IN THE COMPETITION APPEAL TRIBUNAL

Case No 1027/2/3/04
1074/2/3/06[IR]

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th December 2006

Before:
SIR CHRISTOPHER BELLAMY
(The President)

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED Applicant
(in administration)

- v -

OFFICE OF COMMUNICATIONS Respondent

Supported by

T-MOBILE (UK) LIMITED Intervener

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Mr. Edward P.O. Mercer (of Taylor Wessing) appeared on behalf of the Applicant

Mr. Meredith Pickford and Miss Robyn Durie, Regulatory Counsel, T-Mobile appeared on behalf of the Intervener.

The Respondent did not appear and was not represented.

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HEARING
Re: Admissibility

THE PRESIDENT: Good afternoon, ladies and gentlemen. I understand that I have been asked to decide a point about the admissibility of evidence that arises in this case and that for good order's sake what I understand myself to be doing, having been authorised under Rule 25 of the Tribunal's Rules, to carry out certain measures on behalf of the Tribunal and, in particular, to decide on the admissibility of evidence under Rule 19(2)(e) that is probably the formal position. I know very little about this case, as you will appreciate – in fact, nothing about the case – so I need to have someone explain to me what the point is and how we should proceed.

MR. PICKFORD: Thank you, Sir, I am very grateful, and I am very grateful to you, Sir, for taking the time in what is obviously a very busy schedule with your imminent departure to pastures new, and I am sure the same goes for my learned friend in terms of his gratitude

THE PRESIDENT: Not at all.

MR. PICKFORD: The President will have had an opportunity to review ----

THE PRESIDENT: What I have quickly seen is Miss Durie's witness statement. I should have mentioned that Miss Rawnsley and Mr. Wells who are assisting us today have also seen it, but the Members of the Tribunal have not seen it. I have had a glance at that and that is more or less as far as I have got I think.

MR. PICKFORD: Yes, I indeed asked the Tribunal staff to ensure that the Tribunal did not see it.

THE PRESIDENT: Yes, well they have not seen it.

MR. PICKFORD: So none of us was prejudiced.

THE PRESIDENT: I see there is a gentleman sitting at the back ----

MR. MERCER: We do not object to that, he is a T-Mobile employee.

THE PRESIDENT: Thank you very much, Mr. Mercer.

MR. PICKFORD: The context of this witness statement is as follows: we say that there is an issue in this case about either who the real appellant is because we say that there has been an assignment agreement pursuant to which the right to pursue the case was transferred from VIP Communications Ltd, somewhat confusingly to another company called VIP On-Line Ltd., and an issue has arisen in the case as to whether in fact that agreement in fact has affected the transfer or it has not. We say that it would appear on its face that it has and my learned friend says, as I understand it, that it has not.

THE PRESIDENT: You say it has?

MR. PICKFORD: Yes.

THE PRESIDENT: And that therefore, I assume, we have not got the correct appellant at the moment?

MR. PICKFORD: Yes. And we say even if we are wrong on that, even if it has not in fact effected a formal transfer it is still the case that the real party behind this litigation is not the party that is

currently named, and that has a bearing on a number of points. In particular, there is an application before the Tribunal for interim relief and we say in relation to that that the party the Tribunal should be concerned about is not the financial position of the party that is in front of the Tribunal currently, the financial position of the party that we say is behind everything. We say that it is very important for there to be absolute clarity before the Tribunal in terms of who really is conducting this litigation and who really should be the appellant. So that is the context in terms of our submissions.

A point that is relevant to that, we do not say it is determinative, but we say it is a relevant point which we think we should be entitled to rely upon, we have adduced this particular witness statement, and the only fact that we seek to draw from it is that it is Mr. Thomas McCabe who has been attempting to settle a claim, apparently on behalf of VIP, that is VIP Communications Ltd – as far as we understood it – not VIP On-Line Ltd., against T-Mobile and that is what is set out in the first two sentences of paragraph 2 of this witness statement. The rest of the witness statement, as far as I understand it, although I am sure I will be corrected if I am wrong, does not contain any information which the Appellants object to in terms of its admissibility, as far as I understand it. Their concern is that we should not be allowed even to tell the Tribunal that Mr. McCabe made an attempt at settlement.

THE PRESIDENT: What is it that you seek to prove from this, Mr. Pickford? Is it that there is an attempt at settlement, or is it that the existence of the assignment had never been disclosed to T-Mobile etc., etc., which is the rest of the paragraph?

