JUDGMENT : Mr Justice Coulson : TCC. 14th March 2008

Introduction

1. This is an application by the Defendant for an order that paragraphs 39 to 48 inclusive of the witness statement of Mr Joseph Martin, signed and dated 14th December 2007, be excised and that the documents which are referred to in those paragraphs be removed from any trial bundles. The grounds for the application are that the material in the paragraphs and the documents relate to without prejudice discussions, in respect of which privilege and/or admissibility has not been waived. The application is opposed by the Claimant on the ground that the material is not without prejudice. The Third Party also opposes the application. The Third Party's emphasis is on the fact that, in relation to one letter and one series of notes of a meeting (which I shall explain further below), the privilege or the admissibility has been waived by the Defendant in any event.

The Claim

2. The underlying dispute in this case concerns a major building project in Birmingham. The Claimant was the design and build contractor. The Defendant was engaged by another entity, not the Claimant, to provide engineering services, including major elements of the design. The Claimant claims that, in breach of its common law duty of care:
   (a) The Defendant did not give the Claimant proper advice as to how to deal with forces exerted by the ground against a pile wall. That is apparently referred to in the pleadings and in the trial documents as the *"pile wall bracing issue";* and
   (b) The Defendant failed to give proper advice about the best way of supporting the existing façade of the building, which was being retained. That is referred to in the documents as the *"hospital façade issue*".

3. The Defendant denies the claims and denies that it owed the Claimant any duty of care at common law. If there was such a duty, it denies that there was any breach. Because the underlying issues relate to steelwork, the Defendant has also issued third party proceedings against the steel work subcontractor.

4. The claim in the action is said to be worth in the region of £10 million. The trial is due to take place before Aikenhead J, starting on 2nd April 2008, with an estimated period of 20 days. The present application concerns part of a statement on which the Claimant intends to rely at that trial.

The Relevant Principles

5. I have been referred to a large number of authorities dealing with the principles applicable to 'without prejudice' material. It is unnecessary for me to set them all out, but I summarise below what I consider to be the important principles to be derived from those authorities.

5.1 **General**

   (a) "*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*": Lord Griffiths in ***Rush & Tompkins Ltd v Greater London Council*** [1989] AC 1280 at 1299.
   (b) *"… 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"*: Oliver LJ in ***Cutts v Head*** [1984] 1 All ER 597 at 605-606.
   (c) The without prejudice rule "*has a wide and compelling effect*": Robert Walker LJ (as he then was) in ***Unilever v Proctor & Gamble*** **[2001] 1 All ER 783 at 791.**

5.2 **Negotiations**

   (a) The without prejudice rule excludes "*all negotiations genuinely aimed at settlement, whether oral or in writing*": ***Rush & Tompkins.***
   (b) The privilege cannot apply unless there is a dispute which is genuinely the subject of settlement negotiations: ***Barnetson v The Framlington Group*** [2007] 1 WLR 2443.
   (c) There is a distinction to be drawn between true negotiations and the mere assertion of each side's case or the making of criticisms of the other side's case. The without prejudice rule does not apply to a communication which does not unequivocally indicate the maker's intention to negotiate: ***Buckinghamshire County Council v Moran*** [1990] Ch 623.

5.3 **The 'Without Prejudice' label**

   (a) The fact that the label "without prejudice" has or has not been used on a particular document or set of meeting notes is not conclusive evidence that the document is or is not without prejudice: ***Rush & Tompkins.***
   (b) Negotiations entered into for the purpose of trying to resolve a dispute are, unless the contrary is shown, without prejudice, whether or not they are described as such: ***Chocoladenfabriken Lindt v Nestlé Co Ltd*** [1978] RPC 287.

5.4 **Waiver**

   (a) The listing of a without prejudice letter in part 1 of schedule 1 of a party's list of documents, certainly under the old Rules of the Supreme Court, "*does not have the effect of rendering the document admissible if it is otherwise inadmissible"*: Lord Bingham in ***Sampson v John Boddy Timber Ltd*** (Court of Appeal) (Unreported) 11th May 1995.

