19/06; [2006] VSC 244

SUPREME COURT OF VICTORIA

SLAVESKI v ECONOMAKIS

Hargrave J

21 June 2006

EVIDENCE – "WITHOUT PREJUDICE" PRIVILEGE – LETTER CONTAINING A REQUEST FOR PAYMENT BY INSTALMENTS MARKED "WITHOUT PRIVILEGE" – REQUEST NOT ACCEPTED BY OTHER PARTY – INSTALMENT ORDER LATER MADE BY COURT – NOTICE OF OBJECTION FILED – LETTER PRODUCED TO MAGISTRATE DURING HEARING OF OBJECTION – INSTALMENT ORDER MADE BY MAGISTRATE IN SAME TERMS AS "WITHOUT PREJUDICE" LETTER – WHETHER LETTER PRIVILEGED FROM PRODUCTION – WHETHER MAGISTRATE IN ERROR IN HAVING REGARD TO "WITHOUT PREJUDICE" LETTER.

1. There is a rule of evidence that communications between parties which are genuinely aimed at settlement of a dispute between them cannot be put in evidence without the consent of both parties in the event that the dispute is not settled. This rule is often called "without prejudice privilege". In order for the privilege to operate, it is essential that there must be some person in dispute or negotiation with another person, and the statement which it is sought to exclude from evidence must have some bearing on negotiations for a settlement of that dispute. The mere use of the words "without prejudice" in the communication does not operate to attract the rule of privilege. The court is required to consider the statement in its context and decide for itself whether the privilege applies. Thus a letter marked "without prejudice" which is not in fact a genuine attempt to settle a dispute will not be privileged from production in evidence, and a letter which is so aimed will be privileged even if it is not marked "without prejudice."

2. Where a letter marked "without prejudice" was written when a proceeding between the parties had concluded, the letter was not, when viewed in its proper context, privileged from production in later proceedings concerning an order to pay the debt by way of instalments. There was no dispute to settle in those events. The "without prejudice" letter was simply a request for time to pay an existing obligation which was the subject of a court order. Such a request was not one which would properly be characterised as a genuine attempt to settle a dispute. Accordingly the magistrate was right to have regard to the without prejudice letter, and no error of law was disclosed in that regard.

HARGRAVE J:

1. On 5 September 2005 the Victorian Civil and Administrative Tribunal ("VCAT") heard and determined a proceeding by the defendants in this proceeding against the plaintiffs in this proceeding. VCAT ordered that the plaintiffs pay the sum of $8,702 to the defendants within seven days. The plaintiffs did not do so.

2. It appears that a certified copy of the VCAT order was filed in the Magistrates' Court of Victoria under s121 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). By sub-s121(3) of that Act, the VCAT order upon filing was taken to be a judgment of the Magistrates' Court of Victoria. The first plaintiff, Mr Slaveski, who is the sole director and secretary of the second plaintiff and whom I gave leave to appear to represent the second plaintiff, considered appealing against the VCAT order, but decided not to do so for reasons which are not relevant.

3. Instead he instructed solicitors then acting for the plaintiffs to offer to pay the judgment debt by instalments. As a result, by letter dated 28 September 2005 from the solicitors then acting for the plaintiffs to the solicitors then acting for the defendants the following offer was made:

> "Given our clients current financial circumstances he proposes the following instalment payment, namely, an immediate payment of $2,000. Thereafter monthly instalments of $1,000 with a final payment of $1,702. We appreciate your advice of your client's instructions by return facsimile."

4. The letter was headed, "Without Prejudice", and I will for convenience refer to it as "the without prejudice letter". The offer contained in the without prejudice letter was not accepted and

was withdrawn for reasons which are not relevant. Next, on 17 October 2005 the plaintiffs applied to the Magistrates' Court of Victoria at Broadmeadows under the *Judgment Debt Recovery Act* 1984 (Vic) for an order that they be permitted to pay the judgment debt by instalments of $500 per month.

5. On the basis of statements made in the written application as to the financial position and capacity of the plaintiffs, on 24 October 2005 the Magistrates' Court at Broadmeadows ordered that the plaintiffs pay the judgment debt by monthly instalments of $500. On 12 November 2005 the plaintiffs paid the first instalment of $500 having previously paid $1,000 in part satisfaction of the debt.

6. However, notwithstanding that the plaintiff made application to this Court for a stay of the instalment order as later varied on 5 December 2005, which application for a stay was dismissed, the plaintiffs have made no further payments in satisfaction of the judgment debt.

