Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] ADJ.L.R. 04/16

JUDGMENT : HHJ Frances Kirkham QBD. 16th April 2008.

1. In issue is whether the defendant is entitled to disclosure of documents arising out of or in connection with two mediations between the claimants and the Department for Environment, Food and Rural Affairs ("DEFRA") and which are not subject to legal professional privilege. DEFRA are not a party to these proceedings but have been invited to make representations pursuant to CPR 31.19(6)(b). They resist the making of an order for disclosure. The claimants do not resist the application. They take a neutral stance.

Background

2. The defendant acted as solicitors to the claimants in connection with the drafting and negotiation of an agreement between the claimants and DEFRA for the provision of waste management services during the foot and mouth epidemic in 2001. The claimants and DEFRA were in dispute as to the sums to be paid for the claimants' services. The first claimant claimed £4.54m and the second claimant £1.72m in respect of unpaid invoices and both claimed interest and costs. On 28 February 2005 that dispute was settled on payment by DEFRA of £3.9m to the first claimant and £1.4m to the second claimant.

3. The settlements between the claimants and DEFRA followed a series of without prejudice communications between the claimants' solicitors (Messrs Wragge & Co) and those for DEFRA (Messrs Eversheds) and two mediations. The first mediation took place in July 2004 and the second in February 2005.

4. The first and second claimants are now claiming from the defendant in the current proceedings the sums of £3.65m and £0.76m, being the alleged balance between the settlement monies paid by DEFRA and the claimants' total claims against DEFRA. The claimants allege that the dispute with DEFRA occurred entirely as a result of the defendant's negligence in relation to the negotiating, drafting and advising upon the terms of the agreement between the claimants and DEFRA. They contend that DEFRA's case in the dispute with the claimants was based upon ambiguities and inconsistencies in the drafting of the contract for which the defendant was responsible. The claimants say that, if the defendant had performed its obligations and ensured that the contract was clear and unambiguous and that it reflected what had been agreed between the parties and/or the claimants' instructions, the position taken by DEFRA on the construction of the contract would not have been possible.

5. The claimants allege that the settlement of the proceedings following the February 2005 mediation was in their best interests and reflected a reasonable and sensible compromise of the claims given, in particular, the ambiguity and lack of clarity in the contract.

6. The defendant's position is that it is for the claimants to prove that the settlement with DEFRA was reasonable and to prove what was the true cause of the settlement. The defendant's case is that the true construction of the contract was clear and that there was no reasonable basis for the contention advanced by DEFRA in the dispute with the claimants. If the claimants settled with DEFRA on the basis that there was a risk that the unmeritorious construction advanced by DEFRA would be upheld by the court, then that was an unreasonable basis for the claimants to settle. Further, if the claimants settled with DEFRA on the basis of concerns (whether legal or commercial) other than the construction of the contract, then the defendant cannot be held responsible for any shortfall between the settlement monies and the amounts invoiced by the claimants.

7. The parties have exchanged lists of documents. Pursuant to the guidance of the Court of Appeal in ***Muller v Lindsay & Mortimer*** [1996] 1 P.N.L.R.74, the claimants waived privilege in and disclosed without prejudice communications between Wragge & Co and Eversheds. They disclosed the existence of documents created in connection with the two mediations but did not show these to the defendant. They enquired of the mediators and DEFRA whether the documents could be shown to the defendant. DEFRA has refused its consent.

Mediation agreements

8. At the hearing of this application, expressly reserving its right to confidentiality and without waiving its claim to privilege, DEFRA produced copies of the agreements entered into by the claimants, DEFRA and the mediator in relation to each of the two mediations. Each agreement contains a confidentiality provision. The agreement for the first mediation, in July 2004, was on a CEDR form. Clause 6 provided:

   "6. Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Model Procedure (paragraphs 16 - 20)."

9. Relevant provisions within the Model Procedure were:

   "16. Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

   17. All information (whether oral, in writing or otherwise) arising out of, or in connection with, at the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information which would in any event have been admissible or disclosable in any such proceedings."

10. Similarly, the mediation agreement entered into by the claimants, DEFRA and the mediator for the February 2005 mediation contains the following confidentiality clause:

   "6. Each Party in signing this Agreement is deemed to be agreeing to the confidentiality provisions of the Mediation Procedure on behalf of itself and all of its directors, officers, servants, agents and/or Representatives *and all other persons present on behalf of that Party at the Mediation."*

11. When asked to consent to the release of all the documents arising out of or in connection with the mediation, Mr Willis, the mediator in the first mediation, took a neutral stance: it was a matter for the parties. On 7 February 2008, Miss Andrewartha, the mediator for the second mediation, wrote as follows:

"The Mediation Agreement of course subjects all matters associated with the mediation to confidentiality. I would be extremely reluctant to allow any inquiry into the proceedings that took place during the mediation. I would normally counsel against the parties agreeing to share such matters. However I view the privilege, ultimately, as being that of the parties and if you decided to waive privilege that may well be a matter for you. I would comment, though, that the request relates to 'all of the documents arising out of or in connection with the mediation'. That is a very wide category of documents indeed. It could include privileged material on your respective files. I do not believe that I have retained any notes but if I had it could be wide enough to encompass those. It could also cover your own notes of private meetings held during the course of the mediation."