(b) *"The fact that a party cannot or does not claim privilege from production does not necessarily mean that the document will be admissible. In the nature of things without prejudice communications will usually be within the knowledge of, and if in writing in the possession of, both parties. They are nevertheless inadmissible unless their exclusion is waived by both parties. Mr Wingate-Saul again relied upon the analogy of legal professional privilege. Once again I think the analogy is a false one. Legal professional privilege is the right of a client to withhold documents or to refuse to divulge communications … there is no rule that such documents or communications cannot be adduced in evidence by someone else. It follows that a waiver of legal professional privilege against production will automatically entitle the opposing party to use the document in evidence. A communication without prejudice, however, remains inadmissible whether tendered by plaintiff or defendant. Even if the opposing party has the document, as he usually will, he can make no use of it":* Hoffmann LJ (as he then was) in ***Forster & Anor v Friedland & Anor*** (Court of Appeal) 10th November 1992.

(c) Where a document covered by legal professional privilege has been offered for inspection by mistake, it will generally be too late for a claim of privilege unless it resulted from an obvious mistake: ***Al Fayed v The Commissioner of Police of the Metropolis*** [2002] EWCA (Civ) 780. A mistake is likely to be held to be obvious if it would have been obvious to a reasonable solicitor in his position that a mistake had been made.

The Issues

6. It seems to me that, from the helpful written and oral submissions provided by Counsel, the issues which I have to decide on this application are these:

(a) Are paragraphs 39 to 48 of the statement and the documents referred to there dealing with negotiations between the Claimant and the Defendant?

(b) If so, is that material without prejudice?

(c) If so, has any relevant privilege or admissibility question been waived by the Defendant?

I deal with each of those issues below.

The Relevant Material

7. Mr Martin was a director of the Claimant Company in 2000/2001 and was directly connected with the problems on the project. The relevant evidence at paragraphs 39 to 48 of his statement concern a meeting that he had with Mr Wilson, a director of the Defendant, on 10th November 2000 and the subsequent discussions and documents that stemmed from that first discussion. The material goes up to May 2001 when, on the 18th, there was a meeting between the parties at which a formal claim was presented by the Claimant against the Defendant. Throughout the relevant period, it is important to note that the project was still progressing on site, so that the parties were principally concerned with finding solutions to the difficulties in order to bring about the completion of the work as promptly as possible. However, it is also clear from the material before me that the alleged problems with the design, and the consequences of those difficulties, were well known and apparent to both sides. Thus, during the period with which I am concerned, namely November 2000 to May 2001, it was plain:

(a) that the problems were considered by the Claimant (as the design and build contractor) to be significant and serious and were leading to the incurring of significant costs which they had not anticipated;

(b) that the Claimant alleged that the Defendant's design was defective

(c) that the Defendant, for its part, had a large claim for unpaid fees which included fees for work done in an attempt to resolve the problems.

I deal further below with some of the detailed parts of paragraphs 39 to 48 and the documents referred to there.

Issue 1 - Negotiations

8. On behalf of the Claimant, Miss Dias submits that, because no claim had been formulated against the Defendant during this period, there could have been no negotiations and thus the whole application is misconceived. As it is succinctly put at paragraph 41 of her written submissions:

"Until 18th May [when the Claimant's formal claim was presented to the Defendant] there was nothing to settle and that is really the short answer to the application."

In her written submissions, Miss Dias made the point that, from the Claimant's perspective, the meetings and the documents which are the subject of this application were largely concerned with the outlining of the Claimant's case to the Defendant via Mr Martin. In her oral submissions this morning, Miss Dias expanded on that argument, and said that in actuality the discussions were not really dealing with the Defendant's potential liability for the design problems at all, and were instead concerned with other and more general matters. Therefore, she submitted, the controversial parts of Mr Martin's statement were simply setting out the background prior to the presentation of the formal claim on 18th May 2001. As she put it, they were setting out the "rules of the game". It is, however, worth noting that, in Mr Martin's statement, he does *not* deal with any of the events from 18th May onwards.