7. The defendants were dissatisfied with the instalment order made on 24 October 2005, and filed a notice of objection under s6(5) of the *Judgment Debt Recovery Act* 1984 (Vic). The objection was fixed for hearing in the Magistrates' Court at Dandenong on 5 December 2005. On 5 December 2005 the objection was heard by a magistrate. The magistrate allowed the objection, cancelled the original instalment order of $500 per month, and made an order that the judgment debt be paid in accordance with the offer contained in the without prejudice letter.

8. The formal order of the court is in the following terms:

> "The judgment debt be paid:
> (1) First payment of $2,000 by 9 December 2005.
> (2) Monthly payments of $1,000 commencing on 1 January 2006. Final payment of $1,702."

9. The affidavit evidence about what happened before the magistrate was scant. The tape of the proceedings has been lost or misplaced. However, the parties agreed to proceed before me on the basis that the magistrate's decision was based upon the without prejudice letter, which was handed up to him at the hearing by the defendants.

10. On 14 December 2005, Harper J gave the first plaintiff leave to commence this proceeding on behalf of the second plaintiff. The plaintiffs have been unrepresented throughout the proceeding, as have the defendants.

11. The proceeding was commenced by originating motion filed on 14 December 2005. It is in the nature of an appeal to this Court on a question of law under s92 of the *Magistrates' Court Act* 1989 (Vic). The sole ground of appeal stated in the originating motion is that the without prejudice letter formed the basis of the decision of the magistrate.

12. Mr Slaveski submitted that, as the without prejudice letter was so marked, the without prejudice letter ought not to have been produced in court, or relied upon by the magistrate. Mr Slaveski did not develop his submission further.

13. There is a rule of evidence that communications between parties which are genuinely aimed at settlement of a dispute between them cannot be put in evidence without the consent of both parties in the event that the dispute is not settled.[1] This rule is often called "without prejudice privilege".

14. In order for the privilege to operate, it is essential that there must be some person in dispute or negotiation with another person, and the statement which it is sought to exclude from evidence must have some bearing on negotiations for a settlement of that dispute.[2]

15. The mere use of the words "without prejudice" in the communication does not operate to attract the rule of privilege. The court is required to consider the statement in its context and decide for itself whether the privilege applies. Thus a letter marked "without prejudice" which is not in fact a genuine attempt to settle a dispute will not be privileged from production in evidence, and a letter which is so aimed will be privileged even if it is not marked "without prejudice."[3]

16. In my view, the without prejudice letter in this case was not, when viewed in its proper context, privileged from production in evidence before the magistrate. At the time the without prejudice letter was written there was in fact no dispute between the parties. This is because the VCAT proceeding had been decided and orders made. The plaintiffs had elected not to seek leave to appeal that result. The VCAT orders had been filed in the Magistrates' Court.

17. There was no dispute to settle in these events. The without prejudice letter was simply a request for time to pay an existing obligation which was the subject of a court order. Such a request is not one which is properly characterised as a genuine attempt to settle a dispute. Accordingly the magistrate was right to have regard to the without prejudice letter, and no error of law is disclosed in that regard.

18. As a result the appeal must be dismissed. As none of the parties has been represented I will make no order as to costs.

---

[1] *Rush and Tompkins v Greater London Council* [1988] UKHL 7; [1989] AC 1280 at 1287-8; [1988] 3 All ER 737; *Field v Commissioner of Railways (NSW)* [1957] HCA 92; (1957) 99 CLR 285 at 291; 32 ALJR 110; [1958] ALR (CN) 1055.

[2] *Re Daintrey; Ex parte Holt* [1893] 2 QB 116 at 119; *Gregory v Philip Morris Ltd* (1988) 80 ALR 455 at 475; (1988) 24 IR 307; *Field v Commissioner for Railways (NSW)* [1957] HCA 92; (1957) 99 CLR 285 at 291; 32 ALJR 110; [1958] ALR (CN) 1055.

[3] *Re Daintrey; Ex parte Holt* [1893] 2 QB 116 at 119; *South Shropshire District Council v Amos* [1987] 1 All ER 340; [1986] 1 WLR 1217; *Gregory v Philip Morris* (1988) 80 ALR 455 at 475; 24 IR 307; *Buckinghamshire County Council v Moran* [1990] Ch 623; [1989] 2 All ER 225; [1989] 3 WLR 152.

APPEARANCES: For the plaintiffs Slaveski & Sky Empire: Mr L Slaveski, in person. For the defendant Economakis: Mr A Economakis, appeared in person.
