Daniel Peter Tomlin v Standard Telephones and Cables Ltd [1969] ADR.L.R. 00/00

JUDGMENT : LORD JUSTICE DANCKWERTS: C.A.

This is an appeal from the judgment of Mr. Justice Fisher given on 3rd October, 1968. It is a case which undoubtedly presents some difficulties, because it depends upon what people say and you cannot always tell what they mean from what they say.

The matter arose out of an accident which occurred on 12th June, 1964. The Plaintiff was a fitter aged 33 at the time and he was employed to help on board H.M. Telecommunications Ship "Alert" to do something in connection with the anchor gear. In the course of that work he managed to strain his back and so he claimed against his employers for damage: in respect of that accident.

The plaintiff's solicitor and the agent for the insurance company who were the employers' insurers got into contact and undoubtedly they started negotiations. At the very start of the negotiations on 16th February, 1966, Mr. Gourd Assistant Claims manager for the insurance company, wrote to Mr. Thompson, the plaintiff's solicitor, in these terms: *"With reference to your letter dated 20th January, we are not prepared to make any admissions at all in this case so far as liability is concerned, but we will be prepared to have a general discussion with you as and when the medical position has been clarified".*

Then they ask for a further medical examination. That at any rate is quite plain in its terms and the negotiations start off on the footing that the defendants' agent does not admit anything with regard to liability or (if there is liability) the amount of damage or anything whatever.

But that is not the end of the matter, because the negotiations proceeded and there are various letters which seem to show quite plainly that, for whatever purpose it may be, there was definitely an agreement between the plaintiff solicitor and the insurance agent that the liability (to put it as neutrally as I can) was not to exceed a figure of 50 percent of the damages which would be properly assessable:

It is constantly referred to as an "agreement" in various letters. At page 49 there is a letter of 27th February, 1967, a great deal of which is taken up with the question of overtime and that sort of thing'. The vital paragraph reads: *"In view of the 50/50 agreement come to between us for settlement of this claim, we are willing to exchange medical reports and accordingly enclose a copy of each of the two received from Mr. Anthony Baron F.R.C.S. We await a copy of each of those in your possession. Perhaps you will now do your own calculations of special damage and let us have the figures when we will go closely into them in the hope that they can be agreed".* On the face of it that is an agreement that the liability of the defendants for the amount of the damages shall be 50/50, which obviously means that the defendants will only pay 50 per cent. of whatever amount of damages is assessed.

In the letter of 2nd May, 1967, at page 54, the last paragraph reads *"We will get into touch with them again forthwith and trust that you will bear with us for a little longer, particularly having regard to the agreement at which we have arrived for disposal of this claim".*

In the letter of 21st July, 1967, at page 58, there was some discussion about figures: *"As we have said in previous correspondence, we consider that the general damages are worth £650, which, added to the specials which we calculate at £601.13.4d., makes a total, on a full liability basis, of £1,251,13.4d .It has already been agreed that this is a 50/50 case, and accordingly we are prepared to pay your client £625.16.8d. in settlement of his claim, plus of course your reasonable costs". That offer was an offer of a sum of money and reasonable costs.*

At page 61 Mr. Thompson writes: "*I refer to your letter of the 21st July and have now been instructed by my client to refuse your offer of £625.16.8d. in settlement of his claim". That puts an end, it would appear, to that offer of a money sum. It is not the end of the matter, because, if one looks at page 62, a letter of 23rd August, 1967, from Mr. Gourd, there he says: "We thank you for your letter of the 16th instant. Liability has already been agreed at fifty-fifty;, so we are only concerned with the question of the value of the claim itself", Then there is a letter of 27th September, 1967, at page 63, in which Mr. Thompson writes: "I have your letter of the 23rd August and would confirm that I regard your valuation of this claim as totally unrealistic and your offer as quite inadequate. I am accordingly instructed to serve proceedings".*

I should have read a letter of 3rd March, 1967, which is mostly concerned with the question of the condition of the plaintiff and so on. The only point that arises, I think, is that the writ was issued on 13th March, 1967, and it was a writ claiming damages in respect of the injuries.