9. It seemed to me that, if that submission was right, it gave rise to the question as to why Mr Martin was bothering to set out these details at all. If the process between November and May merely consisted of statements and restatements of the Claimant's position, why bother to go to the effort of repeating it all over again in a witness statement? If these were simply matters of background, were they really relevant at all?

10. To consider these questions, I therefore turned back to consider in greater detail the controversial paragraphs of Mr Martin's statement. In doing so, it quickly became apparent precisely why the Claimant was seeking to rely on that material. It is seeking to rely on this evidence because, according to Mr Martin, Mr Wilson of the Defendant made an express admission not only as to the Defendant's liability to the Claimant, but also as to the costs of any extra work necessary. What he says in paragraph 43 is that, at the meeting on 10th November, which is at the heart of this application, Mr Wilson accepted that "it looked as though I might be right" about the Defendant's liability for the extra costs, and at paragraph 45 he goes on to say that Mr Wilson acknowledged that "our significant costs would be honoured".

11. In other words, the relevant material has been included in Mr Martin's statement, albeit at rather inordinate length, because, far from it being a recital of each side's position, and far from it being concerned with matters that were unconnected with the claim at trial, Mr Martin was seeking to rely on what happened at the meeting and thereafter as giving rise to important admissions on the part of Mr Wilson. It seems to me that that is wholly contrary to the suggestion that what was being discussed at the meeting was either irrelevant to the claims or that all that was happening was a statement or restatement of each side's case. It seems to me that admissions of the sort now apparently relied on by Mr Martin can only arise out of detailed negotiations between the parties. It matters not that the claim had not been formulated. It is common, particularly in the construction industry, for high-level executives from those companies involved in potentially expensive difficulties on site to try and resolve those differences before they spiral out of control. Accordingly, it seems to me that the reason why the Claimant wishes to rely on this material is the best possible evidence that what was happening at these meetings, and in these documents, was a process of high level negotiation.

12. If there was any doubt about that, I note that Mr Wilson's evidence in his witness statement is to explain, in some detail, how and why these meetings and this written material related to negotiations between the parties on (as he puts it) a "without prejudice basis". On behalf of the Defendant, Mr Howe submitted that it was noteworthy that there was no material from the Claimant to contradict that statement, namely that this material arose out of negotiations. I accept that submission. It is true that I have before me both the statement for the trial from Mr Martin, as well as the statement that was put in as part of the earlier adjudication, but on the critical question of fact for me, namely whether or not there were negotiations between the parties, it seems to me clear that Mr Wilson's evidence on that point is not contradicted by Mr Martin in either statement. Therefore, again on the material available to me, it seems clear that the relevant evidence arose out of negotiations between the parties.

13. For those reasons, I reject the Claimant's first proposition. It seems to me that the discussions between the parties were not simply restatements of each side's case: if they were, I consider that they might well be inadmissible on the grounds of irrelevance. It is plain, both from Mr Martin's detailed evidence, and the fact that the Claimant wanted to rely on his alleged admissions, that what was happening was a process of negotiation. Therefore, I conclude that the material related to genuine negotiations between the parties to try and head off at the pass the potential problems on site. Parties are to be encouraged to adopt such a course, particularly in the construction industry where disputes on long running projects can prove to be very expensive if they are not resolved early on.

Issue 2 - Were the Discussions/Documents Without Prejudice?

14. The next question is whether the material to which this application relates is without prejudice. Obviously I have concluded that the relevant material related to negotiations between the parties and there is no dispute, therefore, that *prima facie* that would mean that the material was without prejudice and therefore inadmissible. It is also common ground that the fact that, for example, the letters are not marked "without prejudice" is irrelevant to this issue.

15. It is right, however, to note in the present case that there are specific reasons why I must conclude that these meetings were without prejudice and that the documents too are inadmissible for that reason. The first is that, in his statement in the earlier adjudication, Mr Martin expressly acknowledged that Mr Wilson had asked for the meeting on 10th November to be without prejudice. I note that that same statement has not found its way into Mr Martin's statement for the purposes of the trial. Although there was a suggestion that Mr Martin was saying that, although he knew Mr Wilson thought the meeting was without prejudice, he, Mr Martin, did not, I cannot accept that submission. It seems to me plain, looking at the documents in the round, that this was a without prejudice meeting and was so treated by both men.

