Mr Cuddihy directly or indirectly to Mr Vowell, Tradition and/or its Related Parties … other than in the proper course of Mr Cuddihy's duties;
>
> 3.1.2 There is no additional information concerning the release of Confidential Information by other parties (other than in the proper course of their duties) of which he is aware;
>
> 3.1.3 Save as set out below, he will provide whatever assistance may be required by BGC in connection with BGC's prosecution of the Action, including in relation to providing additional witness statement or affidavits … and also willingly and cooperatively prepared for attend court if needed to provide evidence to the Court in the Action…"

6. By clause 3.2, Mr Cuddihy acknowledged that any breach of the foregoing representations and warranties would entitle BGC to take action against him for breach of the Settlement Agreement.

7. As indicated by clause 2.2, Schedule 4 of the Settlement Agreement contains copies of notes of the 12 and 18 October 2017 interviews and Schedule 5 contains copies of the emails dated 16 and 17 October 2017 (but not the email dated 25 October 2017). In the version of the Settlement Agreement provided by BGC for inspection by the Tradition Defendants, Schedules 4 and 5 were redacted.

The application for inspection

8. As counsel for the Tradition Defendants emphasised, the Tradition Defendants' application is for inspection of an unredacted copy of the Settlement Agreement. It is not for inspection of the notes of the meetings on 12 and 18 October 2017 or of the emails dated 16, 17 and 25 October 2017 ("the Antecedent Communications"). Accordingly, the question to be considered is not whether the Antecedent Communications are protected from inspection by without prejudice privilege and/or litigation privilege, but whether the relevant parts of the Settlement Agreement are protected from inspection by without prejudice privilege and/or litigation privilege.

9. As counsel for the Tradition Defendants acknowledged, however, there is a distinction between the notes of the meetings on 12 and 18 October 2017 and the emails dated 16 and 17 October 2017 on the one hand, which are reproduced in Schedules 4 and 5, and the email dated 25 October 2017 on the other hand, which is referred to in clause 2.2(e), but not reproduced in the Settlement Agreement. Counsel for the Tradition Defendants argued that clause 2.2(e) incorporated the text of the email dated 25 October 2017 into the Settlement Agreement by reference. I shall return to the merits of this argument below. At this stage the point to note is that, in reality, the Tradition Defendants' application is for inspection of both the Settlement Agreement and the email dated 25 October 2017. Consistently with this, the Master's order provided "[f]or the avoidance of doubt" that the email dated 25 October 2017 should also be produced for inspection.

Without prejudice privilege

Applicable principles

10. There is no dispute as to the relevant principles, which may be summarised as follows.

11. Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. As Oliver LJ stated in *Cutts v Head* [1984] Ch 290 at 306, the policy behind this rule 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 … may be used to their prejudice in the course of proceedings. They should … be encouraged fully and frankly to put their cards on the table … The public policy justification, in truth, essentially rests with 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."

12. In disputes between the parties to the without prejudice communication ("two-party" cases), an additional basis for the rule may be an express or implied agreement between the parties. In situations involving a third party who was not a party to the negotiations ("three-party" cases), however, the documents are protected as against

the third party purely by reason of the public policy justification: see *Muller v Linsley & Mortimer* [1996] PNLR 74 at 77 (Hoffmann LJ).

13. Where communications are inadmissible on the basis of without prejudice privilege, they are also protected from inspection by other parties in the same litigation, whether or not a settlement was concluded: see *Rush & Tomkins Ltd v Greater London Council* [1989] 1 AC 1280 at 1300, 1305 (Lord Griffiths).

14. Where a written settlement agreement results from without prejudice negotiations, the settlement agreement is not covered by without prejudice privilege. This does not in itself affect the status of the prior without prejudice negotiations; but where the settlement agreement was concluded by the acceptance of a without prejudice offer, the fact that the agreement is not privileged means the without prejudice offer ceases to be protected by the privilege since it forms part of the contract: see *Walker v Wilsher* (1889) 23 QBD 335 at 337 (Lindley LJ).

