

Application to amend Defences, pursuant to rule 59 of the Royal Court Civil Rules 2007, which is opposed by the Defendants on the ground that the proposed amendments refer to a without prejudice letter in respect of the Plaintiffs, who refuse to waive privilege.

**[2021]GRC009**

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**Between:**

(1) DENNIS SHANE JACKSON  
(2) DAVID FRANK JACKSON  
(3) VALERIE SANDRA REOCH  
(4) CAROLYN ANN JACKSON  
(5) ARRON JACKSON

**Plaintiffs**

**-and-**

(1) EDNA BARTER (acting herein by her guardian ad litem Amanda Barter, hereunto duly appointed by Act of Court dated the 21st day of April 2021)  
(2) ANDREW THOMAS COOPER  
(3) IAN HUTTON  
(4) MAUREEN RANSOME  
(5) PATRICIA TWINE  
(6) MICHELLE COOPER

**Defendants**

**Application To Amend Defences**

**Judgment handed down: 6<sup>th</sup> May 2021**

**Before: Sir Richard Collas, Lieutenant Bailiff**

**Counsel for the Plaintiffs: Advocate N J Barnes**  
**Counsel for the Defendants: Advocate L Le R Strappini**

**Introduction**

1. Advocate Strappini has applied, pursuant to Rule 59 of the Royal Court Civil Rules, 2007 to amend his clients' defences. The Application is opposed by Advocate Barnes on the sole

ground that the proposed amendments refer to a without prejudice letter (“the Contentious Letter”) in respect of which the Plaintiffs, on whose behalf the letter was written, refuse to waive privilege. If the letter is held by me to be admissible, Advocate Barnes will raise no other objection to the proposed amendments.

## **Factual Background**

2. The substantive proceedings relate to a property in the Braye Road, Vale, Guernsey (“the Property”) formerly owned by Mrs D I A Jackson (“Mrs Jackson”) who died on 7<sup>th</sup> January 1992. Mrs Jackson was survived by illegitimate children (“the Children”) but she did not leave a will so there is no dispute that, by virtue of our then laws of intestate succession, the Property passed to her eight siblings (“the Siblings”) in equal undivided shares. The facts are set out in further detail in a judgment I handed down on 7 May 2020 dismissing the Defendants’ Exceptions de Fond. The case is now listed for a final hearing before myself and Jurats on 18 May. It is sufficient for the purposes of this judgment to summarise the facts briefly by explaining the relevance of the Contentious Letter and the circumstances in which it was written, insofar as those circumstances can now be established.
3. In this judgment I refer both to “the Plaintiffs” and also to “the Children”. The difference is that one of the Children, Brian Jackson (“Brian”), died in 2018 unmarried and without issue so any interest he might have had in the Property has passed to the Plaintiffs. References to the “Siblings” are to the eight siblings of Mrs Jackson who inherited the Property on her death. Three of the Siblings have conveyed their interests in the Property to the Children and, for that reason, they are not involved in these proceedings. Three of the Defendants are the surviving Siblings, and the other three Defendants are heirs of the two other Siblings who have passed away without conveying their interests in the Property to the Plaintiffs.
4. In the substantive proceedings, the Plaintiffs seek a declaration that they are the lawful owners of the whole of the Property in undivided one quarter shares, having acquired, by operation of the laws of acquisitive prescription, the undivided five-eighths share that was vested previously in the Defendants.

## **The Contentious Letter**

5. The Contentious Letter, dated 15 December 1992, was written by Advocate Barnes (then at Advocates Randell and Loveridge), acting on behalf of the Children, to Bell, Rose & Bridgwater, English Solicitors, acting for Mrs Nora Hutton and Mrs Edna Barter, two of the Siblings. (Mrs Hutton has since died and her share passed to her son who is the Third Defendant and Mrs Barter is the First Defendant, acting through her guardian ad litem). A copy of the Contentious Letter was also sent by Advocate Barnes to Advocate Le Pelley who (according to his letter in reply of 18 January 1992) was acting for two of the other Siblings, Mrs Paddington and Mrs Twine. Unlike the Contentious Letter, the letter to Advocate Le Pelley was not marked without prejudice. There are a number of open letters from that time that have been located in these proceedings and it is clear that other letters are now missing. The Contentious Letter is the only letter now available that is marked without prejudice.
6. The correspondence records that the Children acknowledged that the Property had vested in the Siblings, they believed their mother would have wished them to have inherited the Property and they were seeking to give effect to her wishes. They were not offering to pay the market price because they were not in a position to raise the required funds.
7. The assertion in the Contentious Letter that the Defendants wish to rely upon in these proceedings is a statement that Brian Jackson was tenant of part of the Property. It is

contained in the following paragraph, referring to an offer to pay some consideration for the Siblings' shares:

