IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No. FAM 72 of 2013

BETWEEN: A

Applicant

AND: C

Respondent

Appearances: Mr. David McGrath of Samson & McGrath for the Plaintiff, mother

Mr. Patrick Chamberlayne Q.C. instructed by Mr. Waide DaCosta, Attorney-at-Law for the Respondent, father

Before: Hon. Justice Henderson

Heard: November 18, 2013

RULING

1. I am asked to rule upon the admissibility of a communication, said to have been made without prejudice, by the plaintiff to the defendant attempting to compromise all or part of her claim.

2. The action is for child support under the *Children Law* (2012 Revision). The parties are not married. They enjoyed an intimate relationship for several years and have one child. By December 2010, the relationship had ended and the parties were discussing the nature and extent of the financial provision to be provided by the father for the child. No accord was reached. It is reasonable to infer, as I do, that each of the parties understood by this time that, absent an agreement, the issue would be determined through litigation. The father arrived at his own estimate of an appropriate monthly payment and has been paying that amount voluntarily.

3. In mid-June 2012, the mother sent a letter to the father proposing that he pay a certain amount, much larger than the amount being paid, as child support. The letter was marked "Without Prejudice" and "Strictly Private and Confidential." The offer was rejected by the father immediately in an e-mail message sent to the mother.

4. A third party was asked to mediate. In due course, the father offered an amount significantly larger than the amount he had been paying voluntarily, but considerably less than the mother had demanded in her June 2012 letter. This offer was made in mid-September 2012, about three months after the mother's letter. The mother responded with an e-mail message which reads:

> "Further to our brief discussion yesterday, I am happy to take the additional amount being offered, but I want to stress that in so doing it does not represent a determination of the final calculation and shall be treated as a payment on account only".

5. The father has been paying the increased amount since that time. The amount is now embodied in a consent order of this court.

6. The father's position is that the parties reached an agreement in September 2012 which was intended to be permanent and that this is evidenced by the consent order. He says this is an important fact for the judge to consider at the hearing.

7. The mother's position is that the parties reached only a temporary accommodation; in effect, they agreed upon interim child support upon the understanding that the final amount would be fixed at the hearing. She has recently advanced a claim for an amount far in excess of the amount currently being paid and well in excess of the amount demanded in her June 2012 letter. Her position has hardened.

8. The father's affidavit, intended for use at the forthcoming hearing, refers in two places to the mother's offer contained in the June 2012 letter. The mother says that this evidence is not admissible.

9. Communications between parties made with the intent of compromising litigation, either extant or threatened, are ordinarily not admissible in evidence between those parties. This is so whether the correspondence is marked "without prejudice" or not. Litigation is "threatened" when the circumstances are such that a reasonable and objective observer would conclude that the dispute is likely to result in litigation if not settled. I am satisfied that litigation was sufficiently likely by mid-June, 2012 to permit the mother to claim the protection of the without prejudice rule.

10. There are exceptions where the privilege cannot apply, or at least apply fully. First, a dispute may arise as to whether an agreement to settle was arrived at and this dispute may itself be the subject of litigation. In this case, communications which would otherwise be protected by the without prejudice rule will necessarily become admissible for the limited purpose of establishing that there was or was not an agreement. Second, if an agreement is made out, communications which would otherwise be protected by the rule will be admissible for the purpose of proving its terms.

11. In my view, these exceptions are limited in the sense that they render admissible only so much of the privileged communication as is necessary to prove the existence or the terms of the agreement. The rule serves an important public purpose: it encourages early and frank communication between the parties with a view to avoiding the difficulty and expense of litigation. The public policy underlying the rule is of sufficient importance that any derogation from the protection offered by it should be no wider than is necessary. I do not accept the father's contention that the dispute over the terms of the agreement reached in December 2012 and embodied in the consent order renders all of the communications between the parties admissible without exception. The authorities relied upon – including *Tomlin v Standard Telephones & Cables [1969] 1 WLR 1378*; *Chocoladefabriken Lindt Sprungli AG and another v The Nestle Co. Ltd. [1978] RPC 287; Ofulue v Bossert [2009] UKHL 16*; and *Xydhias v. Xydhias [1998] All ER (D) 789* – do not go that far.

12. The offer made in the June 2012 letter was rejected immediately. The facts of the offer and its rejection are unnecessary to any determination the judge will have to make at the hearing. The father will rely upon what was said by the parties in September, upon the fact that the higher amount he began paying was accepted, and upon the terms of the consent order. The mother will rely particularly upon the terms of the e-mail quoted above. Neither can derive any significant assistance from the fact that, some three months earlier, a different offer was made and rejected.

13. I find that the references to the mother's offer in the father's affidavit are not admissible and must be redacted.

14. I feel obliged to observe that this application has served no useful purpose. The evidence which I have now ruled upon could have been excluded by the judge at the hearing itself. A judge must be relied upon to disabuse his mind of inadmissible bits of evidence.

Dated this 18th day of November, 2013

Henderson, J.

Henderson, J.
Judge of the Grand Court