DEFRA's evidence

12. Mr Rabey is Director of Purchasing and Supply of DEFRA. He made a witness statement in relation to the defendant's application for disclosure. His evidence is that DEFRA are in dispute with other parties in relation to the 2001 foot and mouth epidemic or other disease outbreaks. If the documents are disclosed and if they become public during the course of hearings within these proceedings, that may provide information as to DEFRA's approach to disputes and resolution of these. That might lead to prejudice to DEFRA in such cases as may arise.

Issues

13. The defendant is facing a substantial claim. As the claimants have pleaded that the settlement was reasonable, particularly given the alleged ambiguity in the defendant's drafting, it would be unfair and unjust to the defendant if a confidentiality agreement between the claimants and DEFRA precluded inspection by the defendant of material documents. The claimants have chosen to bring these proceedings against the defendant and should not be entitled to hide behind a confidentiality agreement which they entered into voluntarily with a third-party (DEFRA) to preclude inspection of disclosable documents.

14. The defendant's case is that there is no principle of English law by which documents are protected from disclosure on inspection by reason of confidentiality alone. Without prejudice communications are confidential. The defendant does not challenge the proposition that the documents are prima facie protected from disclosure on the ground of privilege but contends that the claimants waived that privilege when they pleaded the reasonableness of the settlement with DEFRA. The defendant submits that the position here as to relevance is indistinguishable from that in **Muller**. In order to assess the reasonableness of the claimants' conduct, the defendant needs to know what that conduct was, including their conduct at the two mediations. Justice requires that the defendant be able to inspect the documents which are vital to understand the relevant conduct.

15. DEFRA's objection is based on four grounds, namely privilege, confidentiality, contract and relevance.

Privilege:

16. The starting point for consideration of the modern law is the decision of the House of Lords in ***Rush & Tomkins Ltd the Greater London Council*** [1989] AC 1280. Lord Griffiths summarised the general rule as follows:

"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 LJ in ***Cutts v Head*** *[1984] Ch.290:*

> *"that the rule rests, at least in part, upon public policy is clear from many authorities, and a 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 Paperworks Ltd*** *(1927) 44 RPC 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 and submissions on the question of liability."*

The rule applies to exclude all negotiations genuinely aimed at settlement whether all or in writing from being given in evidence."

17. In ***Unilever PLC v Proctor and Gamble*** [2000] 1 WLR 2346, Robert Walker LJ referred to that passage in Lord Griffiths' judgment and said:

"This well-known passage recognises the rule as being based at least in part on public policy. 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."

18. Robert Walker LJ went on to summarise the exceptions to that rule, and identified the authority relevant to each exception. The only exception of relevance here is that identified in ***Muller,*** namely where a former client sues his former solicitors for negligence and an issue arises as to whether he acted reasonably to mitigate his loss in his conduct and conclusion of negotiations with a compromise of proceedings brought against him. Robert Walker LJ said:

"Whatever difficulties there are in a complete reconciliation of those cases [ie the exceptions to the rule] they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They 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 the ***Rush v Tomkins*** *case: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a base of compromise, admitting certain facts."*

19. In his judgement in ***Halsey v Milton Keynes General NHS Trust*** [2004] 1 WLR 3002, Dyson LJ said:
"We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the Court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the Court should not note, and therefore should not investigate, why the process did not result in agreement."

20. In ***Savings and Investment Bank Ltd v Fincken*** [2004] 1 WLR 667 Rix LJ reviewed the authorities, and said, at paragraph 53: *"All four authorities in this court, while allowing the existence of an exceptional rule to cover cases of unambiguous impropriety, have stressed the importance of the public interest which has created the general rule of privilege and have cautioned against the too ready application of the exception."*

At paragraph 62, he said: *"In the tension between two powerful public interests, it seems to me that in favour of the protection of the privilege of without prejudice discussions holds sway - unless the privilege is itself abused on the occasion of its exercise.".*

21. In ***Muller*** the plaintiffs were in dispute with shareholders of a company. Settlement was agreed. They then claimed damages for negligence from their former solicitors. The plaintiffs asserted that the settlement had been a reasonable attempt to mitigate their loss. The defendant solicitors asserted that it was not and applied for discovery of the documents relating to it. The Court of Appeal ordered disclosure. Hoffmann LJ referred to the two justifications for the without prejudice rule, namely public policy to encourage parties to settle disputes and implied agreement about what are commonly understood to be the consequences of negotiating on a without prejudice basis. He said: *"If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rules on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of the party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions ie independently of the truth of the facts alleged to have been admitted."*

He went on to outline some of the exceptions to the without prejudice rule, noting: *"Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made."*

22. Hoffmann LJ concluded:
"But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.
If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the statement of claim is whether the conduct of the Mullers in settling the claim was reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action.
The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them.
I do not think that interpreting the rule in this way infringes the policy of encouraging settlements. It may of course be said that a party may be inhibited from reaching a settlement by the thought that his negotiations will be exposed to examination in order to decide whether he acted reasonably. But this is a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It would in my judgment be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective."

