Compagnie Noga D'Importation et D'Exportation SA v Australia & New Zealand Banking Group Ltd
[1999] ADR.L.R. 12/10

CA on appeal from QBD Comm. Ct (Mr Justice Longmore) before Evans LJ, Judge LJ. 10th December 1999

JUDGMENT : LORD JUSTICE EVANS:

1. Substantial litigation is pending in the Commercial Court. There are three actions which were begun in March 1999. In two of them the claimants are the company I shall call "Noga", and in the third the claimants are the Federal Government of Nigeria and the Attorney-General of the Federal Public of Nigeria. The numerous defendants in the actions include a group who are known as "the SJ Berwin defendants" (so named because of the solicitors who represent them) and specifically they include a Mr Bagudu, who appears for the purposes which are relevant at present to have acted as spokesman for that group of defendants. The parties before us are Noga, as appellants, and the SJ Berwin group of defendants as respondents to this appeal. The appeal arises out of a judgment given by Longmore J on 18th November 1999. By that judgment he refused the claimant's (that is to say Noga's) application to strike out certain paragraphs of a Defence which had been served on behalf of the present respondents.

2. The history of the matter is as follows. There was, on 11th August 1999, an agreement signed in Nigeria by representatives of all three parties (that is to say Noga, the Nigerian government and the present respondents) which purports to be an agreement to settle the dispute out of court, the dispute in question being identified by a description, the "*Ajaokuta Steel Project Bills of Exchange and related Claims*". That agreement was signed by Mr Gaon senior on behalf of Noga and by Mr Bagudu on behalf of the present respondents. It is admitted by both parties before us that the agreement was signed and its terms are before us. There is an issue as to its legal effect. Specifically, Clause 2 of the agreement recites: *"NOGA, having agreed to receive a settlement amount from MECOSTA, agrees to withdraw its claims under the dispute against the defendants."*

3. The agreement itself does not say what the settlement amount was. Noga contends that there was an oral agreement at about the same time under which Mr Bagudu, on behalf of the relevant defendants, agreed to pay a sum of $100 million. That allegation of an agreed amount is disputed by the present respondents and it has given rise to the quite separate issue, as will appear, as to whether or not there was a concluded agreement having legal effect on 11th August.

4. Subsequently, and this can be recited simply as part of the history, there were further communications between the two parties, specifically on 17th August. The solicitors acting for Noga wrote to the SJ Berwin, acting for the present respondents. That letter resulted in a meeting which took place between representatives of the two parties on 31st August. It was expressly agreed that that meeting should take place on a *"without prejudice*" basis and neither side before us contends that the contents of that meeting are otherwise than privileged and inadmissible in evidence. The central dispute for the purposes of this appeal is whether the letter dated 17th August was likewise privileged as a *"without prejudice"* communication.

5. Subsequently, Noga amended its claims in order to rely upon the tripartite agreement as a settlement of the dispute. It was ordered that that issue should be tried as a separate and preliminary issue. The hearing is due to take place on Monday next, 13th December, hence the urgency of this appeal. It should be recorded that the appeal began yesterday, 9th December, before myself and Potter LJ, but Potter LJ unfortunately was taken ill. The hearing therefore was resumed this morning before Lord Justice Judge and myself. It has been treated as a hearing de novo.

6. Pleadings were ordered for the purposes of what I will call "*the settlement issue*". They consisted of a statement of case, served on behalf of Noga, on 11th October 1999. It will be sufficient to summarise the contents of that statement of case as an allegation that there was a settlement agreement consisting, first, of the signed tripartite agreement and, secondly, of an oral agreement reached in Nigeria at about the same time, under which the sum of $100 million was agreed as the settlement amount. There are further allegations, but it is not necessary to refer to them for the purposes of this judgment.

7. The respondents' Defence to that statement of case is a clearly pleaded document which begins with a summary of the defendants' case in relation to what is called the alleged settlement agreement made on 11th August 1999. The contentions as summarised in paragraph 3 are that the document represented an agreement in principle only, it was not intended to create legal relations and was therefore of no contractual effect. Alternatively, it was no more than an agreement to agree. In the further alternative, no settlement sum had been agreed and in the premises any alleged agreement was void for uncertainty.

