

Vestergaard Frandsen A/S v Bestnet Europe Ltd

Chancery Division

15 December 2014

The applicants (V) applied to strike out various paragraphs in a witness statement filed by the respondent (B). B had been held liable for misusing V's confidential information in the development of mosquito nets. At an inquiry as to damages V was awarded considerably less than it had claimed. B had made two Part 36 offers, the second of which was not far below the final amount awarded. V had not responded to either offer, and had made no counter-offer. The costs of the inquiry remained to be determined. At the costs hearing B wished to criticise V's conduct during the inquiry and served a witness statement referring to an exchange of without prejudice solicitor's letters in which the parties had attempted to resolve the costs of the liability trial. V applied to strike out those parts of the witness statement on the grounds that the letters were protected by without prejudice privilege. B argued that (1) V were not entitled to the protection of without prejudice privilege because the letters referred to had not been genuine attempts to settle; (2) V had impliedly waived the privilege by claiming indemnity costs, which necessarily raised the issue of the parties' conduct, and by asserting in a skeleton argument that their own conduct was not to be criticised.

Application granted. (1) There was a strong public policy justification for denying the ability to rely on a without prejudice communication at any stage in the proceedings, including costs assessment, *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 A.C. 990 and *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 A.C. 662 followed. Once a party had made a without prejudice offer, the recipient was free to make a without prejudice response. The response might be to make a counter-offer, ask for more information, reject the offer or ignore it. All those responses were protected by the privilege, *Cutts v Head* [1984] Ch. 290, *Walker v Wilsher* (1889) 23 Q.B.D. 335 and *Reed Executive Plc v Reed Business Information Ltd (Costs: Alternative Dispute Resolution)* [2004] EWCA Civ 887, [2004] 1 W.L.R. 3026 applied. It was plain that the rejection of a without prejudice offer, without making a counter-offer, was not admissible in evidence. No such rejection could be given in evidence in isolation, without providing the initial offer as well. It logically followed that it could never be open to one party, who had made a genuinely without prejudice offer, to disclose the response to that offer without the consent of the offeree (see paras 26, 31, 33 of judgment). (2) There had been no waiver of privilege. The claim to indemnity costs was based on an allegation that B's conduct in the litigation was worthy of criticism. That could not be said to be inconsistent with V continuing to assert privilege in without prejudice communications. The statement that V's conduct was not to be criticised was counsel's summary of the finding that he would like the court to make based on the evidence that it had heard and seen. Since the court had heard and seen no evidence about the without prejudice negotiations, the statement could not be taken as making any assertion about V's conduct. It was therefore impossible to see how it could have implicitly waived the privilege attaching to the negotiations (paras 37-38).