

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
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5 Cause No. FAM 72 of 2013
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9 BETWEEN: A Applicant
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12 AND: C Respondent
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21 Appearances: Mr. David McGrath of Samson & McGrath for the Plaintiff, mother
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23 Mr. Patrick Chamberlayne Q.C. instructed by Mr. Waide DaCosta,
24 Attorney-at-Law for the Respondent, father
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27 Before: Hon. Justice Henderson
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30 Heard: November 18, 2013
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34 RULING
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36 1. I am asked to rule upon the admissibility of a communication, said to have been made
37 without prejudice, by the plaintiff to the defendant attempting to compromise all or part
38 of her claim.
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1 2. The action is for child support under the *Children Law* (2012 Revision). The parties are
2 not married. They enjoyed an intimate relationship for several years and have one child.
3 By December 2010, the relationship had ended and the parties were discussing the nature
4 and extent of the financial provision to be provided by the father for the child. No accord
5 was reached. It is reasonable to infer, as I do, that each of the parties understood by this
6 time that, absent an agreement, the issue would be determined through litigation. The
7 father arrived at his own estimate of an appropriate monthly payment and has been
8 paying that amount voluntarily.

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

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

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



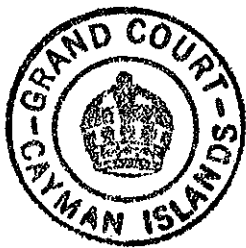
1 5. The father has been paying the increased amount since that time. The amount is now
2 embodied in a consent order of this court.

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

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

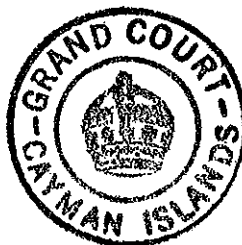
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14 8. The father's affidavit, intended for use at the forthcoming hearing, refers in two places to
15 the mother's offer contained in the June 2012 letter. The mother says that this evidence is
16 not admissible.

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



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

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10 11. In my view, these exceptions are limited in the sense that they render admissible only so
11 much of the privileged communication as is necessary to prove the existence or the terms
12 of the agreement. The rule serves an important public purpose: it encourages early and
13 frank communication between the parties with a view to avoiding the difficulty and
14 expense of litigation. The public policy underlying the rule is of sufficient importance
15 that any derogation from the protection offered by it should be no wider than is
16 necessary. I do not accept the father's contention that the dispute over the terms of the
17 agreement reached in December 2012 and embodied in the consent order renders all of
18 the communications between the parties admissible without exception. The authorities
19 relied upon – including *Tomlin v Standard Telephones & Cables* [1969] 1 WLR 1378;
20 *Chocoladefabriken Lindt Sprungli AG and another v The Nestle Co. Ltd.* [1978] RPC
21 287; *Ofulue v Bossert* [2009] UKHL 16; and *Xydhias v. Xydhias* [1998] All ER (D) 789 –
22 do not go that far.



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

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

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

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16 Dated this 18th day of November, 2013

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18 *Henderson, J.*

19 Henderson, J.
20 Judge of the Grand Court
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