On 19th October, 1967, the defendants asked for extension of time for delivery of Defence, and an extension of 14 days was given on 20th October, 1967.

Possibly the most important letter is at page 44, which I have not mentioned, in which reference is made to a medical report. This was written by Mr. Thompson and in the second paragraph he says: *"Whilst, as you appreciate, I take the opposite view to yourself on the question of liability, my client has instructed me to say that he will agree to settle his case on a 50/50 basis as you propose and accordingly this leaves only the question of quantum to be disposed of".*

The importance of this is that in the subsequent correspondence that letter was never refuted and the correspondence proceeded, as I think I have shown, on the basis that there was a concluded agreement on the basis of 50/50 liability and, as stated, it would appear there was only a question of quantum to be decided after that by way of further negotiation or, as it might appear, by recourse to the court.

The matter came before Mr. Justice Fisher on a preliminary point and in a very careful judgment he decided that there was in agreement which was effectively binding in regard to the 50/50 basis. He decided in favour of the Plaintiff and gave judgment accordingly.

A point that arises is that all the letters written by the agent of the insurance company bore the words "without prejudice". The point is taken that by reason of those words there could not be any binding agreement between the parties and it was said indeed on behalf of the Defendants that the letters were not admissible. I feel no doubt, as the learned Judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.

The learned Judge quoted a statement by Lord Justice Lindley which really was in the case no more than a dictum but seems to me to have great force and to be of great importance in regard to the case. That was in the case of **Walker v. Wilsher** (23 Queen's Bench Division, page 335). The passage quoted by the learned Judge in his judgment is at page 337. When the case is looked at it appears that in fact the decision was that the letters in question should not have been looked at "or the purpose of the case at all and consequently the judge In the court below was at fault in relying upon them for the purpose of depriving the party of his costs. But in the course of his judgment Lord Justice Lindsey said "*What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to Alter the old state of things and to establish a new one.*" That statement of Lord Justice Lindley is of great authority and seems to me to apply exactly to the present case if in fact there was a binding agreement, or an agreement intended to be binding, reached between the parties; and accordingly it seems to me that not only was the court entitled to look at the letters though they were described as "without prejudice", but it is quite possible (and in fact the intention of the parties was) that there was a binding agreement contained in that correspondence. That disposes of the first point.

When, however, it comes to the letters there is another and more difficult point, I think, and that is: was there (as Mr. Justice Fisher held) an agreement which was effective and binding between the parties that the rights of the Plaintiff should be 50 percent of any liability and therefore be would be entitled to recover 50 per cent. of whatever was the proper amount of damages, which was the construction put upon the matter by the learned Judge; or is there the alternative construction (which other people may possibly view as being the right one) that the agreement as to 50/50 liability was merely a step in the negotiations which were still in progress and which were intended to reach a final settlement between the parties of the amount of damages and of the liability of the Defendants in respect of those damages, as was contended on behalf of the Defendants? It seems to me quite possible that that might be the proper result, but when the correspondence that I have read is looked at, and in particular the letter from the Plaintiff's solicitor at page 44, which states that a 50/50 basis has been agreed as proposed by the insurance company on behalf of the Defendants "and accordingly this leaves only the question of quantum to be disposed of", that was never contradicted or rejected on behalf of the Defendants. In four cases at least the Defendants' representative, the insurance company's claims manager, had referred to the agreement for **50/50** as an "agreement" and there is no suggestion that it was merely a step in an eventual settlement to be reached. The correspondence proceeds on the basis that there is an agreement for sharing the liability **50/50** and that the Plaintiff should be entitled to recover 50 par cent. of whatever was the proper amount of damages. In the face of the letters written by the representatives of the Defendants I come to

the conclusion that the proper construction is that there was a definite and binding agreement on a 50/50 basis and that though certain negotiations were entered into for the purpose of trying to agree the amount of the damages the agreement as to the 50/50 basis stands and the Plaintiff is entitled to hold on to that agreement which was reached. Accordingly I would dismiss the appeal.