Application to the present case

15. Counsel for BGC pointed out that there was no dispute that the Antecedent Communications were protected from inspection by without prejudice privilege at the time they were made because they were expressly stated to be made on that basis. He submitted that there was no basis for contending that they had subsequently lost that status by being included (still less, in the case of the 25 October 2017 email, referred to) in the Settlement Agreement: there had been no allegation by the Tradition Defendants, or finding by the courts below, of any waiver of privilege, nor that any exception applied. He made it clear, however, that he did not contend that the Antecedent Communications retained that status simply because clause 2.2 of the Settlement Agreement so provided. He also accepted that it made no difference that the documents (other than the 25 October 2017 email) were reproduced in Schedules to the Settlement Agreement rather than in the body of the Settlement Agreement.

16. As counsel for the Tradition Defendants submitted, the short answer to BGC's argument is that it focusses on the wrong communications. As noted above, the question is not whether the Antecedent Communications are protected from inspection by without prejudice privilege, but whether the relevant parts of the Settlement Agreement are protected. The fact that the Antecedent Communications are protected does not mean that the relevant parts of the Settlement Agreement are protected, since they are distinct communications.

17. Counsel for BGC sought to avoid this conclusion by arguing that, as a matter of contractual construction, clause 3.1.1 of the Settlement Agreement showed that the notes and emails referred to as the Disclosures were prior communications and not new communications. He accepted, however, that, if the admissions made by Mr Cuddihy in the Disclosures had been recited in clause 3.1.1 using the same words, then that would not be covered by without prejudice privilege. He further accepted that it was not a question of the information content of the communications.

18. I do not accept this argument. In my judgment, this is not an issue of contractual construction, but of the purpose of the relevant communication. Here the relevant communication is the Settlement Agreement. The purpose of that communication was not to negotiate, it was to conclude a settlement of the dispute between BGC and Mr

Cuddihy on the terms set out in the Settlement Agreement. It was therefore not covered by without prejudice privilege. Furthermore, the fact that the 25 October 2017 email became incorporated into the terms of the Settlement Agreement meant that that email ceased to be protected by without prejudice privilege, because otherwise it would not be possible (for example) for BGC to sue Mr Cuddihy for breach of warranty relating to the contents of that email.

Litigation privilege

19. The rule with respect to litigation privilege was stated by Lord Carswell in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at [102] in the following terms:

> "… communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

20. The rationale for this rule was explained by James LJ in *Anderson v British Bank of Columbia* (1875-76) LR 2 Ch D 644 at 676 as follows:

> "… as you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief."

Thus the rule is founded upon the adversarial character of litigation in this jurisdiction.

21. The Master rejected BGC's claim to litigation privilege on two grounds. First, he held that litigation privilege did not attach to the Settlement Agreement because it was a communication between opposing parties who did not have a common interest in opposing the Tradition Defendants. Secondly, he held that the dominant purpose for which the Antecedent Communications were incorporated into the Settlement Agreement was to "benchmark or police" the Agreement, and not to enable BGC to gather evidence for the litigation. The Judge upheld the Master's decision on the first ground, and therefore did not need to consider the second ground. On the appeal to this Court the Tradition Defendants served a Respondents' Notice relying in addition upon the second ground.

22. I propose to consider the second ground first, since in my view it provides an easier answer to BGC's claim than the first ground.

Dominant purpose

23. The requirements for claiming litigation privilege were summarised by Hamblen J (as he then was) in *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) at [11] (so far as relevant, citations omitted):

> "(1) The burden of proof is on the party claiming privilege to establish it ….
>
> (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible ….
>
> …
>
> (4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. …"

24. In the present case the evidence in support of the claim to litigation privilege was contained in the eighteenth witness statement of Graham Shear of BGC's solicitors. This evidence explained BGC's purposes in engaging with Mr Cuddihy in the Antecedent Communications. I am prepared to accept that it shows that BGC's dominant purpose in engaging in those communications was to gather evidence for use against the Tradition Defendants in the proceedings. Mr Shear does not explain BGC's purpose in incorporating the Antecedent Communications into the Settlement Agreement, however. Accordingly, the only evidence as to that purpose is that provided by the Settlement Agreement itself.

