Without Prejudice Communications and Public Policy

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Some lessons for commercial negotiators and litigators

Alan Ramsay Sales & Marketing Ltd -v- Typhoo Tea Limited [2016] EWHC 486 (Comm.)

Earlier this month Flaux J addressed the question of whether without prejudice correspondence was admissible to show that a party had repudiated his contractual obligations and enabled his opponent to bring the contract to an end.

The Claimant, ARSM, had been Typhoo's commercial agent. The agency provided for 12 months' notice. Typhoo sent two without prejudice emails giving far shorter notice.

Typhoo's email of 18 March *(sic)* 2013 read:

> "With effect from February 11th 2013, Typhoo will give ARSM 3 months' notice to terminate services provided by ARSM to Typhoo. This means that the final date of provision of services will be 11th May 2013.

Typhoo's follow up on 26 March was even blunter:

> "I have had no response to [the previous email].
> Payments due to ARSM will finish on 11th May 2013"

Later the same day ARSM sent an open email ending the agency based on Typhoo's repudiatory breach.

At trial, Typhoo argued that its two emails had been protected by privilege and that ARSM's purported acceptance of Typhoo's breach was itself a repudiatory breach. Typhoo contended that ARSM was therefore entitled neither to damages for breach of contract at common law nor to compensation under the Commercial Agents (Council Directive) Regulations 1993.

The protection the law affords to without prejudice correspondence is based, in part, upon an implied agreement between the parties that what is said in settlement negotiations will not later be relied upon in court and, in part, upon the public policy ground that parties should be encouraged to settle their disputes by negotiating with their cards fully and frankly on the table.

Typhoo did not rely upon any implied agreement but contended that there was an extant dispute, in relation to which the parties were negotiating, and that its two without prejudice emails were part of those negotiations.

Engagement of the public policy ground depends upon the satisfaction of two conditions. First, there must be a dispute in which the parties could reasonably have contemplated litigation if they did not agree. This is tested objectively but is given a wide scope so that, for example, an "opening shot" without prejudice offer can fall within the privilege. Second, the communication must be within *bona fide* negotiations attempting to resolve the dispute.

Flaux J accepted that the case law demonstrated that the public policy ground for the privilege was itself subject to public policy exceptions. Thus *In re Daintrey* [1893] 2 QB 116 decided that an undoubtedly without prejudice letter could be relied on as evidence of an act of bankruptcy. In *Best Buy Co -v- World Sales Corporation* [2011] EWCA Civ 618 Lord Neuberger opined that a without prejudice letter could be admissible to prove an unjustified threat of proceedings sufficient to found an action under section 21 of the Trade Marks Act 1994.

The question was therefore:

> "whether it can be said that there is a public policy against parties engaging in repudiatory or renunciatory conduct being able to avoid the normal consequences of such conduct (that the innocent party is entitled to treat the relevant contract as at an end), because the repudiation or renunciation is in without prejudice communications." [30]

Since there was no authority directly in point, the Judge approached the question as a matter of principle. He held that the Typhoo emails were protected by the privilege and thus inadmissible for two reasons:

> "First, I rather doubt whether there is any public policy requiring repudiatory conduct to be opened up when it occurs as part of a without prejudice sequence of communications, which overrides the public policy that such communications should be privileged. It seems to me that this is exactly the sort of statement which might be characterised as a threat which is part of the continuum of without prejudice negotiations which Robert Walker LJ considered in ***Unilever***[1] should not be filleted out and made admissible, but should remain protected by the privilege" [32]

> "The second reason is that it seems to me that if the emails were part of the continuum of without prejudice discussions, it would simply not be possible to construe them as sufficiently unequivocal to constitute renunciation or repudiation of the agency agreement." [33]

Then, following a detailed review of the evidence, the Judge held that Typhoo's emails had been sent at a time when there was a dispute as to the future of the agency in respect of which the parties could reasonably contemplate litigation if they were unable to reach an amicable settlement.

He observed:

> "Whilst if the two emails are viewed in isolation, they can be seen as somewhat mandatory and peremptory, when they are seen as part of the whole chain of correspondence and meetings constituting the relevant negotiations, they are still part of those negotiations." [65]

Additionally the Judge considered that even if they had not been protected as without prejudice correspondence, when they were placed in the context of the negotiations they had not been sufficiently unequivocal statements to amount to a renunciation or repudiation of Typhoo's contractual obligations.

However, all was not lost. Although the open "acceptance" of Typhoo's inadmissible emails had itself been repudiation of the agency by ARSM it had never been accepted by Typhoo as ending the contract. On the contrary, Typhoo had accepted ARSM's offer to continue working until 11th May 2013.

As a result ARSM was entitled to common law damages for breach of the agency of over £45,000 and to compensation under the Regulations which were expected to be in the region of £130,000.

[1] See *Unilever v Proctor & Gamble* [2000] 1 W.L.R. 2436 CA

Lessons can be drawn from this case:

(1) If it really is tactically appropriate to make threats on behalf of your client that are, or could arguably be, construed as repudiatory, be very careful to ensure they are firmly embedded in clearly without prejudice correspondence and that they can only be regarded as within the continuum of settlement negotiations;

(2) If you receive such threats as part of without prejudice negotiations beware of crying "snap" and putting your own client in repudiatory breach by purporting to accept them;

(3) If, however, there is an admissible and unequivocal repudiation that your client wishes to accept make sure the acceptance is open and unequivocal and that it precedes the agreement of any interim *modus vivendi* that might otherwise be construed as electing to continue with the contract.

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