JUSTICE ORMROD: I have the misfortune to differ from my Lord as to his conclusion on this appeal and would like to reiterate very Briefly the background to this situation. It starts, as my Lord has pointed out, with the letter of July 1966 from Mr. Gourd of the insurance company (whom I call the Defendants for the purpose of this judgment) writing to the Plaintiff's solicitor a letter which quite plainly states that liability is not admitted. That letter was headed "Without prejudice" as indeed nearly all Mr. Gourd's letters were. Later he moved from that position slightly in the letter which he wrote on 14th November, 1966, again headed "Without prejudice", and in this one he stated that as in his view there was "more likelihood of a finding in our favour" - that is the Defendants' favour - "then against us, we are only prepared to deal with the case on a 50/50 basis". I stress the words "deal with the case on a 50/50 basis". He then went on "The offer we make therefore is £355". I respectfully agree with the judgment of the Judge below in his view that that was not an offer to settle on a 50/50 basis but an offer to settle for a sum of €355. The Plaintiff's solicitor in his reply of 20th December in the second paragraph wrote "Whilst, as you appreciate, I take the opposite view to yourself on the question of liability, my client has instructed me to say that he will agree to settle his case on a 50/50 basis as you propose and accordingly this leaves only the question of quantum to be disposed of".

At one stage it was suggested that could be an acceptance if the Defendants' offer in the previous letter which I have read, but for reasons which Mr. Justice Fisher gave that is clearly not possible. Therefore, strictly speaking, we have to regard the 20th December letter as a counter-offer. I agree that thereafter the 'defendants accepted that proposal in substance, although it is not possible to put a finger on the precise moment when they accepted it, but the negotiations proceeded thereafter on the basis that the two parties were greed and that the ultimate figure which they would arrive at would in fact be half what the Plaintiff would recover on a full liability basis and that, in my judgment, is the real meaning of the reiterated word "agreement" by the defendants throughout the later letters.

But I do not think that is the crucial point in this case. The crucial point to my mind is this: is it in fact open to the plaintiff here to sever the negotiations and to say, as he does, there was an agreement as to liability on a 50/50 footing but no agreement as to quantum and therefore all that remains is for the court to assess the amount of damages? If we were here construing a bundle of correspondence of open letters I Would feel the force of that submission, but we are not; we are here construing a bundle of correspondence which plainly is without prejudice and is plainly correspondence negotiating for a settlement of this action and not, in my judgment, for partial settlement of it.

The principle to be applied to "without prejudice" negotiations and "without prejudice" correspondence is perfectly clearly set out in the cases which Mr. Beldam referred us to, namely, **Jones v. Foxall,** which is reported in Baavan's Reports page 388 and the passage in question is at page 396; and in the passage which my Lord has referred to in Lord Justice Lindley's judgment in **Walker v. Wilsher.** From those cases it seems to me that this principle which emerges is that the court will protect, and ought to protect so far as it can, the public interest, "without prejudice" negotiations because they are very helpful to the disposal of claims without the necessity for litigating in court and therefore nothing should be done to make more difficult or more hazardous negotiations under the umbrella of "without prejudice". I am well aware, coming from the Division which I do, that letters got headed "Without prejudice" in the most absurd circumstances, but these letters, in my judgment, are not letters headed "Without prejudice" unnecessarily or meaninglessly. They are plainly "without prejudice" letters and therefore the court, in my judgment, should be very slow to lift the umbrella of "without prejudice" unless the case is absolutely plain. Lord Justice Lindley's proposition is, I think, quite clear where he states at page 337 (and I read the passage again) *"I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a now one".*