MR. PICKFORD: Well it is all of it but, as I understand it, it is only the first part of it to which exception is taken. It may well be that Mr. Mercer says otherwise, but I am not clear how he would argue that any of the rest of that could possibly be something that we could not tell the Tribunal about. It is simply saying that the witness was not aware of certain facts.

THE PRESIDENT: But what is the fact that you want to prove from this – that they were not aware of certain facts?

MR. PICKFORD: Two facts; first, it is Mr. McCabe who entered into the negotiations; and secondly, that it had never been brought to T-Mobile's attention that it was VIP On-Line Ltd that apparently at some point in time assumed the rights in respect of this litigation, not VIP. The relevance of that, if I could explain it, is as follows. We say that in relation not the person behind the litigation, Mr. McCabe is not the administrator of VIP, so strictly speaking he is not actually entitled to settle on behalf of VIP. So one of the inferences that might be drawn from the fact that he appears to be trying to settle is that he is trying to settle on behalf of VIP On-Line Ltd., and that would support – we say – our allegation that in fact there is a real party behind this and it is not VIP any more, it is VIP On-Line. That is one point.

Another point that arises in relation to it is let us suppose that Mr. McCabe was, in any event, entitled to settle on behalf of VIP Communications because he had been authorised by the Administrator to do so, let us just assume that that is the case. If that is right, it becomes very relevant if Mr. McCabe believed that in fact he had assigned those rights, or rather VIP Communications Ltd., had assigned those rights to someone else, because he should not have been trying to settle the case on behalf of VIP Communications Ltd., which T-Mobile might have settled, only to discover that in fact they had settled with the wrong person, that company – whatever had happened to it – and then VIP On-Line came along and said "Actually, you owe us the money, and the fact that you settled with this other company that you should not have done is your bad luck, and you will have to go after them for it."

THE PRESIDENT: So you say an attempt by Mr. McCabe to settle is in itself relevant?

MR. PICKFORD: We say it is relevant to VIP's conduct in the Appeal and, in particular, because VIP are seeking interim relief we say examples of where VIP on our case have been less than frank and open with us are relevant to whether the Tribunal should exercise its effectively equitable jurisdiction to grant interim relief.

THE PRESIDENT: And it is relevant to determining who is the real party conducting the litigation, relevant to who is the correct Appellant and more generally relevant to the whole question of interim relief ----

MR. PICKFORD: And conduct.

THE PRESIDENT: -- and conduct. Those are the main points.

MR. PICKFORD: That is, in a nutshell, what it is relevant to.

THE PRESIDENT: Well now on the substance, well we have not heard Mr. Mercer yet so you may want to come back to what he says.

MR. PICKFORD: Can I address first his argument about whether or not anything in here is actually privileged?

THE PRESIDENT: Yes.

MR. PICKFORD: The rule against disclosure of without prejudice communications is clearly a well established one, but one has, in my submission, to have regard to the purpose of the rule in order to understand precisely what the extent of the rule is, and we have provided the Tribunal with bundles of authorities, and I do not know, Sir, whether you have them before you?

THE PRESIDENT: Yes.

MR. PICKFORD: It is the second volume, and it is the case of *Rush & Tompkins v Greater London Council*. It is a Decision of the House of Lords in 1989 and it is one of the leading Decisions on without prejudice communications. It is cited in a number of places – in the White Book, when the White Book deals with this particular issue.

THE PRESIDENT: Yes.

MR. PICKFORD: I do not think it is really necessary to go into the background to this case, I think one can jump simply to the relevant principles, which are to be found in the speech of Lord Griffiths, at p.1300, at marks B to D. In the preceding pages Lord Griffiths has surveyed the relevant jurisprudence in this area and then at B he then goes on to express his views: "Nearly all the cases in which the scope of the without prejudice rule has been considered …"

THE PRESIDENT: I will quickly read it – where do you want me to read down to?

MR. PICKFORD: If you read down to about 12 lines, to the sentence ending "… admission made purely in an attempt to achieve settlement."

THE PRESIDENT: Yes. (After a pause) Yes.

MR. PICKFORD: I draw two principles from this authority. The first of those is actually the one that is found second in the passage to which I have just referred you and it is that "… the underlying purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve settlement." So we say it is about admissions made in the context of trying to achieve settlement, and it is beyond any doubt that clearly there are good public policy reasons why those should not be ordinarily admitted. But we say the very fact itself of engaging in settlement, or attempting to engage in settlement is very different. There is absolutely no reason whatsoever why that fact should cause embarrassment to anybody. It is expected under the CPR and certainly in private litigation that parties should attempt to settle. It is generally good practice before this Tribunal – before every Tribunal – that parties should attempt to engage in settlement.

