Claim No. QB-2020-003936

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Before :

MASTER THORNETT

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Between :

SAMUEL COLLINGWOOD SMITH

Claimant

-and-

MY MEDIA WORLD

1st Defendant

MUHAMMED BUTT

3rd Defendant

Date: 25.07.22

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Mr David Hirst (instructed as Direct Access Counsel) for the **Claimant**
Mr Richard Munden (instructed by Simons Muirhead & Burton LLP) for the **1st and 3rd Defendants**

Hearing date: 6th July 2022

JUDGMENT

Master Thornett:

1. This is a reserved judgment on a particular element within the currently part-heard Application of the 1st and 3rd Defendants (the claim against the 2nd Defendant having been discontinued) dated 6 May 2022 to amend their Defence. Both this Application and the 8 June 2022 Application by the Claimant (to amend the Claim Form and his Statement of Case) came before me on 6 July 2022. Contrary to the optimism expressed by Mr Hirst, Direct Access counsel instructed for the purposes of the 6th July hearing by the Claimant, it was far from possible to conclude both Applications during the hearing that afternoon.

2. Some progress was made. The Claimant objected to the Defendants' proposed amendment to deny the opening averment at Para 1 in his Amended Particulars of Claim in that, he argues, they seek to deny an averment not being advanced i.e. that the Claimant has a general good reputation. On closer analysis, Mr Hirst he had to concede that there arguably were elements of Para 1 that could be construed as averring a good reputation, although still maintaining his objection to the Defendants' proposed amendment. I was satisfied that this exchanged engaged in a somewhat circular argument. It was not for the court first to decide and excise what might be unnecessary or unintended by the Claimant as part of the Defendants' Application. In that the Claimant already had an Application to amend listed, I directed that it was for the Claimant to consider and, if thought appropriate, offer to the Defendants any conceded further amendment (to Para 1) before he could then pursue his objection, assuming the Defendants' proposed amendment (on this point) remained the same. I directed a period of time for him to do that.

3. The remaining time at the hearing was spent engaged in the Claimant's opposition to the Defendants retaining, as part of their proposed Amended Defence, reference to Third Defendant's e-mail dated 18 October 2020, as sent to the Claimant at 17.10 ["the 17.10 e-mail"]. The Claimant maintains the 17.10 e-mail is "without prejudice" and so inadmissible. The Defendants dispute this.

4. The background is as follows.

5. On 18 October 2020 at 15.39 the Claimant had sent an open complaint letter to the Defendants about the video and alleging it was defamatory. The letter asked Mr Butt to remove the video, explaining how ordinarily a full letter of claim would be written but, the Claimant remarked, was impractical given the urgency and seriousness of the matter. In the video, the Claimant said that Mr Butt had said (about the Claimant) "I condone any violence against you by any Muslim". The Claimant wrote "If you do not remove the video I anticipate legal action next week". An urgent response was requested by 19 October 2020.

6. Within two hours, Mr Butt had replied with his 17.10 e-mail. Marked "Private, confidential and strictly without prejudice", the e-mail read:

"I refer to your e-mail. Please note that on reflection I note there was an innocent mistake on the video, due to a slip of the tongue. The video on question has been removed for correction. For the avoidance of any doubt, I do not condone, that is to say I condemn, any form of violence against anyone.

Take note, that if you see fit to disseminate information about me with view to acting aspersions or besmirching my good name I will have no option but to take such stapes [sic] *as I may be advised, including by way of legal action if necessary".*

7. The Claimant replied at 18.29 marking his e-mail "without prejudice". He acknowledges Mr Butt's e-mail and the removal of the video but comments that this "only mitigates the damages. I can still sue you for the original version as well as your accomplice, Sonia".

   "Sonia" is Sonia Poulton, the former Second Defendant in this case. The letter goes on to suggest that Ms Poulton was likely to be "bankrupted" in the context of other litigation so the Claimant felt he need not personally take up any action [by implication for the video] against her. However, the Claimant "reserve[ed] the right to issue my claim later, for example after a more expanse Pre-action Letter". There is then gratuitous comment about the other litigation between Ms Poulton and a Third Party.

8. Mr Hirst describes the Claimant's 18.29 reply as a "potential concession" in that the Claimant was indicating that he might not sue Sonia Poulton and not issue his claim straight away. Mr Hirst realistically describes references to chances of settlement between Ms Poulton and a third party in other litigation having slipped away as mere "ruminating". Accordingly, he submits, the Claimant had conceded the without prejudice nature of "the exchange and made admissions against his interest, not least by entertaining the prospect of settlement".

   Legal principle

9. The general rule is that discussions or exchanges that form part of negotiations attract privilege against subsequent reference in open proceedings. Hence, the former are "without prejudice" to the latter. Reference to, either directly or indirectly, without prejudice material is inadmissible.