16. Secondly, again there is no dispute that, on 18th May 2001, when the claim was formally presented, Mr Martin asked for and received the Defendant's agreement that all discussions from that point forward would *"move beyond the without prejudice stage*". It seems to me that that is a clear acceptance that everything that had happened before that, i.e., from November 2000 onwards, was regarded by both parties as having been without prejudice. Accordingly, this is another reason why I must conclude that the material in question is without prejudice.

17. It is right to note that, in the course of her clear submissions, Miss Dias asked that the Court should look at the detailed contents of paragraphs 39 to 48 and indeed the individual documents to which reference is made there. As to the statement itself, it is a little difficult to subject paragraphs 39 to 48 to a chronological or clear editing exercise, given that those paragraphs jump around rather in dealing with Mr Martin's recollection of the meeting and one or two of the other documents. An editing exercise is therefore not straightforward. Moreover, in accordance with the principles referred to above, and particularly what Robert Walker LJ said in ***Unilever,*** it

would not be appropriate to undertake that exercise in any event. In essence, these paragraphs refer mainly to the meeting on 10th November and the alleged admissions that were made.

18. As to the individual documents, I deal with those briefly as follows:

(a) The letter of 6th November 2000 was, said Miss Dais, "critical to any understanding" of the meeting on 10th November. For the reasons that I have given, that meeting was without prejudice. Therefore, on the basis of that submission, it would seem to me, *prima facie*, that that letter too should also be regarded as being without prejudice and, therefore, inadmissible, although the Defendant has recently indicated that it would waive the privilege in that document.

(b) The letter of 27th November 2000 is plainly inadmissible because this is Mr Wilson's own recollection and notes of the meeting on 10th November.

(c) The manuscript minutes of the meeting on 4th December are difficult to read and, again, jump about between a variety of different matters. However, they refer repeatedly to claims which, in the context of this case, appear to be those claims as to the design being formulated by the Claimant against the Defendant. They are plainly dealing with the disputes which now form the subject matter of this trial and which were the subject matter of the discussions on 10th November. For that reason, therefore, those documents too ought to be regarded as without prejudice and inadmissible. Of course, if the parties can agree an editing exercise in respect of these notes, then so much the better.

(d) The letters of 13th January, 15th February and 27th April 2001 all refer back to the meeting on 10th November and, indeed, they demonstrate a disagreement between the authors as to precisely what was said and agreed at that meeting. Again, therefore, it seems to me that those must also be covered by the without prejudice privilege.

(e) The minutes of the meeting on 18th May are the final document in the sequence. This is when the formal claim was presented. It was from this point on that the parties agreed that they would be moving away from without prejudice discussions. In those circumstances, it seems to me that, on the face of these meeting minutes, this was the last step in the without prejudice negotiations and this document, too, is inadmissible.

19. For all those reasons, it seems to me that the material in question is without prejudice and, subject to the waiver point, should not be included in the statement, and the documents should not be included in the trial bundle. I repeat the point that, but for the admissions on which the Claimant sought to rely, this material would have been largely irrelevant; however, it is the admissions that make the difference and it is, therefore, the admissions which lies at the heart of my conclusion that no reference should be made to the material. Otherwise, the Claimant is seeking to gain an unfair advantage in referring to something said at a without prejudice meeting, apparently to the detriment of the Defendant.

Issue 3 - Waiver

20. The final point is whether the disclosure of the letter of 27th November 2000 and the notes of the meeting on 4th December 2000 (one in a list and one in a supplementary list), and the offer of those documents for inspection, amounts to a waiver. It is plain that this point relates only to those two documents and does not, therefore, affect the relevant passages in Mr Martin's witness statement.