8. The submission that the tripartite agreement was of no contractual effect is expanded in paragraph 15 of the Defence. Paragraphs 15.1 and 15.2 are not in issue. Paragraph 15.2 contains a denial that any settlement sum was agreed on 11th August 1999, or at all. Objection is taken to paragraphs 15.3 through to paragraph 15.7 which follow. Paragraphs 15.3 and 15.4 read:

> *"15.3 In an unsuccessful attempt to reach a legally binding settlement agreement, the negotiations between the parties continued after 11 August 1999 [and that is followed by a reference to pleadings in the action brought not by Noga, but by the Federal Government for Nigeria.]*
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> *15.4 Those settlement negotiations continued up to 31 August 1999 at which juncture the SJ Berwin Defendants and Noga signed an agreement that further discussions (if any) would be expressly without prejudice to (a) the issues in these proceedings, and (b) the issue of whether a legally binding settlement had been concluded."*

9. The pleading continues in paragraphs 15.5 and 15.6 with a reference to the letter of 17th August 1999. 15.5 reads: *"Prior to that date, under cover of a letter dated 17 August 1999 (marked `without prejudice, confidential and subject to contract') from Noga's solicitors, James & Sarch to SJ Berwin, Noga enclosed various draft documentation for consideration by the SJ Berwin Defendants with a view to reaching a settlement of the proceedings."*

10. Paragraph 15.6 begins: *"The defendants will refer to the letter and enclosed draft documents at trial, as necessary, for their full terms and true effect."*

11. There follows a summary under six sub-heads of the contents of the documentation which was enclosed with the letter.

12. It is common ground that the contents were inconsistent with the allegation that a figure of $100 million had been agreed as the settlement amount on 10th or 11th August. Other discrepancies are noted. The prime one is that in place of the figure of $100 million, the draft terms were that a cash payment of $70 million should be made in two parts, first, to James & Sarch's client's account and, secondly, that a sum of no less than about $12 million would be paid to James & Sarch's own account in respect of part of their costs said to have been incurred in these proceedings.

13. There was an additional draft term by which the respondents would provide certain bonds, Nigerian par bonds dated 2020, with a face value of $72 million. Clearly, an issue would arise as to the current cash value of those bonds, if they were to be regarded as a substitute for the $30 million balance of the original $100 million said to have been agreed.

14. Paragraph 15.7 continues: *"None of the proposals summarised in Sub-paragraph 15.6 above appeared in, or are consistent with, the 11 August document. Such proposals were not acceptable to the Defendants and, accordingly, no legally binding settlement was concluded."*

15. As I ventured to point out in the course of argument, there is some ambiguity in the wording of paragraph 15.7. It does however appear to be common ground that the issue raised is whether there had been a binding settlement agreement on 11th August and that the respondents' pleaded references to the subsequent negotiations, and to the letter dated 17th August, are included on the basis that they are relevant to that issue.

16. On 2nd November Noga applied to have those paragraphs of the pleading struck out. The grounds, essentially, were that the letter of 17th August was, as it stated, "without prejudice" and therefore privileged from production and inadmissible in evidence. Apart from the claim for privilege, Mr Gee

has not disputed the relevance, or possible relevance, of the letter or the fact that it was written to the issue raised in the settlement proceedings. His submissions have concentrated on the question whether the letter was without prejudice or not. He accepts that the fact that it was labelled or described as "without prejudice" is not conclusive. As he puts it, the label is neither sufficient nor necessary. The issue is whether the document was one which should be regarded as privileged in law.

17. That was the issue which came before Longmore J on 18th November. Summarising his judgment to the extent of failing to do full justice to it, he accepted an argument on behalf of the respondents that no such privilege could exist because, as at 17th August, there was not in fact any dispute as to whether or not there was a binding settlement agreement. He, in my respectful view rightly, identified the relevant issue for the purposes of the preliminary issue proceedings as being whether a binding settlement agreement had been reached or not. That is the issue against which the relevance of the letter and its contents falls to be tested. He held, however, that since by that date no dispute had arisen with regard to that issue, it was not possible for the legal "without prejudice" privilege to be claimed.

18. One matter which has been argued before us is whether the judge was right in holding that the existence of a dispute is an essential prerequisite for recognition of the "without prejudice" privilege. Mr Gee has advanced substantial arguments, to the effect that it is not necessary for there to be a pending actual dispute. He refers in particular to what have come to be called the "opening shot cases", that is to say cases of the kind referred to by Lloyd LJ in the case of Standrin v Yenton Minster Homes (1991) Court of Appeal transcript, page 634. As will appear, it is not necessary for us to express a final conclusion as to whether Mr Gee's submission is correct. I therefore shall say no more, except that for my part I would not wish to be taken to have approved Longmore J's ruling on that issue.

