Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] ADR.L.R. 02/28

JUDGMENT : Jules Sher QC sitting as a deputy judge of the High Court, Chancery Division. 28th February 1992

1. I have before me an appeal from a judgment of Deputy Master Powell made on 10 January 1992. He had before him a summons for directions that certain attendance notes of telephone conversations and letters were not admissible in evidence to be led at a substantive hearing of an assessment of damages which is due to take place on 11 March 1992. The plaintiffs, Cheddar Valley Engineering Ltd, are vendors under an agreement for sale of certain property, the defendant, Chaddlewood Homes Ltd, being the purchaser. On 31 July 1990 there was an application heard by Warner J for summary judgment in this action and the relief claimed included a claim for damages. Warner J gave the defendant, Chaddlewood Homes Ltd, leave to defend conditional upon the payment into court by 14 August 1990 of the sum of £185,000. That condition was not met and so the judgment took effect and the assessment of damages, as I say, is due to take place shortly. On 1 August 1990, the day after the judgment of Warner J, Mr Croall of the defendant's solicitors telephoned Mr Brydon of the plaintiff's solicitors. In that telephone conversation a 'without prejudice' offer to compromise this litigation was made by Mr Brydon on behalf of Cheddar Valley Engineering Ltd. On 2 August 1990 the lay clients met, when different terms for settlement of the litigation were discussed. So by 2 August the offer made without prejudice on 1 August had been impliedly rejected or overtaken. On 9 August 1990, some few days before the date by which the condition imposed upon the leave to defend by Warner J was to be met, there was a crucially important telephone call at 9.15 am. It is this telephone call which has given rise to the dispute on this appeal. It was a call made by Mr Croall. He was hoping to speak to Mr Brydon. Mr Brydon was on holiday and it was Mr Mark Ogden who took the call. Mr Ogden is a legal executive in the employment of the plaintiff's solicitors. I read from Mr Croall's note of that telephone attendance, which is the very first attendance note which is sought by the plaintiffs, represented by Mr Cunningham, to be excluded from evidence at the forthcoming hearing for the assessment of damages. The telephone message is as follows: *'Time: 9.15. Date: 9 Aug 1990 From DC ['DC' being Mr Croall's initials] to Brydon. Brydon on hol this week. Mark Ogden. Put open offer to purch whole land (i.e. blue land + buffer zone) for £180,000 plus we pay their costs. Complete five weeks from 14/8. They can have deposit on 14/8. He'll put to his clients.'*

2. Everything in this appeal turns upon the use of the word 'open' in that conversation.

3. The first question before me is whether this conversation was open or whether it was conducted on a ***'without prejudice'*** basis. I think I am right in saying that if the conclusion is that it was conducted on a without prejudice basis it is accepted that pretty well everything else in the schedule to the summons was without prejudice.

4. The evidence before me is as follows. There were two affidavits put in by Mr Ogden and two by Mr Croall. I think the deputy master had the benefit only of the first of each of those affidavits. There was also a further affidavit by Mr Brydon, but I do not think very much turns on Mr Brydon's affidavit.

5. Mr Ogden's evidence is that it was his understanding and belief that these negotiations were conducted on a without prejudice basis and, in particular, that the conversation on the morning of 9 August was conducted without prejudice. He supports that assertion of his understanding and belief by referring to the context of the litigation and the stage it had reached, in particular that it was between the time of Warner J's judgment and the time when the money had been paid into court; and he refers to this context as supporting his understanding, saying that he thinks it is unlikely that such discussions would have been open.

6. While I do not accept his reasoning as to why these discussions would necessarily have been without prejudice, his assertion that his belief and understanding was that the negotiations were conducted without prejudice was repeated in his later affidavit. That assertion has not been challenged directly by Mr Croall, though it is right to point out that Mr Croall says that he fails to see how a misunderstanding could have arisen in the mind of Mr Ogden.

7. As neither party had requested and applied for the attendance of the deponents to these affidavits for cross-examination, I asked Miss McAllister, who appeared on behalf of Chaddlewood Homes Ltd, whether Mr Ogden's veracity was challenged or not. She made it perfectly clear to me, on instructions,

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that his veracity was not challenged, that is to say that it was not said on behalf of Chaddlewood Homes Ltd that Mr Ogden is not telling the truth when he says that it was his belief and understanding that the conversation on 9 August, and other conversations mentioned in the summons, were conducted on a without prejudice basis. The importance of this is that if there had been a head-on challenge it might well have been the case that that conflict could only have been resolved by means of cross-examination. For reasons which will appear, I have in the circumstances decided not to accede to Miss McAllister's application made during the course of this appeal that the matter be adjourned in order that Mr Ogden and Mr Croall can be cross-examined. When I raised the possible conflict of evidence she suggested that the difficulty might be dealt with by remitting the matter to the deputy master who was to hear the assessment of damages, inviting him to consider the issue after cross-examination before him, but I indicated that I would decline to do that. Subsequent to that Miss McAllister made the application that Mr Ogden attend for cross-examination before me. I am conscious of the fact that if I were to accede to that application it would undoubtedly mean an adjournment of this appeal with a considerable increase in costs. However, as I say, I have decided that it is not necessary for me to have the benefit of that cross-examination.