10. Although a point often either overlooked or at least misunderstood, particularly (but not always exclusively) by those who are not within the legal profession, the centrality of the principle is to render inadmissible evidence of what was said and/or done during the course of negotiations genuinely aimed at settlement: see *Rush v Tompkins Ltd v GLC* [1989] AC 1280 per Lord Griffiths at 1299-1300. It is not merely that by marking a communication "without prejudice" a communication automatically becomes privileged. This suggestion was not made directly by Mr Hirst on behalf of the Claimant although, paring away the arguments instead relied upon, I am left with at least an

impression this may have been a personal misunderstanding of the Claimant at least from an earlier point in the chronology that leads to his objection.

11. Lord Griffiths made clear in *Rush* at 1299 that "the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the contact of those negotiations will, as general rule, not be admissible". It follows, therefore, that it is the content rather than the appellation itself that renders something "without prejudice". A letter may be entitled "without prejudice" but its privileged status is nonetheless clearly implied.

12. Conversely, however, as stated marking a letter "without prejudice" does not automatically activate the privilege but is instead a "highly material factor" in determining its status. It is not of itself conclusive that there is a genuine dispute and a genuine attempt to settle the dispute: *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWHC 3322 (Ch) per David Richards J at [22]. See also at [24] where the court in *Avonwick* quoted Lord Mance at [84] in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, [2006] UKHL 37:

> "…the express use of the phrase not only puts the matter beyond doubt in a situation where there is an offer to compromise an existing dispute, but is also capable of throwing some light on the answer to the objective question whether such a situation existed. But its use is by no means inclusive. Neither a dispute nor a concession or offer to compromise can be conjured out of mere words."

13. Despite Mr Hirst on behalf of the Claimant reproducing various sections from *Foskett on Compromise* taking me through dicta emphasising the importance of the rule, I am quite satisfied that no such authority or reference is needed in this case. Instead, there arises a very simple question whether the contended letter is, in fact, "without prejudice", despite being so marked.

Conclusion as to status of 17.10 e-mail

14. I am entirely satisfied that the 17.10 e-mail is not a "without prejudice" letter. It is emphatically not an attempt to settle a dispute, either expressly or impliedly. Quite to the contrary, it is an admission (that the word "condemn" had not been intended and had been accidentally expressed rather than the word "condone"). It features a clear correction of any potential lingering misunderstanding: "*For the avoidance of any doubt, I do not condone, that is to say I condemn, any form of violence against anyone".*

15. One ordinarily might have thought a party in receipt of such a letter would have been quick to argue that it was *not* "without prejudice", in order to ensure the terms of its unqualified admission could be relied upon. I do not know, but moreover it would not be appropriate for me to seek to guess, why the Claimant instead seeks to argue to the contrary and so exclude the 17.10 e-mail. As he made clear in his 18.39 reply, he both

reserved his position in respect of the original publication of the video, maintaining it remained actionable.

16. Were the point to need deciding, I add it is less than clear whether the Claimant's 18.29 reply was "without prejudice" either. The contents do not seek to negotiate a settlement and, if anything to the contrary, the Claimant is keen to emphasise that he reserves his future position despite the admission from Mr Butt on the terms as had been offered. I certainly am not persuaded by the submissions that in this reply the Claimant had "made admissions against his interest, not least by entertaining the prospect of settlement". I can see nothing of the kind but, even if others might, that would only support a proposition that the 18.29 e-mail was privileged (which is not a point I understand either party to be taking). However, even that conclusion would not necessarily facilitate the retrospective conversion of the 17.10 e-mail as "without prejudice".

17. The Claimant heading his 18.29 response as "without prejudice" in no way therefore alters the status of the Defendant's 17.10 e-mail. In short, either the 17.10 e-mail was "without prejudice" or it was not. I am clear that it was not.

Other arguments by the Claimant : estoppel

18. The Defendants instructed solicitors, Spencer West, to act for them in response to the Claimant's 30 October 2020 letter. In their 18 November 2020 reply [Para 10], they made clear that the Claimant's reliance upon the word "condone" stemmed from an accidental mistake by Mr Butt for the word "condemn" and added that it was "clear from the full transcript of the text that this is not what Mr Butt meant". In the context of making such observations, they went on at Paras 23-25 to refer to the 17.10 e-mail. The Claimant apparently objected (I was not taken to the actual exchange in correspondence during the hearing) and, in a revised version of their 18 November 2020 letter, the sections were blacked out with the rider "The following privileged information is redacted by consent".

