THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE JUSTICE ROGER GILES

BETWEEN

ASIF HAKIM ADIL

Claimant

and

FRONTLINE DEVELOPMENT PARTNERS LIMITED

Defendant

Hearing: **19-21 May 2015**

Counsel: Bushra Ahmed (KBH Kaanuun) for the Claimant.

Zeeshan Dhar (Al Tamimi & Co) for the Defendant.

Judgment: **21 May 2015**

RULING OF JUSTICE ROGER GILES

Transcribed from the oral judgment delivered on 21 May 2015, revised and approved by the Judge.

RULING

1. The trial of these proceedings was fixed for 17 May 2015. By an application filed on 21 April 2015 the Defendant sought orders that a number of paragraphs of the witness statement of Mr Asif Adil "be removed from evidence or redacted", that a number of documents referred to in the witness statement "be excluded from evidence", and that "there be no reference to any settlement discussion between the parties in evidence at trial".

2. As the last mentioned order indicates, the basis of the application was that the materials, which I will call the without prejudice materials, and which were centred on minutes of meetings between the parties on 3 October 2013 and 20 January 2014, were recorded without prejudice communications.

3. The application came before me at trial which in fact commenced on 19 May 2015. The trial began with debate on whether I should decide whether the without prejudice materials were admissible and, if so, whether I should do so as part of the trial hearing rather than on an initial and separate hearing of the application.

4. To further explain these matters, I proposed to the parties, who did not appear to have considered it, that the without prejudice materials should be received subject to objection and their admissibility decided as part of the trial hearing and decision. I briefly indicated my reasons. They were as follows.

5. The Defendant said that the two meetings were in settlement of disputes concerning termination of the Claimant's employment on 30 June 2013. The Claimant said that that was not so at all. He said that a purported termination was waived or otherwise ineffective and they were commercial negotiations on revision of his employment contract. It was not suggested - but see the last paragraph of these reasons - that there had been any overt agreement or description of the communications as on a without prejudice basis. Their basis was to be determined objectively from the circumstances in which they came about and the communications themselves. The correct characterisation of the without prejudice materials was best, if not only, to be ascertained by placing the meetings in the context of whether there was termination of the employment and what disputes arose and how the parties acted in the period after 30 June 2013. Further, issues of credit could arise which should not be twice addressed and perhaps

on different evidentiary bases. It appeared to me, and I said, that subject to what the parties wished to say the proper course was as I had proposed.

6. The immediate response of the Defendant raised the two matters. It submitted that the application, and thus the decision on the characterisation of the without prejudice materials, should be referred to another Judge for hearing and the trial adjourned, or alternatively that if I heard the application I should not hear the trial, which again should be adjourned. It suggested, that admissions of substance were made in the without prejudice materials, which at this point I had not seen; and while it also accepted the judicial ability to put aside, for the decision in the case, knowledge of without prejudice materials ruled inadmissible, it submitted that the reasonable observer would consider the trial contaminated (its expression, which I will adopt for the present for convenience) and not justly conducted if the without prejudice materials were before me for the purpose of determining their admissibility and were ruled inadmissible.

7. I do not think that, in the event that these submissions were not accepted, the Defendant meaningfully opposed the course of deciding the application as part of the trial hearing and decision; its position being that that course should not be taken because of the contamination.

8. The Claimant opposed the Defendant's submissions, submitting that I was entitled to look at the without prejudice materials for the purpose of deciding their admissibility, and could do so without contamination, and that the decision could be arrived at as part of the determinations at or following the trial.

9. I declined to refer the application to another Judge, and said that I would decide the admissibility of the without prejudice materials as part of the trial. I said that I would give my reasons for so ruling within a short time, and I now do so.

10. Ordinarily, questions of admissibility of evidence are determined by the trial Judge at the trial. While there are occasions appropriate for determination in advance of the trial and by another Judge, it is commonplace for a Judge to receive evidence, including where there is contest over its without prejudice character, for the purpose of deciding its admissibility, and to continue with the trial having ruled the evidence inadmissible. An appropriate course for the Defendant was to give due notice to the Claimant that it would object to the paragraphs of Mr Adil's witness statement and the documents and take the objection at the trial.