“With this in mind they [the Children] have obtained a valuation of the property a copy of which is enclosed. I should point out that this valuation of £60,000 is based on the value of the property with vacant possession when in fact one of my clients is a tenant of the lower flat. He is not prepared to give possession of this flat unless the division of the real property can be resolved to the satisfaction of himself and his brothers and sister. Should it not be possible to reach an agreement concerning the Estate the heirs would have to take action in the Guernsey Court to force a sale and since one of my clients is a tenant of the property and now has an interest in the property as well the Court could not order his eviction and the property would have to be sold subject to his tenancy. I doubt whether the property would be marketable in those circumstances.”

### **The Defendants' reliance on the Contentious Letter**

8. The Defendants wish to rely upon the Contentious Letter for several reasons. First, if the statement is true, they will allege it is inconsistent with the Plaintiffs' assertion that the Children all entered into possession of the whole of the Property on the death of their mother. Second, it shows they were not acting in good faith. (I will not deal here with the question of whether the Plaintiffs have to show good faith as that was the subject of my earlier judgment and will be further considered at the final hearing.) Third, they contend that even if the statement is untrue, it raises an estoppel against the Plaintiffs from denying it. The evidence in support of the latter argument is in the witness statement of the Fourth Defendant, who will be called to give evidence on behalf of the defence. She will say that “we” (she does not say to whom she is referring, other than herself) decided not to take any immediate action to realise their interests because of Advocate Barnes' statement that one of the Children was a tenant and unwilling to give possession unless the division could be resolved and because of the Advocate's assertion that his tenancy would probably make the Property unmarketable.
9. In this judgment, I am not concerned with the merits or otherwise of those arguments, only with the question of the admissibility or otherwise of the Contentious Letter.

### **The Legal Principles re Admissibility**

10. The legal principles that govern the privilege attaching to without prejudice letters and the admissibility of such letters in evidence are well established and are not in dispute. Both advocates have referred to passages in the 19th edition of Phipson on Evidence.
11. The general principle is that “Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute may generally not be admitted in evidence.” (Phipson para 24-13(a)). In Cutts v Head [1984] Ch. 290, Oliver LJ said “the public policy justification, in truth, essentially rests with the desirability of preventing statements of offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.”
12. “The starting point is that there must be a bona fide attempt to resolve a dispute. If not, then “without prejudice” privilege is not engaged whether or not the words “without prejudice” are used.” (Phipson para 24-13(b)). Further, in Phipson para 24-13(f), the learned author considered the importance of the use of the words “without prejudice” and said that when determining whether the privilege is engaged, the Court must begin by deciding “is the communication in the course of bona fide negotiations with a view to settlement of a dispute, or have the parties otherwise impliedly agreed that their correspondence should be inadmissible in court proceedings between them”?

13. Without prejudice privilege may also extend to other, related, proceedings. Phipson para 24-13(k) cites a passage from the speech of Lord Griffiths in Rush v Tompkins [1989] 1 A.C. 1280 with which the other law lords agreed: "I would therefore hold that as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject-matter proof of any admissions made in a genuine attempt to reach a settlement."
14. Phipson para 24-13(h) sets out exceptions to the without prejudice principle. The judgment of Robert Walker LJ in Unilever v Proctor & Gamble [2001] 1 All E.R. 783 which was followed by Moore Bick LJ in R v K [2010] QB 343 held, *inter alia*, that even if there is no concluded compromise a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel.

### **Was the Contentious Letter written in the course of a dispute?**

15. There were a number of grounds on which Advocate Strappini relied in submitting that the Contentious Letter is admissible in evidence. The first was that the Contentious Letter was not written in the course of a dispute. The circumstances are far removed from the typical situation where, for example, to negotiate an out of court settlement of a personal injury claim, the defendant may offer to make a payment without prejudice to a defence that they were not liable for the injury suffered to the client. In such a situation, the dispute exists before the negotiation commences.
16. In the present matter, in 1992, there was no dispute as to the legal ownership of the Property. The Children accepted that the Siblings had inherited the property from Mrs. Jackson by reason of her intestacy. They were seeking to finalize the estate by persuading each of the Siblings to convey their interests in the Property to the Children. On proper analysis, Advocate Strappini said, the Contentious Letter was written in the course of those negotiations and not in the course of a dispute.
17. In reply, Advocate Barnes submitted that there was a dispute as indicated in the paragraph from the Contentious Letter that I quoted above because if the matter could not be resolved amicably, the Siblings would only be able to realise their shares by going to Court with proceedings for licitation.
18. The chain of correspondence now available is incomplete but it does show that the parties, through their lawyers, were engaged in a bona fide negotiation. Applying the starting point mentioned in the extracts from Phipson quoted above, the question I have asked myself is whether it was a bona fide negotiation to settle a dispute, or a bona fide negotiation to acquire a property which the Children believed should belong to them. I am satisfied that it was the latter. The Children were not in dispute with the Siblings, they acknowledged the fact that the Property had been inherited by the Siblings. The mention of licitation did not create a dispute; it was merely a statement of the procedure the Siblings would have to follow if they wanted to realise their interests and were unable to agree a price with the Children. Even if licitation had been commenced I would not regard it as a dispute as such; licitation is merely the customary law procedure that enables co-owners to realise their interests in a property as a consequence of the maxim that "nul n'est tenu de rester dans l'indivis" or "no one is bound to remain in undivided ownership".
19. On that ground alone I could decide that the Contentious Letter is admissible in evidence but in case I am wrong I will go on to consider the further submissions made by Advocate Strappini.