19. Longmore J did not deal in terms with what have been advanced as the second and third propositions on behalf of Noga before us. These were developed admirably well by Miss Selvartnam on behalf of Noga, and I shall come to them next. Before doing so, however, I should record that Longmore J also relied upon what he called a subsidiary point. This was to the effect that the letter in question had been made available to the Government of Nigeria, or its lawyers, and that it was therefore likely to be used in the course of the proceedings in any event. Mr Gee told us that that was in fact a misunderstanding of the position, and that the letter retains the privilege which Noga claims for it if this court rules that that claim should be upheld.

20. I come therefore to the second and third grounds of appeal. They turn on the events of 31st August when, as is explained in the evidence before us, the parties' representatives met in order to discuss the contents of the letter. Mr Taylor, for the respondents, says in paragraph 10 of his third affidavit that he was abroad in the United States when the 17th August documents were received by his firm and that, accordingly, he had no discussions with James & Sarch, Noga's solicitors, or any other representative of Noga before the 31 st August meeting. He records in that affidavit the events of that day, 31st August. It is unnecessary to read the contents of the affidavit. There is further evidence from Mr David Gaon, the son of Mr Gaon senior, who was present in person. He records: *"The meeting held at SJ Berwin's offices on 31st August 1999 was held for the purpose of discussing our proposals of 17th August. It was made quite clear to me by Mr Bagudu, in the presence of Mr Schmidt, when we met in an ante room without our lawyers, that he would not agree to new proposals that were being made."*

21. He then continued, unfortunately, to refer to a limited extent to what happened at the subsequent meeting. That is unfortunate because before the meeting began an agreement was reduced to writing and signed by Mr Gaon and by Mr Bagudu, which is in the following terms*: "[Noga] and the SJ Berwin Defendants agree that all discussions taking place at the offices of SJ Berwin & Co on 31 August 1999:*
(1) are without prejudice to any issue in the actions;
(2) are without prejudice to any issue as to whether a settlement agreement has already been concluded;
(3) will not give rise to any binding agreement unless and until a written agreement has been signed on behalf of the parties thereto."

22. Among those present at the agreement were Mr Gee, leading counsel for Noga, and, as I understand it, Mr Stanley, counsel for the SJ Berwin defendants. It seems that they drafted or assisted in drafting that agreement which I shall call *"the without prejudice agreement'* .

23. The second submission made by Miss Selvartnam on behalf of Noga is that that agreement should be construed so as to extend not only to the oral discussions which took place after it was signed, but also to the preliminaries including the letter of 17th August which was the subject matter of the discussions themselves. Her third submission is that even if the agreed without prejudice status does not extend back to include the 17th August letter, nevertheless the court should recognise the unfairness which would result for Noga if the 17th August letter was treated as an open document about which Mr Gaon in particular could be asked in the course of his evidence, if on the other hand any discussion about that letter at the subsequent meeting was to be maintained on a without prejudice basis. This would restrict Mr Gaon's ability to give a full answer to questions that might be asked of him in cross-examination in these proceedings.

24. In response to the third submission, Mr Shepherd, for the respondents, has submitted that the court does not have a general discretion to extend privilege or to take away privilege. He has made it plain that the respondents are not prepared to waive privilege as regards the discussions that took place on 31 st August, even as the price of being permitted to treat the letter of the 17th August as an open document. It has not been necessary for to us consider that matter further. We have to decide, first, in response to Miss Selvartnam's second submission, whether there was an agreement between the parties on 31st August which included in its effect the letter of the 17th August. She referred us to an extract from Phipson on Evidence, 14th edition, which in paragraph 20/61 on page 552 states the following: *"`Without prejudice' protects subsequent and even previous letters in the same correspondence."*

25. The word *"previous*" is annotated by reference to footnote 37 which refers to **Peacock v Harper** 26 WR 109 and **Oliver v Nautilus Company** [1903] 2 KB 639 CA.

26. Mr Shepherd has not challenged that statement of the law or those authorities. He submits simply that, first, a without prejudice agreement should not be held to operate retrospectively; in particular, he submits, when that allegation has not been pleaded in the present proceedings. I cannot say that I fully understood that submission, unless he was challenging the statement in Phipson, which I did not understand him to do. He concentrated, however, on his straightforward second submission, which was that this agreement was not stated to be retrospective and therefore should not be construed as having that effect.