19. The Claimant maintains that this redaction is both an acceptance by the Defendants (through their solicitors) that the 17.10 e-mail was privileged and, further, this constitutes an agreement to not to rely upon the same and so as gives rise to an estoppel. In his skeleton argument, Mr Hirst submits that, because of this agreement, for the Defendants to revert to reference to the 17.10 e-mail would constitute an unfair change of position and to the detriment of the Claimant. Although not developed, the proposition was that in conceding the 17.10 e-mail was privileged the Defendants had represented to the Claimant fact and/or law.

20. The Claimant was invited by the court during the hearing to identify more precisely the necessary detriment that had arisen from the alleged representation. That detriment, surely, principally had to be illustrated in terms of the Claimant's conduct the litigation from the date of the redacted letter.

21. Despite permitting some time on the point, the Claimant's arguments here were difficult to follow. I gained the impression it had been assumed that the aspect of detriment was somehow self-evident because the representation had come from a firm of solicitors, the Claimant was a litigant in person and general concepts of "fairness" applied. The closest legally principled conclusion appeared to be that were the 17.10 email to be treated as open then the Claimant would then have pleaded and relied upon the Defendants' concession that there had been a mistake in using the word "condone" when he meant "condemn". However, to the contrary, he had proceeded to put his case differently and on the basis of a "weaker defence". Further, his pleading and reliance upon the Data Protection Act would have been different.

22. I questioned whether the specie of any estoppel the Claimant might have in mind was procedural and, in that context, the element of detriment might be more based upon the principle of certainty and election in terms of litigation process rather than needing definite or crystallised examples of actual consequence from a party relying upon such specie of estoppel. I invited counsel to submit following the hearing any brief submissions *on the law* on this point. Plainly, the invitation was not an opportunity to either party to supplement their primary submissions with evidence or to introduce new arguments.

23. The Claimant has personally submitted an 11-page document supplemented by various materials. In response, I questioned whether, as counsel still retained at least for the purposes of concluding the hearing on 6 July 2022, it was more properly for Mr Hirst to prepare and submit the response. Mr Hirst clarified to me by e-mail that he adopted the Claimant's submissions.

24. In his submissions, the Claimant seeks to adduce additional material to that in the hearing bundle. In particular, to amplify the exchange as gave rise to the redaction. In his 3 December 2020 the Claimant had told Spencer West that "In the interests of efficiency and compliance with CPR 1, I am willing to treat your letter as open provided you consent that all paragraphs referencing that email are obscured completely and deal with it as below, and also consent that this letter becomes open (with paragraphs referencing the privileged material likewise obscured)" The invitation to "deal with it as below" is that, later in the letter, the Claimant invited them to agree not to refer to the e-mail in open correspondence because "It was headed by your client "Strictly Without Prejudice" and therefore cannot be admitted in evidence even on costs".

25. The Claimant seeks in his written submission to develop the point that the agreement that arose was supported by consideration in that the Claimant had reciprocally agreed to "open his letter (and/or remove any doubt over its openness". In doing so, the claimant had expended more of his time to modify his own correspondence. This sequence constituted valuable consideration to both parties and as sought to "eliminate risk and potential costs expense".

26. Although somewhat confusingly couched in terms of estoppel by convention, the specie of which seems entirely irrelevant, the Claimant seeks in this supplemental submission

therefore to bolster and supplement Mr Hirst's submissions at the hearing in identifying detriment. He argues that "he had to respond to the allegation of dishonesty made at the moment of resilement" and not only prepared his case accordingly but expended monies such as on the issue fee and in obtaining legal advice.

27. Referring to reliance-based estoppel, doctrine of election or as also called waiver by election, the Claimant illustrates by reference to various materials the common law principle that where B is faced with inconsistent courses of action which affect the rights or obligations of A, and makes a choice between them in the knowledge that they are inconsistent and that he has the right to chose between them then, once this is unequivocally communicated by B to A, B is prevented from afterwards resorting to the course of action he has deliberately rejected.

28. Seeking to apply this principle to the facts of the case, the Claimant emphasises academic commentary suggesting that such doctrine of election is not founded on detrimental reliance. The Defendants had, he argues, the choice of either maintaining that the 17.10 e-mail was privileged or that it was open. Their solicitors were, or ought to have been, mindful in making their election in response to his 3 December 2020 objection that the Claimant would have to proceed thereafter in any litigation so as not to refer to privileged material, either in pleading or orally.

29. The Claimant in this subsequent submission at Para 24 clarifies that had the Defendants not accepted that the 17.10 email was privileged, the Claimant would have directly challenged in his Statement of Case the notion that the distinction between "condone" and "condemn" was a mere slip of the tongue, and would have sought to elaborate in his pleading the phonetic differences by which the Defendant's proposition of accidental mistake ought not to be believed.

30. Returning to the essence of the exercise as actually permitted, the Claimant concludes that had had "pleaded accordingly subject to his obligations in law and to the court. It is contrary to CPR 1 for the Defendants to now resile".