I ask myself, looking at this correspondence: is there here a complete contract and, more importantly perhaps, did both parties intend there to be here a complete contract? The contract which kr. Kidwell argues for is a

contract to settle this litigation on the basis that the parties are equally to biama for the accident and therefore should share the damages in equal proportions, whim means of necessity that it is an implied term of the agreement that the court will assess the damages in the event the parties cannot agree. In my judgment that is not what this correspondence meant or was intended to moan. I think it was an attempt to settle this case for a sum of money and that the "without prejudice" umbrella remains up and protects the parties negotiating up to the point when they agree on a figure. It might well havo been otherwise if they had set out quite separately to negotiate the issue of liability: than I think it might be different. But the onus seems to me to be on the side which claims to be able to sever negotiations of this kind into bits which have been agreed and bits which have not, to establish that that was really the agreement reached between the parties. With what limited experience I have of personal injury litigation and negotiations and so on to reach settlements, I should be astonished if at any rate the Defendants in this case ever imagined when writing letters headed "Without prejudice" that some part of those letters might later be turned into an agreement. For those reasons I think if we were to uphold the learned Judge below we should be running right into the danger indicated in **Jones v. Foxall** where the learned Master of the Rolls expressed his anxiety there in these words: *"But, in addition to this, I find that the offers were, in fact, made without prejudice to the rights of the parties; and I shall, as far as T am able, in all cases endeavour to repress a practice which, when I was first acquainted with the profession was never venturᵉd upon, but which, according to my experience in this place, has become common of late - namely, that of attempting to convert offers of compromise into admissions of acts prejudicial to the person making them. If this were permitted, the effect would be, that no attempt to compromise a dispute could over be made*." In my judgment, that is the principle we ought to follow.

For these **reasons,** in my judgment, this appeal ought to be allowed.

SIR GORDON WILLMER: In this difficult case I have, not without some doubt and hesitation, reached the same conclusion as my Lord, Lord Justice Danckwerts, and the learned Judge in the court below. The issue between the parties is as to the effect to be given to a number of letters expressed to be "without prejudice" contained in the bundle of correspondence which has been put before us. It is not in issue that letters which are written "without prejudice" in furtherance of negotiations between the parties cannot be put in evidence unless those negotiations do in fact result in an agreement. But it is equally accepted that the letters themselves can be, and indeed necessarily must be, looked at for the purpose of ascertaining whether any such agreement has in fact been arrived at. Here it is said by the Plaintiff that in the course of the negotiations a clear agreement was arrived at, to the affect that the Defendants should accept 50 per cent liability for his damages, whatever those damages might amount to.

The rival contentions can be briefly expressed as follows. The Defendants say that there was a single process of negotiation going on covering both liability and damages, and that what was said in relation to liability was merely a step in the course of such negotiations. In the language of modern industrial relations what was being discussed would now be described, I suppose, as a "package deal". If that be right, the Defendants say, the without prejudice letters cannot be used as evidence unless an overall agreement is arrived at, which it never was in the present case. The contention on behalf of the Plaintiff, on the other hand, is that there is no reason why in the course of negotiations part of what is offered may not be severed from the other part; and in relation particularly to this case there is *no* reason why one should not find a separate agreement with regard to liability, which is quite severable from the: continuing negotiations in relation to the measure of damages. If I may draw *on my own* experience from the past, I would remind the parties that such an agreement is an everyday matter in the Admiralty Court, where the question of liability is almost universally dealt with separately and severably from the question of quantum of damages.

It is not therefore a concept which presents any difficulty to me. I can see no reason why it should *not* be possible to carve out of this correspondence an agreement as to liability, leaving the question of quantum of damages open for further negotiation. That seems to be exactly the view which was being put forward in the first of the relevant letters written on behalf of the Plaintiff (page 44), in which his solicitor says "my client has instructed me to say that he will agree to settle his case on a 50/50 basis as you propose and accordingly this leaves only the question of quantum to be disposed of". The Plaintiff at least thought, as it seems to ma, that he had settled the question of liability, and that it only remained to discuss how much in pounds, shillings and pence he was entitled to recover by way of damages.