23. In the same case, Swinton Thomas LJ noted that the plaintiffs had alleged that they had acted reasonably in settling the proceedings, and said: *"…. that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the without prejudice negotiations and correspondence. By bringing their conduct into the arena, and putting it in issue, the plaintiffs have, in my judgment, waived any privilege attached to the without prejudice negotiations and correspondence."*

Conclusion

24. I am not persuaded that disclosure of documents within the mediations falls within the exception to the without prejudice rule enunciated in ***Muller***. The circumstances in **Muller** are different from those which obtain here. In that case, it was the plaintiffs who sought to deny disclosure of without prejudice material. Here, the question is whether a third party's without prejudice material should be disclosed. The Court of Appeal in ***Muller*** gave no consideration to the position of a third party. In this case the privilege belongs not only to the claimants but also to DEFRA. There are public policy reasons why DEFRA should be entitled to assert that privilege: DEFRA are entitled

to protect from disclosure material which may embarrass them in other disputes. Further, in this case there was express (not just implied) agreement between the claimants and DEFRA that the without prejudice rule apply.

25. The rationale of Hoffmann LJ in ***Muller*** was that the issue was unconnected with the truth or falsity of anything stated in the negotiation and as therefore falling outside the principle of public policy protecting without prejudice communications. It would appear that that will not apply in this case, because, here, the truth or falsity of what was argued in the mediation will or may (subject to relevance) be an issue in the litigation.

26. The long line of authorities, and the CPR, encourage parties to attempt to settle disputes through without prejudice communications and mediation. There is clear public policy to encourage mediation in place of litigation. The court should be slow to find exceptions to the without prejudice rule.

27. In my judgment, the defendant cannot bring itself within the ***Muller*** exception to the without prejudice rule. For that reason alone, the defendant's application must fail. I nevertheless deal with the question of confidentiality.

Confidentiality

28. Mr Acton Davis QC refers to extracts in **Confidentiality,** Toulson and Phipps, 2006:

*17.001: "Generally speaking, confidentiality is not a bar to disclosure of documents… but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see… **British Steel Corporation v Granada Television Ltd** [1981] AC1096.*

17.005: "The principle that information necessary for the fair disposal of disputes should be disclosed, even if it is confidential, is subject to statutory and common-law exceptions".

17.007: "The general principle does not apply in cases of:
(1) 'without prejudice' communications and communications to mediators and conciliators … the rationale being that the public interest in maintaining secrecy in such cases outweighs the general principle in favour of disclosure."

*17.015 : "In **Unilever PLC v The Proctor and Gamble Co** Robert Walker LJ categorised a number of circumstances in which - and purposes for which – 'without prejudice' communications may be admissible in evidence. A private law duty of confidence arising from the 'without prejudice' nature of communications will not usually prevent a party from adducing such communications in those circumstances and for those purposes. However, if no duty of confidentiality were owed at all, a party to without prejudice negotiations would be at liberty to publicise them at large. This would be inimical to the object of such negotiations and contrary to the assumption on which they are ordinarily conducted."*

17.016: "Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice' rule set out above."

29. There is an overlap between DEFRA's objection to disclosure based on the ground of confidentiality and its resistance based on the protection it seeks pursuant to the *'without prejudice'* rule, as many of the applicable principles are common to both. Had I not concluded that the defendant's application failed for the reasons given above -that is, as not falling within one of the exceptions to the without prejudice rule - I should have concluded that DEFRA would be entitled to rely on an exception to the general rule that confidentiality is not a bar to disclosure. DEFRA was a party to the confidentiality agreement and wishes its provisions to be honoured. In any event, I am persuaded that, for the reasons identified in 17-016 above, documents within a mediation should be protected from disclosure.

30. In my judgment, whether on the basis of the without prejudice rule or as an exception to the general rule that confidentiality is not a bar to disclosure, the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.

31. I note that the disclosure sought by the defendant is of such wide scope that it would include documents held by the mediator. In my judgement, the court should be very slow to order such disclosure. Mediators should be able to conduct mediations confident that, in normal circumstances, their papers could not be seen by the parties or others.

32. Mr Cannon submits that the court could offer DEFRA the protection it seeks by setting in place safeguards such as restricting those entitled to see material or hearing evidence with respect to material within the mediations in closed court. In my judgement, the court should not follow that route. First, justice should normally be conducted in the open and the court should be slow to choose to do otherwise. Secondly, DEFRA has legitimate interests to protect. DEFRA would, understandably, wish to have an observer present to ensure that its position was protected; in my judgment, the court should not impose on DEFRA a regime which would cause them to such incur expense and suffer that inconvenience.

33. Given my conclusions with respect to these matters, it is not necessary to deal with Mr Acton Davis' submissions in relation to contract or relevance.

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