31. The Claimant's post-hearing submission, despite having been adopted by Counsel, presents an undesirable mix of material that was invited and that that was not.

Conclusion on estoppel

32. Particularly when both parties are still seeking to conclude their Statements of Case and so, subject to sufficiently transparent prior presentation, there still remains (within reason) facility to achieve their desired position, I am struck by a certain degree of artificiality in the Claimant's position in objecting to the proposed amendment (or, perhaps mores strictly speaking, the proposition to retain contentious aspects of the original Defence). The very material sought to be excluded by the Claimant features concessions (i.e. as to mistaken description) that are actually to his advantage. However, rather than simply work from that admission and incorporate such admission as being still relevant to his own claim (as the Claimant concedes at Para 24 in his

supplemental submission he either might have, or indeed still could), the Claimant seeks to treat the current Statements of Case as irrevocable because, he maintains, an estoppel has arisen.

33. I should emphasise here that these remarks are not to imply that parties to litigation are free continually to adapt and amend their cases as the litigation develops. Or to deny that positions in litigation can come to be adopted that amendments ought in certain circumstances to be refused because they would entail unfairness. Instead, it is to observe in this case that both sides are have still active applications to amend and that the case is still at an early stage in its case management. Pragmaticism and objectivity ought therefore to still be possible if, that is, there is a will to achieve this.

34. The starting point is that, as I am satisfied, the 17.10 email was not "without prejudice" as a matter of law and therefore any argument can only be based upon, as the Claimant seeks to describe it, a representation that it was and in response to which he has acted to his detriment.

35. I follow the Claimant's proposition that estoppel by election arises when a party is faced with two (or possibly more) competing options and openly elects for one to the knowledge of the other party. I follow how, in that scenario, it is perhaps of less importance whether one of those options was wrong (e.g. the concession that something meant something in law when in fact it did not). I anticipate the Claimant's point is that this only serves to illustrate the potential confusion of the competing options and hence the procedural dilemma of needing to choose between them.

36. The Claimant's difficulty here I am unsatisfied anything truly has flowed from so called "agreement" as led to the Spencer West retraction. I agree here with the written submissions from Mr Munden[1], as repeat those he made during the hearing, that the entire notion that the "without prejudice" appellation of the 17.10 e-mail firmly ringfences any argument from the Defendants that the word condemn was a slip of the tongue is artificial and is simply not made out on the facts. To the contrary, it is also evident from the video that Mr Butt had made such a mistake, that he had subsequently publicly stated on the same website as had hosted the video that a mistake had been made and, further still, this had been conceded in other (open) pre-action correspondence. The Claimant has therefore remained from the outset entirely unfettered to plead reference to Mr Butt's concession that he had mistakenly used the wrong word. I reject the Claimant's argument that, because of the privileged description, he has been prevented from doing so and that any "agreement" arose by which the Claimant's position became qualified or compromised.

37. I reject the Claimant's submission that specifically a contractual agreement arose. With respect to the care and detail with which the Claimant has approached his submission, this proposition fails to recognise the ordinary way in which amendments in practice are approached by both professional representatives and the court. Litigation would grind to a halt if every time when a party sought to amend it was argued in response

[1] Permitted to be served sequentially to any relied upon by the Claimant post hearing

that they could not be permitted to because of an understanding and acceptance by the responding party of the pre-amendment position or state of affairs, all which constitutes a contractual agreement given they way that had prepared the litigation in a certain way before that point. That preparation may have to be revisited is precisely why the court retains substantial discretion to make costs orders in consequence to successful amendments.

Objection to amendments based on estoppel or agreement instead have to be supported by concrete evidence as to evidential or procedural difficulty. They often, I would add, succeed if, for example, the amendment is sought at too late a stage in the litigation. Again with respect to the Claimant, however, the submission that a binding agreement arose on these facts misdescribes the more simple reality that, in the context of pre-action correspondence, the Defendants' solicitors unilaterally chose to omit reference to material the Defendants subsequently have chosen instead to rely upon. The Claimant may well have had an understanding and impression to the contrary but disappointment does not of itself establish prior contractual agreement. Critically, Spencer West did not require the Claimant's agreement or permission to send their letter, in redacted form or otherwise.

38. I should add that I also agree with Mr Mundon that the entire notion of a contractual agreement, with a view to creating legal relations, having arisen was not the way the point was argued at the hearing. As above, the point was instead focused upon the Claimant's understanding and apparent change or adoption of procedural position. I agree that the contractual argument is beyond the permission I gave for the parties to rely upon any legal submissions as to the relationship between detriment and estoppel arising in a litigation context. Indeed, the contractual point seems the very reverse of the point I invited submission upon.

39. As to reliance upon the 17.10 email, I am satisfied the Defendants are entitled to continue to include this within their Defence.