8. Before I look at the legal position I shall complete my reference to the evidence. Mr Croall in his affidavit of 8 January 1992 deposes to the fact that the offer made in the telephone call at 9.15 am on 9 August 1990 was expressed by him to be an open offer, and was, in his words, 'subsequently confirmed in the letter of the same date which I faxed to the plaintiff's solicitors on that day'. In fact what happened is that at 2.40 pm on the same day Mr Croall telephoned to Mr Ogden and made a further offer. The attendance note of that telephone call reads, as follows: *'Offer £190,000 for all land plus their reasonable costs re. Court proceedings. In default, taxation. Complete five weeks on Tuesday.'*

9. There is no reference of course in that note to the word 'open' and there is no suggestion that the word was used in that telephone call.

10. There then followed the letter referred to by Mr Croall. It was dated 9 August 1990. It was headed 'Subject to contract'. It reads as follows. In the first paragraph Mr Croall said: *'We refer to the writer's telephone conversation with your Mr Ogden during the course of today.*' Then he goes on in the next paragraph: *'We would write to confirm that our clients offer to purchase the blue land and "the buffer zone" from your client Company for the price of £190,000 with completion to take place five weeks after Tuesday, 14th instant. In addition, our clients agree to pay your clients reasonable costs in connection with the conduct of the High Court proceedings; such costs to be taxed in default of agreement. Please note that we have no authority to sign any note or memorandum on behalf of our client Company. Yours faithfully …'*

11. There is of course no express confirmation in that letter that the first conversation of the day was an open conversation. No doubt Mr Croall makes the statement that that confirmation was contained in the letter by reference to the fact that the letter was not headed 'without prejudice' and appears on the face of it to be an open letter in that sense. Mr Ogden makes the point, and I can well accept it, that, given that he was under the impression that the conversations on 9 August were without prejudice, this letter only served to compound that misunderstanding (if misunderstanding it be). Certainly, there was nothing express in the letter to disabuse him of that understanding.

12. Perhaps I should briefly complete my reference to the evidence by indicating that in the summons which was before the deputy master and is before me there were in addition to the three items that I have thus far mentioned (namely the two telephone attendances on 9 August and the letter on 9 August) six other items, including two attendance notes of two telephone conversations between the plaintiff's solicitors and the defendant's solicitors on 10 August, a copy letter from the defendant's solicitors to the plaintiff's solicitors on 10 August, two other attendance notes of telephone conversations between the two firms of solicitors on 23 August and, finally, a letter from the defendant's solicitors to the plaintiff's solicitors written on 24 August 1990. There is absolutely nothing in those attendances of telephone calls or letters which in any way adds to or subtracts from the contentions with regard to the critical first conversation on the morning of 9 August so far as the without prejudice issue is concerned and I think it is accepted by Miss McAllister that if I find against her clients in relation to that telephone conversation that really is the end of this appeal. I should say

that in the evidence there was also put in at some stage (perhaps not before the deputy master) an attendance note of a conversation on 17 August which both sides plainly accepted was a conversation which was indeed held without prejudice.

13. So the matter stands thus, that in the period between 1 and 24 August 1990 there were negotiations between these parties for the settlement of this litigation. That alone would prima facie raise the presumption that the communications in this period were without prejudice: see ***Chocoladefabriken Lindt & Sprungli AG v Nestle Co Ltd*** [1978] RPC 287. Even without any express reference to the words 'without prejudice' or 'off the record' or anything of that kind negotiations of this kind prima facie raise the presumption that the communications involved in those negotiations are conducted without prejudice. However, at the beginning of these negotiations, namely on 1 August, the offer made by the plaintiff's solicitors to the defendant's solicitors was plainly without prejudice, as is accepted by both sides, and, as I say, conversations connected with these negotiations on 17 August are also accepted to have been without prejudice. In the circumstances one would expect to find something very specific and clear before one came to the conclusion that conversations conducted as part of these negotiations in the period between 1 and 17 August were not without prejudice and conducted upon an open basis. As the evidence stands, Mr Ogden says that his belief and understanding was that the critical conversation and the other conversations were conducted without prejudice. Mr Croall is not prepared to say that Mr Ogden is not telling the truth but Mr Croall nonetheless says that he used the word 'open' in the conversation in the early part of the morning of 9 August. Mr Cunningham does not call for cross-examination. Mr Ogden cannot and does not therefore deny that the word 'open' was used on that day; he cannot confirm it, but he cannot and he is not prepared to deny it. Plainly therefore I must proceed upon the basis that the word 'open' was used by Mr Croall; there is no reason for me not to accept that it was indeed used. In his contemporaneous note of the conversation he noted that he had made an open offer to the other side.