11. On the question of contamination, the Claimant referred to In re Daintrey [1893] 2 QB 116, which endorses looking at a document claimed to have without prejudice character for the purpose of deciding its admissibility. Of more direct assistance, however, is Berg v IML London Ltd [2002] 1 WLR 3271. That was a privileged communication case, although without prejudice communications were instanced as well in his Lordship's discussion. Stanley Burnton J observed that the procedure of the Court would be greatly hampered, and the cost of litigation greatly increased, if the Court were too easily to come to the conclusion that the viewing of prejudicial irrelevant material necessarily disabled the Court from continuing to hear the proceedings, and stated two aspects for the Court's consideration in determining whether or not it was disabled. The first was whether subjectively the judge considered that he was disabled from fairly continuing with the case. The second was expressed:

> "There are circumstances, in my judgment rare circumstances, in which whatever the subjective feeling of the judge in question, he cannot continue with the case without there being a real possibility or a real danger of there being seen to be, by a fair minded and informed observer, an unfair trial."

12. For this second aspect his Lordship took up the test then found in Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700. The test has since been refined in Magill v Porter [2001] UKHL 67; [2002] 2 AC 357 at [102]-[103] by deleting the reference to a real danger, and it was there shortly stated that:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

13. As explained in Berg, in a case such as a privileged communication case bias does not arise, hence the reference to appearance of a fair trial. His Lordship said:

> "The fair-minded observer will appreciate that the judge is not partial to either party, will appreciate that when the judge expresses his views as to whether or not he can continue, he is expressing those views honestly and unaffected by any connection with either party.The informed observer will know not merely of the traditions of judicial independence and impartiality, but will know of the procedures of the court, of the practices of the court and the facts of the case in question ... the relevant facts do include, where the judge has seen the material in question, the contents of that material."

14. The judgment of Stanley Burnton J was quoted with approval by Dyson LJ in the Court of Appeal in Garratt v Saxby [2004] EWCA Civ 341 at [19], Ward LJ agreeing and Buxton LJ seemingly also approving. This was a Part 36 offer case in which his Lordship was satisfied that the judge could have continued with the hearing. Berg was also referred to by Lady Hale in the Supreme Court in In the matter of A (a child) [2012] UKSC 60 at [17], the other members of the Court agreeing, with the observation that "the well-established test of apparent bias will apply: see Porter v Magill."

15. Although the Defendant did not refer to these or any cases, its submission in the language of contamination effectively took up the second aspect stated by Stanley Burnton J in Berg. While his Lordship did refer to the effect of EU law I do not think that it materially affected or affects the test to be applied, and I direct myself accordingly.

16. I did not feel in any difficulty in continuing with the trial should the without prejudice materials be ruled inadmissible. I was not satisfied that this was one of the rare cases in which a fair minded and informed observer would conclude that there was a real possibility that, through influence of the knowledge gained of those materials or otherwise because of their reception subject to objection, there would be an unfair trial.

17. That observer would be informed by the ordinary practice of a Judge ruling on admissibility and continuing if ruling evidence inadmissible, without which it should be said cases would grind to a halt, and the judicial capacity earlier mentioned through long practice to put aside, for the decision of the case, knowledge of that material in that event. Without more I would not have acceded to the submission of contamination, or more correctly one in accordance with the second aspect in Berg and the test in Magill.

18. In the present case also, however, the merits of consideration of the reasons for the decision as part of the trial would, in my view, be attributed to the informed observer, and would add to that observer's acceptance that there was no unfairness in taking that course. On the proposal which I made to the parties it is sufficient that, having heard the parties, I remained of the view that whether the without prejudice materials were admissible should be

dealt with as part of the trial hearing. If in due course the without prejudice materials be ruled inadmissible they will be disregarded and I was and am confident of the assistance of Counsel in any necessary dissecting out.

19. I refer to one further matter. The Defendant submitted that it would be unjust to require it now to respond by witness statement to the without prejudice materials against the event of their admissibility. There was no merit in the submission. The Defendant was dilatory in making its application, and did not follow it up with a view to ensuring its decision prior to the date on which its witness statements were required and in time for the trial to proceed. It should have responded fully to the without prejudice materials, so far as response to them was called for, while maintaining its objection. I considered that any difficulty would be of its own making, and in any event I gave leave to bring in a supplementary witness statement the next day.

20. I conclude with three remarks made at the time of giving these reasons on 21 May 2015. First, I was informed on the day after announcing my ruling that the Defendant would not respond by further witness statement. Secondly, there was produced today a document said to amount to a description of the communications as on a without prejudice basis, but that itself has been a matter of dispute. Thirdly, having now seen the without prejudice materials I am of the view that in neither aspect identified in Berg should I depart from my ruling.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 3 November 2015

At: 10am