21. The first point that arises is a matter of principle. Mr Howe relies on ***Rush & Tompkins v GLC*** and ***Forster v Friedland*** to say that questions of inadvertent disclosure of without prejudice material simply do not arise. He relies on the latter case to demonstrate the difference between legal professional privilege (and the inadvertent waiver of such privilege) on the one hand, and without prejudice privilege (and the impossibility of inadvertent waiver of such privilege) on the other.

22. In answer to that, Miss Powell submitted that all but one of the authorities relied on by the Defendant are based on the old disclosure rules under the Rules of the Supreme Court, and not CPR 31.6. She submitted that the new rules are very different to the old and do not admit of inadvertent disclosure at all. She argued that, once a document is included in the list, then, subject to the obvious mistake point that I shall come on to, it is admissible.

23. The post-CPR authority to which Miss Powell properly drew to my attention is a decision by Mr Roger Kaye QC (sitting as a Deputy Judge of the High Court) in ***Smiths Group plc v George Weiss & Ors*** (Friday 22nd March 2002, Chancery). In that case, precisely this argument was advanced to the learned Judge and he said:

"The claimants submit that the new procedure under the Civil Procedure Rules has altered that position and now renders, in effect, the inclusion of a document in a list of standard disclosure admissible in evidence. I do not agree. It is plain that the rules contemplate that a document might be included to which objection could be made."

I agree with that statement of general principle. I do not consider that the changes in the disclosure rules, and in particular the new way in which disclosure is to be undertaken, as set out in the CPR, have altered the fundamental rules dealing with the admissibility or otherwise of without prejudice material. I certainly do not accept the proposition that the CPR has had the effect (inadvertent or otherwise) of reversing, or of rendering of no effect, the statements of principle in, for example, ***Rush & Tompkins v GLC*** and ***Forster v Friedland***. More specifically, I do not consider that the differences between the old rules and the CPR are such that a completely different regime must now apply. In consequence, it seems to me that, in accordance with those authorities, there has been no waiver. However, if I am wrong about that, it is appropriate to go on and deal with the position as to obvious mistake, as set out in ***Al Fayed***.

24. Even on that basis, I have concluded that the without prejudice privilege in the letter of 27th November and the notes has not been waived. These documents were produced as part of a very long disclosure exercise. The letter of 27th November contains Mr Wilson's account of the meeting on 10th November, which was agreed to be without prejudice. On this basis, for such disclosure to be retracted, it is necessary for the Defendant to demonstrate that the disclosure was an obvious mistake. In my view, disclosure was an obvious mistake, and it would be wrong and unfair now to find that privilege had indeed been lost.

25. As far as the Claimant's solicitor is concerned, I note that the question of the admissibility of this material had arisen in the adjudication, at which time the Defendant had expressly reserved its right to say in any subsequent litigation that this material was inadmissible. It seems to me, therefore, given that this letter directly dealt with a meeting which, on Mr Martin's own case, Mr Wilson had asked to be without prejudice, it must have been apparent to the Claimant's solicitor that disclosure was indeed inadvertent and a mistake. A reasonable solicitor in his position could not have reached any other conclusion.

26. I accept that the Third Party's solicitor is in a slightly different position, but that, of course, is because he was not involved in either the discussions in 2000/2001 or in the subsequent adjudication. However, it seems to me that I have to consider the position in relation to the reasonable solicitor who has read and is familiar with the various detailed aspects of the case, including this very dispute about the privileged nature of the material. In those circumstances, it seems to me that a reasonable solicitor should have known that the documents had been disclosed by mistake.

27. For all those reasons, therefore, I grant the Second Defendant's application that the statement of Mr Martin should be modified so that the relevant paragraphs are excluded. In addition, for the reasons that I have stated, the documents that I have identified in paragraph 18 above are documents which should not be included in the trial bundles.

Miss Julia Dias (instructed by Messrs McGrigors LLP) for the Respondent/Claimant.
Mr Robert Howe (instructed by Messrs Fishburns) for the Applicant/Defendant.
Miss Katie Powell appeared on behalf of the Third Party.