25. On the face of the Settlement Agreement, the purpose for which the Antecedent Communications were incorporated into the Settlement Agreement by BGC was in order to obtain the benefit of the representations and warranties from Mr Cuddihy contained in clauses 3.1.1 and 3.1.2, and hence the ability to sue Mr Cuddihy if those representations and warranties were inaccurate. As I understand it, this is what the Master meant when he said that the purpose was to "benchmark or police" the Settlement Agreement. I would observe that, given this purpose, it does not make any difference whether the Antecedent Communications were reproduced in the Settlement Agreement or incorporated by reference.

26. Counsel for BGC argued that the incorporation of the communications into the Settlement Agreement was part of a "single wider purpose" because it was another stage on the same journey, relying upon the following statement of the law in Hollander, *Documentary Evidence* (13th ed) at 18-09:

> "When will it be appropriate to treat communication as part of a 'single wider purpose'? On one view, the insurers in *Highgrade* had two purposes: one to decide whether to resist

> the insurance claim and only if they decided to do so, to use the information in litigation. But in such a case, one purpose simply follows from the other: there are simply two stages in the same journey made by the same person or entity and the second purpose follows on immediately from the first."

27. Assuming without deciding that this is a correct analysis of the reasoning of the Court of Appeal in *Re Highgrade Traders* [1984] BCLC 151, I do not consider that it assists BGC. It seems to me to be plain that BGC's purpose in incorporating the Antecedent Communications into the Settlement Agreement and making them the subject of clauses 3.1.1 and 3.1.2 was a different purpose to the purpose of evidence gathering which had informed the making of the Antecedent Communications.

Communications between opposing parties

28. It is well established that no litigation privilege attaches to communications between opposing parties to litigation: see in particular *Baker v London & South Western Railway Co* (1867-68) LR 3 QB 91 at 93 (Cockburn CJ) and *Kennedy v Lyell* (1883) 23 Ch D 387 at 405-6 (Cotton LJ).

29. Counsel for BGC submitted that this principle was confined to two-party cases, and that in three-party cases litigation privilege could attach to communications between two opposing parties which protected those communications from inspection by the third party. Counsel for the Tradition Defendants disputed that litigation privilege was available in three-party cases unless the two parties between whom the communications passed shared a common interest as against the third party.

30. This raises the question of the basis for the principle that no litigation privilege attaches to communications between opposing parties to litigation. Counsel for BGC submitted that authorities such as *Baker v London & South Western Railway* and *Kennedy v Lyell* showed that the basis for it was that confidentiality was a necessary (although not a sufficient) condition for litigation privilege, and that there could be no confidentiality as between two parties to the same communication, whereas there could be confidentiality as between those parties and a third party.

31. As counsel for the Tradition Defendants pointed out, however, the role of confidentiality in litigation privilege is not free from controversy, and it has been suggested that confidentiality is not required in relation to litigation privilege: see Thanki, *The Law of Privilege* (3rd ed) at 3.34. Moreover, even if confidentiality is required, it may be argued that what matters about a communication between two opposing parties A and B is not that they are parties to the same communication, but that they are adversaries in litigation and that that is inimical to any obligation of confidence subsisting between them (save in the context of without prejudice negotiations). On that view of the matter, it makes no difference if there is a third party C to the litigation unless A and B have a common interest in opposing C, in which case A and B can owe each other an obligation to keep confidential their communications concerning the issues in relation to which they have a common interest (but not concerning issues in relation to which they do not).

32. These are not straightforward issues, and it is therefore better to leave them for decision in a case where their resolution matters.

Conclusion

33. For the reasons given above, I conclude that the relevant parts of the Settlement Agreement and the 25 October 2017 email are not protected from inspection by either without prejudice privilege or litigation privilege.

Lord Justice David Richards:

34. I agree.

Lord Justice Lewison:

35. I agree that the appeal should be dismissed for the reasons given by Arnold LJ in paragraphs [10] to [27] of his judgment. So far as without prejudice privilege is concerned, the key point for me is that the Antecedent Communications could not have been used to found a claim against Mr Cuddihy because they are inadmissible. But the repetition of their information content in the Settlement Agreement radically changed the status of the information. From being incapable of founding any claim against Mr Cuddihy, they became the legal foundation of a potential claim for breach of warranty. So far as litigation privilege is concerned, I agree that the evidence did not explain the dominant purpose of including the Antecedent Communications in the Settlement Agreement itself; and that the Master was entitled to find that the dominant purpose of doing so was to police the Settlement Agreement.