### **Does the Contentious Letter contain an admission against the interests of the Children?**

20. The statement in the Contentious Letter on which the Defendants wish to rely is that Mr Brian Jackson was a tenant of part of the Property. Advocate Strappini said that does not amount to an admission against the interests of the Children and Advocate Barnes did not seek to suggest otherwise. I am also satisfied that it is not that statement that could support the without prejudice privilege.
21. When asked what it was about the Contentious Letter which justified without prejudice status, Advocate Barnes replied that it was the independent valuation of the Property. However, I agree with Advocate Strappini who said that the figure is not an admission of liability nor is it a statement against the interests of the Children.

### **Are these the same or related proceedings?**

22. Advocate Barnes relied upon the dictum of Lord Griffiths in Rush v Tompkins quoted above in submitting that the Contentious Letter was written in connection with related proceedings because they involved the same subject matter namely the ownership of the Property. That much is correct but it is apparent from the speech of Lord Griffiths (at page 1301 A-D) that he was speaking of an admission made in negotiations to settle one dispute being admissible in another dispute in separate proceedings involving the same subject matter.
23. The present case is distinguishable because, as I have said, there was no dispute in 1992 and the Contentious Letter contains no admission against the interests of the Plaintiffs in the 1992 negotiations.

### **Is the right to exercise without prejudice privilege prescribed?**

24. Advocate Strappini's written skeleton argument included a submission that any without prejudice privilege that originally attached to the Contentious Letter is now prescribed, "whether as a "demande mobilière" or "action personnelle" under the Loi relative aux Prescriptions 1890 or as a "chose immobilière" or "action réelle ou dépendante de la réalité" under the Loi relative à la Prescription Immobilière 1909 or both". In his oral submissions he agreed it was a novel submission and was candid enough to admit it was something of a makeweight argument.
25. I congratulate Advocate Strappini on his ingenuity but I am not persuaded that the right to exercise without prejudice privilege is a right that could ever be prescribed.

### **Does the statement give rise to an estoppel?**

26. If I were to decide against Advocate Strappini's main submissions and rule that the Contentious Letter is protected by privilege, he submitted that the Plaintiffs are estopped from denying the truth of the statement that Brian Jackson was tenant of part of the Property on the ground that the Defendants acted in reliance upon that statement.
27. Legal authority for the submission derives from the judgment of Neuberger J (as he then was) in Hodgkinson & Corby Ltd v Wards Mobility Services Ltd [1997] FSR 178, quoted with approval by the Court of Appeal in Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783. Neuberger J held that: "there is, to my mind, a powerful argument for saying that if a clear and unambiguous statement is made by one party in "without prejudice" correspondence and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the court".

28. In this judgment I am deciding only the issue of the admissibility of the statement that Brian Jackson was tenant of part of the premises. I am not deciding whether the statement was true, nor whether it was reasonable for the Defendants to act on the statement nor any other of the issues that will be for the Jurats to decide at the trial. I am not even deciding whether it is capable, in law, of giving rise to an estoppel with the legal consequences pleaded by the Defendants.
29. However, I am satisfied that if the case pleaded is in fact correct, it would be unconscionable to deny the Defendants the opportunity of arguing it. I therefore find that even if the letter is inadmissible with the benefit of without prejudice privilege, the Defendants would be entitled to rely upon it as an exception to the general principle.

### **Conclusion**

30. For the reasons given in this judgment, I allow the application to amend the defences. Subsequent to the hearing, Advocate Strappini has asked, via the Deputy Greffier, that I also deal with the question of costs. Costs normally follow the event so unless there is any application to the contrary within 14 days of the handing down of this decision, I award the costs of the application to amend the defences to the Defendants on the recoverable costs basis.