THE PRESIDENT: We make efforts to get people to settle, where we can.

MR. PICKFORD: Indeed, rightly so. We say that the very fact of a party attempting to settle, cannot of itself be without prejudice. What is without prejudice is any admissions that are made in the content of that. So that is our first point, we say what is being put against us on that simply does not stack up.

Secondly, we say that even if we are wrong about whether it is without prejudice, it is clear from what Lord Griffiths is not an absolute one, courts and Tribunals are permitted to have regard to such material when the justice of the case requires it. We say that if the other party has effectively put points in issue to which it requires us to respond, and all we are doing is simply referring to the mere fact of attempting to enter into a settlement negotiation, then that would be a permissible exception in these particular circumstances because we say that the conduct of the other parties effectively put the point in issue. We would draw attention to the fact, Sir, that we have strenuously attempted to limit to its narrowest scope the nature of what we are relying upon. It is simply the fact of the settlement. It is nothing to do with the content.

That, in essence, is our position.

THE PRESIDENT: Thank you very much. Let me hear from Mr. Mercer.

MR. MERCER: I say it is privileged in the circumstances of the event, particularly because it is not just that there was an approach, but it is who. It is the 'who' that they are most interested in.

THE PRESIDENT: Why does the 'who' make it privileged? When we say 'privileged' you are putting it all under the 'without prejudice' heading?

MR. MERCER: Yes. The 'who' because – the fact that there was this approach at this time, we say, is privileged. Unless there is a public interest reason for waiving that privilege, it should not be waived - because otherwise it is a disincentive towards settlement in this case in the future, and generally. That is a matter of public policy.

THE PRESIDENT: What I am struggling with at the moment is: why is the fact that there was an effort to open negotiations, and the person who opened the negotiations, was in itself covered by the without prejudice rule as distinct from what may, or may not, have been said in those negotiations which I would immediately accept would be covered by the rule. You see the difference?

MR. MERCER: I see the distinction, sir. (After a pause) It is my understanding that an offer to negotiate is covered by privilege.

THE PRESIDENT: Can you draw my attention to some authority for that?

MR. MERCER: It will be the White Book at p.779, the penultimate paragraph. "A letter stated by a party to be written without prejudice which amounts not to an offer to negotiate, but merely to an assertion of that party's rights or an attempt to argue his case is well-founded is not privileged". Taking the reverse of that, an offer to negotiate would therefore be privileged.

THE PRESIDENT: The fact of having made an offer.

MR. MERCER: Yes.

THE PRESIDENT: I am not sure you can quite draw that, as it were, reverse engineering conclusion from that short note in the White Book. We get letters all the time saying, "The parties are in negotiations. Do you mind waiting for a week before you fix the next hearing" or whatever it is. Nobody seems to object to the fact that somebody has opened negotiations is normally a very sensible thing to do which no-one would regard as in any way unusual.

MR. MERCER: In those circumstances, sir, by implication at least, both sides would have waived their right to privilege because you have been contacted. If one party contacted you without the other knowing, then that might be a breach of privilege. In most circumstances, sir, undoubtedly it would be the case that though there may only be one letter written, it would be with the consent of both sides.

THE PRESIDENT: You seem to have indicated that the identity of the person who has communicated with T-Mobile - namely, Mr. McCabe - is potentially relevant to the factual issues that the Tribunal has to decide. Is that fair?

MR. MERCER: I do not think it is at all actually, but that is because I take a different view of the law from Mr. Pickford. If I were in Mr. Pickford's shoes I would say that it was.

THE PRESIDENT: Yes. It is sometimes the case that without going into the content of any negotiation, the fact that somebody at a particular time did approach someone about something, might be relevant to some other issue - not whether or not any admission had been made in the course of that contact, but to some wider dispute between the parties (like who was acting on whose behalf, or not). If that were the case it would surely be difficult to say that there was an absolute rule, I would have thought, if it is relevant ----

MR. MERCER: That leads me I think, sir, to the real reason for this statement.

THE PRESIDENT: It would be helpful to understand it, yes.