27. It seems to me that the question of construction which arises, which naturally begins with the terms of the written agreement, can be approached in this way. There is evidence that the meeting was for the purpose of discussing the letter of the 17th August; there is evidence that, apart possibly from the initial remark made by Mr Bagudu, to which I have referred, the parties were keen to establish at the outset that the discussions were taking place on the basis set out in the written and carefully drafted agreement. Nothing at all was said on that occasion by any representative of the respondents to the effect that the letter of the 17th August was being taken other than at its face value, which included of course the heading "*without prejudice*" etc.

28. It seems to me that in those circumstances it is clear beyond any doubt that what the parties were agreeing was that their discussions, including the contents of that letter, should be regarded as being "*without prejudice*" and therefore should be privileged. One can test it in this way: if at that stage the respondents' representatives had said, "We should make it plain that the purpose of the meeting is to discuss your open letter of the 17th August, we challenge that it was in fact without prejudice", then the discussions would have taken a dramatically different turn. Precisely what form they would have taken it is impossible to say. Perhaps they would not have taken place at all. Perhaps there would have been, without more, an agreement that would expressly include the letter as well as the oral discussions that were about to take place. What one can say with certainty is that had that matter been made plain at the time, events would not have developed as they did. In those circumstances it seems to me quite clear, from all we know of what happened on that occasion, that the agreement was

intended to take account not only of the oral discussions, but of the letter which was the subject matter of those discussions. One could also test it in this way. I have already quoted the remark which Mr Bagudu is alleged to have made before the agreement was signed. It seems to me that the agreement would have been intended to cover that remark also, notwithstanding that it took place, or may have taken place, before the agreement was actually signed.

29. For those reasons, I would hold in favour of the appellants that there was a contract on 31st August which had the effect of including within the scope of the "without prejudice" umbrella, as it has been called, the letter of 17th August. It follows from that, in my view, that the contents of that letter should not be referred to in the pleadings, nor could they be introduced in any other way (for example, for the purposes of showing an inconsistent statement in the course of cross-examination) without breaching that privilege. If that is right, then paragraphs 15.5 and 15.6 of the pleading, and perhaps part of 15.7 also, have to be excluded.

30. There remains the question whether the fact that that letter was sent as a without prejudice document can properly be pleaded, as it is in paragraph 15.5. 1 should note in passing that the respondents themselves pleaded in that sub-paragraph that the letter: *"Enclosed various draft documentation for consideration by the SJ Berwin Defendants with a view to reaching a settlement of the proceedings."*

31. That of itself would seem to come close to an admission, if not in fact being an admission, that the requirements for privilege were in fact established.

32. However, paragraph 15.5, if read as a mere reference to the fact that the letter was sent and that it was a without prejudice letter, is parallel to the factual allegation in paragraphs 15.3 and 15.4 that negotiations which were agreed to be without prejudice did continue up to 31 st August.

33. Mr Shepherd submitted that the fact that there were such negotiations and that there was such a letter can be introduced without breaching the privilege, even if it does exist. But the question then arises whether those facts are relevant to the issue in the settlement proceedings, that issue being a quite straightforward one whether an agreement having legal effect was entered into on 11th August. The objection therefore, in my view, to paragraphs 15.3, 15.4 and 15.5 is simply that without reference to the content of the negotiations, the allegations simply are irrelevant. The same applies to any residual relevance which may exist in paragraph 15.7.

34. For those different reasons, I would, for my part, allow this appeal and hold that paragraphs 15.3 to 15.7 should be struck out of the Defence.

LORD JUSTICE JUDGE:

35. I agree. In my judgment it is not possible to isolate the letter dated 17th August from the ambit of the written agreement of 31st August.

ORDER: Appeal allowed with costs against the SJ Berwin defendants. Judge's orders as to costs below set aside. Noga to have their costs of the hearing below against the SJ Berwin defendants. No order as to costs as between Noga and the Attorney-General below. (Order not part of approved judgment)

ME S GEE QC and MISS V SELVARTNAM (Instructed by Messrs James & Sarch, London WCIR 3EN) appeared on behalf of the Appellants
MR P SHEPHERD and MISS E WEAVER (Instructed by Messrs SJ Berwin, London WC1) appeared on behalf of the Respondents