14. The question for me is how to reconcile these two apparently inconsistent pieces of evidence and it seems to me that the resolution is this, that the word 'open' was used but simply not adverted to by Mr Ogden. There is no suggestion that Mr Ogden did not understand the difference between without prejudice and open negotiations; as is quite plain from other documentation in evidence he did indeed well appreciate the distinction. The only reasonable inference therefore and the one which I make is that he simply did not pick up the use of the word by Mr Croall because he did not hear it or he did not realise its significance and of course there was nothing in the letter which was sent by Mr Croall on the same day to alert him to the change from the without prejudice nature of negotiations to an open negotiation.

15. Mr Cunningham for the plaintiffs submits, firstly, that because the documents form part of an attempt to compromise actual litigation they are prima facie without prejudice. By 'documents' he means and includes not just the attendance notes but I think he means to refer also to the evidence of the conversations themselves. I did not understand Miss McAllister to challenge that submission. Secondly, he submits that the absence of labels attached to the correspondence, labels such as 'without prejudice' or 'open', is not determinative of the issue. That again is in accordance with Miss McAllister's submissions. Thirdly, he submits that once negotiations are held on a without prejudice basis they remain so unless and until they are changed so as to be conducted on an open basis. Again, I do not understand Miss McAllister to quarrel with that submission. Finally, Mr Cunningham submits that the change from the without prejudice basis to an open basis must be bilateral in the sense that the change has to be communicated to and understood by the other side.

16. This is where the battle lies. I agree that if negotiations start off on the basis that they are being conducted without prejudice and one or other side wishes to make an open offer the change to an open basis must be bilateral in the sense that that change from a without prejudice basis to an open basis must be communicated to the other side and of course, I may add, cannot itself refer in any way to the earlier without prejudice discussions. However, in my judgment, if the communication is made in circumstances in which the change would be brought home to the mind of a reasonable man in the position of the recipient of that information that would be enough. In other words, it is not enough for

the recipient (in the position of Mr Ogden) to show that he did not understand the meaning of the word 'open' due to his ignorance of the difference between without prejudice negotiations and open negotiations. Another example is that the recipient of a letter which is plainly marked 'open' cannot say that he did not read the letter and threw it away.

17. In my judgment, however, where negotiations begin without prejudice, as indeed these began on 1 August, and, what is more, where they are expressly made without prejudice to begin with, which again is this case, it is incumbent on the party who changes the basis of such negotiations to spell out the change with clarity. It may not be enough merely to say the word 'open'. It is unfortunate in this case that the letter of 9 August, which was Mr Croall's first opportunity in writing to make clear the change that he had sought to bring about, did not include the word 'open'.

18. On the evidence I have seen and in light of the fact that Mr Ogden's veracity has not been challenged, it is plain that Mr Ogden believed the negotiations on 9 August to be without prejudice. The only reasonable conclusion in the circumstances is that Mr Croall, although he used the word 'open', did not use it in a way in which he ensured that it was brought home to Mr Ogden and made crystal clear to Mr Ogden that the without prejudice basis of the negotiations conducted before that time was being changed. Given the background of the conversation on 1 August and the undoubted fact that these were negotiations to compromise the litigation then in progress, in my judgment it was incumbent upon Mr Croall, if he was to rely upon the openness of an offer made during the course of those negotiations, to ensure that Mr Ogden took on board the significant change that he, Mr Croall, was proposing. I find on the evidence that Mr Croall did not do enough to bring that change home to Mr Ogden and that accordingly the conversation at 9.15 on the morning of 9 August remained within the umbrella protection of the without prejudice negotiations that began on 1 August 1990; and it follows from what I have said before that there is nothing in the remainder of the evidence that can possibly lead to the conclusion that any of the conversations or letters itemised in the summons before the master was anything but covered by the same without prejudice umbrella of protection.

19. It will be apparent from the way I have dealt with the evidence that it would be a waste of costs and time to accede to Miss McAllister's late application for cross-examination. Indeed, in reply she agreed that if on the law I found that the burden was upon the defendant to ensure a bilateral understanding of the change from without prejudice to open negotiations, bearing in mind that her clients are not challenging the veracity of Mr Ogden, there would be no point in calling for cross-examination of Mr Ogden. Although I have held that the test is objective I can see no real value in postponing a decision on this issue any further by permitting the matter to be adjourned for cross-examination.

21. In the circumstances I dismiss the appeal.

Ann McAllister (instructed by Edwin Coe, agents for Cloney & Croall, Lytham St Annes) for the defendant.
Mark Cunningham (instructed by Laytons, Bristol) for the plaintiff.