MR. MERCER: As I understand it, it is to lever our side into disclosing further information, and in particular the date of an assignment agreement - or, indeed, who had authority, at what date, at what time, in what way. That, it would appear to me, is the purpose of the witness statement. It is to try and open up those issues and get the information which should properly, if it were required, be the subject of an application under Rule 22.

THE PRESIDENT: Yes. Well, they could make an application if they wanted to.

MR. MERCER: That would be the proper way to consider it.

THE PRESIDENT: Yes. Mr. Pickford, is there no authority on the point made by Mr. Mercer that a mere offer to negotiate could itself be privileged?

MR. PICKFORD: Sir, I cannot say that I have researched the point exhaustively, because certainly as far as I was able to ascertain from the authorities that I looked at - and, indeed, the one that I have cited to the Tribunal - there was no absolute rule and one had to have regard to the purpose of the rule. The purpose of the rule is, as we say, quite clearly set out - that it is to prevent someone being embarrassed by any admission made, but not by the very fact of the offer to settle being made.

Now, I cannot say that there is nothing that Mr. Mercer might be able to rely upon if he could find it, but ----

THE PRESIDENT: I was just having a quick look down through the White Book to see whether this passage helps us at all. (After a pause) I think, Mr. Mercer, your submission is giving a wider scope to the without prejudice rule that I remember it being, if I can put it no more than that. It is not a subject I have had to address my mind to in recent times. I am trying to get myself up to speed very quickly.

MR. MERCER: If I can just make one further point? If you look in terms of the effect knowledge about an approach gets into a wider domain, the mere fact that the approach might give an indication of a party's apparent strength or lack of strength in a negotiation, or in respect of their case ---- The mere fact that they attempted to settle might give that indication.

THE PRESIDENT: I am not sure that is within the proper scope of the without prejudice rule, even if it was an inference that you would want to draw.

MR. PICKFORD: Sir, if those are Mr. Mercer's submissions, could I very briefly reply to the points he has raised? Addressing the last one first, the mere fact of even entering into, or attempting to enter into, any settlement could be prejudicial, and I would endorse the Tribunal's view – the President's view. In particular, I would emphasise that the position that Mr. Mercer is putting forward there is, at the very least, a rather pre-Woolfian one. In modern litigation there simply is no shame in attempting to enter into settlement negotiations. It is to be expected, and is actively encouraged by all courts and tribunals. So, we say there is nothing in that point.

In relation to disclosure, it is true that we said as one way of getting round this particular issue, when there appears to be a stalemate over whether VIP was prepared to allow the Tribunal to even consider the admissibility of this issue – we suggested, "Well, an alternative is if you tell us all of this information that we are trying to find out about, we may not need to rely on this".

THE PRESIDENT: What information is that, Mr. Pickford?

MR. PICKFORD: Those were the points that Mr. Mercer has articulated in terms of ----

THE PRESIDENT: When the assignment was?

MR. PICKFORD: Precisely, when the assignment was. It is conceivable that we might not need it, but I have to say that that was a suggestion of one way that we might be able to avoid it. But, that was rejected. So, we have come back to the position that we say is an entirely justifiable one from our point of view - which is that we were entitled to rely on this anyway.

In relation to disclosure, it is correct that we could make a disclosure application ourselves, but this is our evidence of what our witness says about what occurred. We are quite entitled to rely on that evidence. Just because there was another way of getting similar facts, it does not mean that this way of addressing those facts is somehow an abuse. That would be a very odd rule of evidence if it were correct. So, in our submission there really is nothing in the points of resistance that have been advanced by Mr. Mercer to this application.

THE PRESIDENT: What I think I would like to do, Mr. Pickford, is just to rise for five minutes. I am sure we have a recent textbook on the law of evidence in the library. I am just going to quickly refresh my memory on the scope of this rule because my recollection is that the rule is

rather narrower than Mr. Mercer is suggesting, but I would like quickly just to double-check, if I may, before giving Judgment.

(Short break)

I have found nothing, Mr. Mercer, in **Phipps On Evidence** that really takes matters very much further, except a statement in the case of *Cutts v Head* [1984] where Lord Justice Oliver says that the basic idea of the without prejudice rule is that anything said in the course of negotiations should not be used to the parties' prejudice in the course of any subsequent proceedings (paragraph 24.14).

(For Judgment see separate transcript)

THE PRESIDENT: Thank you very much. I think that probably concludes my brief role in this case. Thank you very much for your help.

MR. PICKFORD: I am very grateful.

THE PRESIDENT: Thank you very much, Mr. Mercer, Mr. Pickford.