The whole tenor of the subsequent correspondence seems to me to be in favour of the view that an agreement along those lines had in fact been made. I refer to (though I need not quoto again) the letters at page 49, page 54, and pages 58 and 62 of the correspondence. Those letters cover a period of time between February and August of 1967, and during that period the Defendants' insurers were repeatedly referring to the "agreement which had been reached between the parties for the settlement of the question of liability. The difficulty which I have felt in this case - and I think I sufficiently voiced it while Mr. Kidwell was presenting his argument on behalf of the Plaintiff - has been to pin-point exactly bow such an agreement is to be spelled out of the correspondence which has been placed before us. It was at one time suggested, as has been pointed out, that the criginal letter of the 14th Novembar 1966 (page 4) written on bahalf of the Defendants' insurance company, in which they say they are prepared to deal with the case on a 50/50 basis, taken together with the plaintiff's solicitor's letter of the 20th December 1966 (page 44), to which I have already referred, might be construed as amounting to an offer and acceptance. The learned judge, however, took the view, with which on the whole I am disposed to agree, that those letters standing by themselves could not be taken as a sufficiently clear offer and acceptance to constitute a binding contract. I think the better view is that the Plaintiff's solicitor's latter at page 44 is rather to bo construed as a counteroffer, in which he offers to settle on a 50/50 basis as far as liability is concerned, and to leave over for further negotiation the remaining question of quantum of damages. That counter-offer is never in the subsequent correspondence accepted in so many words. I am bound to say that for myself I am left with an uneasy suspicion that there was probably telephonic communication going on between the parties in the background behind this correspondence. But we have no evidence of that, and we can only proceed on the correspondence.

The question, which I think must finally be resolved in favour of the Plaintiff, is whether the Plaintiff's counter-offer, as contained in that letter of December 1966, can be said to have been accepted by the repeated recital in the numerous letters subsequently written on behalf of the Defendants referring to the existence of an "agreement". On the whole I think that those repeated recitals of the existence of an agreement can be, and should be, construed as an acceptance of the Plaintiff's counter-offer.

In those circumstances I think the proper conclusion is that which was arrived at by the learned Judge, namely, that there was a concluded agreement on the issue of liability, leaving over for further negotiation the separate and severable question of quantum of damages.

That being so, it is no objection that the agreement is contained in letters, which are headed "Without prejudice". For those I would agree with my Lord, Lord Justice Danckwerts, reasons in dismissing this appeal.

MR KIDWELL: I ask that the appeal be dismissed with costs.

LORD JUSTICE DANCKWERTS: That seems right.

BELDAM; Of course, I cannot make any observations on the question of costs, but I do ask for leave in this case. I would submit that this is a matter of considerable public importance in this sense that on any showing the offer and acceptance in this case was contained in "without prejudice" correspondence.

LORD JUSTICE DANCKWERTS: Is it not a case which is rather confined to its own facts? I do not suppose one would find another case with correspondence like this. Another thing is that the amount at stake is not very big.

BELDAM: The amount at stake is not big, but it is my submission that the principles involved might have reference to a considerable number of other cases and might affect the course of correspondence in negotiation. It is possible to see, for example, parties writing "without prejudice" correspondence, one of them making an admission with regard to liability and the other party would write back in clear terms saying 'I accept your offer of 25 percent contributory negligence" or something of that kind. There is no previously recorded case in which (as it were) part of an agreement has been held to be taken out of "without prejudice" correspondence. I would submit that this is a matter of importance going beyond the facts of this particular case in its principles.

(<u>The Court conferred)</u>

LORD JUSTICE DANCKWERTS: You may have leave